REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENEOUS CRIMINAL APPLICATION NO.52 OF 2015

ZACHARY MWANGI KARIUKI …….....…….APPLICANT

VERSUS

REPUBLIC ……..……..RESPONDENT

RULING

By chamber summons dated 13th February, 2015 brought under Section 135(1) and 79(a) of the Criminal Procedure Code and all the enabling provisions of law, the applicant prays for the following orders:-

1. That criminal case numbers 4343/12, 4342/12, 4241/12 and 4365/12 investigated by Kilimani police division and before the chief magistrate Kibera be consolidated.
2. That criminal case numbers 4256/12, 4257/12, 4258/12, 4259/12, 4261/12 and 961/13 investigated by the flying squad and before the chief Magistrate at Kibera be consolidated.
3. That Criminal cases numbers 4343/12, and 43/60 investigated by CID headquarters and before the Chief MagistrateKibera be consolidated.
4. That Criminal case numbers 4263/12 and 4366/12 investigated by Gigiri police station and before the chief Magistrate Kiberabe consolidated.
5. That the applicant be granted consolidated bond/bail in all the cases before Chief Magistrate's court at Kibera including 3518/12, 6568/12 and 6228/12 which are also before the said magistrate and are related.
6. That in the event of conviction in several of the cases or any of the cases, the sentences be made concurrent as far as possible.

The same is premised on the following grounds:-

a. The Applicant's health is deteriorating for lack of medical care.
b. That cases being about 18 of them in one court but different magistrates might take eternity to complete.
c. That these matters all relate to the same company, are of a similar nature, offences obtaining involve one accused; circumstances and character of the offences is the same and are all under the same investigation jurisdiction i.e. the P.C.I.O. Nairobi and are in the same court.
d. Prosecution, with limited resources the 1st accused cannot keep track of the cases and the same may be too stressing as they are stretched.
e. It is impossible for the 1st accused to fulfill the terms of bond in the 18 cases.

It is supported by the affidavit of Gladys Wangui Mbugua, the wife of the applicant sworn on 13th

February, 2015. She depones that among all the several cases the applicant is facing only three have commenced in which three witnesses have testified for the last three years. That since the cases are pending in different courts, it is very taxing and exhausting for the applicant to follow up on them. For the same reason, he is not able to raise the varied bonds which are huge in amounts as well as the securities. She further deposes that the various charges relate to one company which is the complainant, hence a consolidation would do no harm.

The application was canvassed before me on 26th March, 2015. Learned counsel Mr. Muthaura represented the applicant while learned state counsel Mr. Mureithi represented the respondent. In brief, Mr. Muthaura submitted that all the charges the applicant is facing are similar, relate to the same subject matter (vehicle), occurred at one location and are of similar character. He submitted that the cases emanate from one police station as outlined in the respective paragraphs in the chamber summons. Further, the fact that the complainants are different is not a bar to a consolidation.

With respect to the consolidation of the bond terms, he submitted that it is extremely hard for the applicant to afford various bond terms and/or a total of eighteen (18) sureties.

Learned state counsel Mr. Mureithi opposed the application. In respect to prayer numbers 1-4, he submitted that a consolidation of the cases was not possible as the complainants are different, the offences were committed on diverse dates and relate to different amounts of money. He submitted that the vehicles involved in each respective charges are different. That further the fact that the offences were committed at one place is not a preliquisite to a consolidation. That in any event, given the varied character of the changes, if a consolidation were allowed, the same would cause confusion hence a stumbling block to both the prosecution and the applicant.

On consolidation of the bond, Mr. Mureithi submitted that the applicant did not disclose to the court if he is able to meet the bond terms already granted. That in any case the bond terms that were granted are commensurate with the charges the applicant is facing.

In rejoinder, Mr. Muthaura submitted that the fact that the models of the subject vehicles and the amounts involved are varied does not change the nature of the offence. He urged the court, in consolidating the bond terms, to consider the number of cases involved.

Mr. Muthaura referred the court to a ruling in **Nairobi Criminal Misc. application No.55 of 2008 consolidating Misc. Criminal application No.54 of 2008 – Joseph MbuguaWaweru& another –VS-Republic** in which a consolidation of cases was allowed under similar circumstances as in the instant case.

I have accordingly considered the application together with the respective submissions and I take the following view of the application.

Section 135(1) of the Criminal Procedure Code provides that;

> **"Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are found on the same facts, or form or are part of a series of offences of the same or a similar character**."

While Section 79(a) of the same statute provides:-

"A magistrate holdinga subordinate court of the first class –

a. **May transfer a case of which he was taken cognizance to any magistrate holding a subordinate court empowered to try that case within the local limits of the first class subordinate courts' jurisdiction.**

These two provisions lay the basis on which a case may be transferred from one subordinate court to

another or may be consolidated. A transfer from one court to another may be effected for various reasons, one of which is a consolidation. Pursuant to Section 135(1), various factors guide the court in laying the basis for consolidation of cases as follows:-

a. **The offences should be founded on the same facts, or form, or**
b. **Are part of series of offences of the same or a similar character.**

In addition, it is my view that although the cases may satisfy the above two conditions, the consolidation must not embarrass the applicant or cause prejudice to him or the prosecution. Such embarrassment may be occasioned in a scenario in which the consolidation will result in too many counts in one charge sheet. See **Ochieng –Vs- Republic (1985) KLR, 255** in which the Court of Appeal sitting in Kisumu held that;

> **"It is undesirable to charge an accused person with so many counts in one charge sheet as this may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed".**

Also, the Court of Appeal sitting in Kisumu **in a judgment in Criminal Appeal No.406 of 2009 George Otieno Akula& 3 others –Vs- Republic** observed that, pursuant to Section 135(1) of the Criminal Procedure Code, it is improper for the police to charge an accused separately when the respective offences are of similar character and were committed in one area. The court added that it matters notthat thecomplainants and the subject matters are different for the offences to be consolidated in one charge sheet. It is in this respect that the court stated as follows:-

> **" As we have stated, that was a case which the appellant was charged in separate trials in respect of offences committed on different dates against different complainants but the offences were of similar character in that they were both theft by agent. In that case, the offenses were also of a similar character as were burglary and theft from dwelling houses and were committed over a duration of a short period."**

Earlier the court had observed:

> **" All the main offenses in each of these charge sheets or in each of the cases were burglary contrary to Section 304(2) and stealing contrary to Section 279(b) of the penal code. These were series of offences of the same or similar character committed within the same area and it did not matter that the complainants were different and that the dwelling houses were not the same compound**".

The court also emphatically stated that:-

> **"First as we have stated above on strict interpretation of the provisions of Section 135(1) of the Criminal Procedure code, the offences that were committed all being burglary within a span of about eleven days in respect of which the perpetrators were the same could have been included in one charge sheet**."

As the Court of Appeal in the latter cited case observed, the mere fact that the complainants and the subject matter in the respective offences are different are not, of themselves, a bar to including them (offences) in the same charge sheet. This noble observation that upholds the tenants of Section 135(1) of the Criminal Procedure Code is echoed outside our jurisdiction in an English decision by the Court of Appeal in the case of **Andrew Ryan Ferrell –Vs- the Queen (2010) UKPC 20 Privy Council Appeal No.0094 of 2009.** The court referred to the English Court of Appeal, Criminal division in **Kray (1969)53 Criminal Appeal R 569** and to that of the House of Lords in **Ludlow Vs Metropolitan Police Commissioner (1971) AC 29**. It stated as follows:-

> **"The fact that evidence in relation to one count was not admissible in relation to another count under the old 'similar fact' principle did not necessarily mean that those counts could not properly be joined pursuant to this limb of the rule: See….Kray….and Ludlow....**

"…..a sufficient nexus must nevertheless exist between the relevant offences; such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other, but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the defendants, those of the Crown, witnesses and the public;

…it is not desirable that the rule should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's direction to sever the indictment…..

both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character."

In the instant case, the applicant's counsel submitted that the applicant is facing eighteen separate charges. A look at all the charge sheets in which the applicant is an accused shows that he is majorly charged with obtaining money by false pretences. Three of those charges contain more than one count. For instance in both criminal case numbers 4242 of 2012 and 4243 of 2012 he is charged with both obtaining money by false pretences and issuing a bad cheque. In criminal case number 961 of 2013, he faces five counts of obtaining money by false pretences. Hence the comparison in similar and dissimilar characteristics of each of the offences in the respective charge sheets. Again, it is not in all the charge sheets that the applicant is the sole accused. I have in mind criminal case number 4260 of 2014 in which he is jointly charged with one JeremiahKaranjaNdungu. The said Jeremiah KaranjaNdungu is not a party to this application. It is unknown whether he would wish the offences be consolidated .The interest that the applicant has in the consolidation may not suit him. It may, in the contrary, cause him great prejudice. For instance, consolidated offences may take longer to be heard because the number of witnesses who will be called will increase. This would certainly drag the trial against his wish. In that regard, it is my view that a consolidation of offences in which the said Jeremiah KaranjaNdungu is jointly charged with the applicant may not be suitable.

As observed in the case of **Andrew Ryan Ferrell –Vs- the Queen** the law guiding consolidation must be considered purely vis vis the circumstances of each individual case.

In the present case, as earlier noted, the character of the offences is basically similar, being obtaining money by false pretences. The applicant has also clustered the cases based on the police station investigating each group of the cases. Furthermore, they have also been grouped based on the courts trying them.

In those circumstances the one inhibiting factor to a consolidation is the diverse dates on which the offences were committed. Although the court of appeal in **George Otieno Akula –Vs- Republic (Supra)** noted that the fact that the offences were committed on diverse dates cannot, of itself, be a bar to a consolidation, it was quick to observe that the cases before it had the offences committed within a span of eleven days. In my view though, where the span of the period within which the offences were allegedly committed is so far apart and the offences were not committed within the same transaction, notwithstanding the similar character of the offences, it is not prudent to consolidate such offences. This is so because the offences may have been investigated by different officers and the consolidation of evidence may be cumbersome to the investigators as well as the courts.

In light of the foregoing, I will consider the proposed consolidation in accordance with the cluster they are placed in.

Under paragraph 1 of the chamber summons, the proposed consolidation is for criminal case numbers 4343/12, 4342/12, 4241/12 and 4365/2012 being investigated by Kilimani police station and are pending before the chief magistrate's court in Kibera. The only charge sheets annexed to the supporting affidavit relate to Criminal case numbers 4365/2012, 4241/2012 and 4343 of 2012. The character of the offences in the cases is similar and the duration within which they were committed is not so far apart.

However, the locations of the offences are diverse as to pose a hurdle in the compilation of the evidence both by the police and the court. They do not also arise from the same transaction. Furthermore, the court was not provided with sufficient material that would guide it in considering the position of each of the cases. All that was said is that a total of three witnesses had testified in all the cases. But which are these cases? And is that contention factual? The failure to give actual facts has rendered the court incapable of arriving at a finding on whether if a consolidation were allowed, any prejudice would be occasioned to the applicant, witnesses and prosecution.

In the foregoing, I am not able to make a positive finding for the applicant under paragraph 1 of the chamber summons.

The cluster under paragraph 2 of the chamber summons relate to criminal case numbers 4256/2012, 4257/2012, 4258/2012, 4259/2012, 4260/2012, 4261/2012 and 961 of 2013 investigated by flying squad and pending before the chief magistrate's court in Kibera. With the exception of criminal case No.4260/2012 in which the applicant is jointly charged with another and criminal case No.4261/2012 which charge sheet has not been furnished, the character of all the other cases being obtaining by false pretences are the same. However, there is no evidence that the cases spring from the same transaction or that the witnesses to be called will be the same. Notwithstanding that they are investigated by the same police station, the trial process would be cumbersome. I am therefore disinclined to allow a consolidation under this head.

Under paragraph 3 of the chamber summons the proposed consolidation is for criminal case numbers 4263/2012 and 4360 (year not indicated) investigated by CID headquarters and pending before Chief Magistrate's court in Kibera. There is also no evidence that these two offences emanate from the same transaction and they do not therefore suit a consolidation.

Finally, the applicant prays to be granted consolidated bail terms in all the cases as clustered in paragraphs 1 to 5 of the chamber summons. This prayer was opposed on grounds that the applicant did not disclose what bond terms he was granted and why he is not able to afford them. I agree that the applicant did not make these disclosures. But a glance at the number of cases no doubt he may not afford the number of sureties required however lenient the bond terms may be. It must also be borne in mind that the main purpose of granting bond is so as to ensure an accused person attends trial. Unless there is reason to believe that the accused is likely to abscond the trial or jump the bail/bond terms, the terms of the bail/bond must be reasonable and affordable. In the present case, nothing has been presented to the court to demonstrate that the applicant is likely to abscond the trial or jump the bail/ bond terms. The prayer for consolidation of the bail terms must therefore succeed.

I make no orders in respect of prayer number 6 as the same was withdrawn.

In the end, I grant the following orders:-

a. Prayer 1, 2, 3 and 4 of the chamber summons fail.
b. The applicant is granted bond terms in respect of the cases as clustered in paragraphs 1, 2, 3, 4 and 5 of the chamber summons. That is to say,

    i. Criminal case numbers 4343/12, 4342/12,4241/12 and 4365/12 investigated by Kilimani Police division and before the Chief Magistrate Kibera.
    ii. Criminal case numbers 4256/12, 4257/12, 5258/12, 4260/12, 4261/12 and 961/13 investigated by the flying Squad and before Chief Magistrate at Kibera.
    iii. Criminal case numbers 4343/12 and 4360 being investigated by CID headquarters and before the chief Magistrate Kibera.
    iv. Criminal case numbers 4363/12 and 4366/12 investigated by Gigiiri police and before the Chief Magistrate Kibera.
    v. Criminal case numbers 3518/2012 and 6228/2012 before the Chief Magistrate's Court in Kibera.

(c) The applicant shall respectively execute a bond of Kshs.2,000,000/- with one surety of similar amount. The Sureties shall be assessed by the Deputy Registrar of this court

(d)This order shall be served upon the respective courts which are hearing the cases for record purposes.

DATED and **DELIVERED** at **NAIROBI** this 14th day of April, 2015.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:-

1. The applicant in person.
2. M/S Ndombi for the state.