



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. CR CASE NO. 14 OF 2015

GALGALO ABGUDO WARIO

BORU DID HALAKE

ADAN DIBA DABASSA.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicants Galgalo Abgudo Wario, Boru Dida Halake and Aden Diba Dabassa face a charge of robbery with violence contrary to Section 296 (2) of the PC. They filed the notice of motion dated 28/4/2015 seeking orders of stay of Moyale SPM's CRC 80/2014 pending the hearing of this application, which prayer was granted by the Court. The only outstanding prayer is prayer 4, seeking the transfer of CRC 80/2014 from SPM's Court, Moyale to any other court for hearing and determination.

The application is premised on grounds that the applicants were initially arraigned before Marsabit Law Courts where they took plea but the matter was arbitrarily transferred to Moyale; that the offence took place within the jurisdiction of Marsabit Law Courts; that on 26/3/2015 the trial magistrate despite the accused not having been provided with witness statements, and one of them being unwell, ordered that they be furnished with statements and directed the case to be heard by 12.00 noon; that accused's bond was cancelled in unclear circumstances; that the magistrate has demonstrated open bias and the applicants believe that they will not get justice before the trial court.

Mr. Muriuki, Counsel for applicants said that to demonstrate that they are keen on having the matter to be determined expeditiously, the case should proceed from where the trial magistrate stopped.

The respondent did not file any reply despite the fact they were accorded sufficient time to do so. Mr. Mungai, Counsel for the Respondent submitted that this court has powers to transfer a case from one court to another and that the applicants have raised the issue of security; that there are other clan conflicts in Moyale. He urged the court to direct that the case be heard expeditiously if transferred. It was not clear whether or not Mr. Mungai was opposing the application.

I have considered the affidavits, the grounds in support of the application and submissions of the Counsel. The applicants contend that the trial magistrate is likely to be biased because one of their clan members complained about the trial magistrate to the Vetting Board as a result of which he was sent home but was later reinstated; that the magistrate has resolved to revenge. This is a case of recusal.

Being that, the applicants should have first requested the trial court to recuse itself from the case and if the magistrate declined, that is when they could have moved this court to consider the application for recusal or transfer. Counsel should exhaust that procedure before moving this court for orders of recusal. It is unfair to deny the trial court the opportunity to consider the application for recusal first.

On 17/2/2015 when the matter came up for hearing before Mr. Ombewa, SRM at Marsabit Court, the prosecution informed the court that this is a case emanating from Moyale and applied to have it transferred there. The magistrate ordered that he was transferring the case to Moyale pursuant to Section 78 of CPC. Section 78 of CPC allows a court to transfer a case to another court if the court is satisfied that the offence was committed within the jurisdiction of that court. It cannot therefore, be said that the case was transferred for no apparent reason. The transfer was proper.

The case is said to emanate from Moyale and that may be the reason why the accused are fearful of being heard at that court due to insecurity.

Coming back to the complaint of likelihood of bias, the trial magistrate has not had an opportunity to respond to the said allegations. However, the applicants having made the said allegations against that court, the trial court might find it difficult continuing with the hearing of the case and for that reason, I direct that Moyale CRC 80/2015 be transferred to Marsabit Court for hearing and determination before any magistrate at that court.

Under Section 81 of the CPC this court has a wide discretion to transfer of case from one court and another or between magistrates for the end of justice to be met. In this case, I have not established bias because the magistrate did not swear any affidavit but because of what I have stated above, sometimes it is a matter of perception; that is, how the ordinary man looks at things. I therefore, order that this case be transferred to Marsabit for hearing and determination. The case will proceed from where Mr. Sogomo, SRM stopped. Mention before Marsabit court on 10/8/2015.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JULY, 2015.

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Musyoka for State

Mr. Wamache Holding Brief for Mr. Muriuki for Accused

Faith/Ibrahim , Court Assistants

Accused 1-3, Present