



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

MISC. CRIMINAL APPLICATION NO. 27 OF 2015

BETWEEN

DOROTHY AOKO NJIKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant is the complainant in *Mbita Senior Resident Magistrate's Court Criminal Case No. 798 of 2015* where Godfrey Maganga Onana is facing a charge of malicious damage to property contrary to **section 339(1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. She has moved the court under the provisions of **section 81** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* seeking that the case between herself and the accused be transferred to another court of similar jurisdiction. She complains that the magistrate has shown open bias in open court and has allowed people who are strangers to intervene in the case.
2. I called for and examined the proceedings. The matter first came up on 16th November 2015 when the accused pleaded guilty after the charge was read to him. The matter was deferred to 17th November 2015 for reading of facts and production of exhibits. On that day the prosecution indicated that the accused seemed to have been recovering from mental treatment. In the circumstances, the learned magistrate ordered that the accused be taken to Homa Bay County Referral Hospital for mental assessment. When the matter was mentioned on 23rd November 2015, the accused had not been taken to hospital as directed and the matter was adjourned to 10th December 2015 for the accused to be taken to Kisii Level V Hospital to determine his fitness to stand trial. Any further action was interposed by this application.
3. The provisions of **section 81** of the *Criminal Procedure Code* invoked by the applicant empower the High Court to transfer a criminal case from one subordinate court to another or to itself state as follows;

81(1) Whenever it is made to appear to the High Court—

- a. *that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or*
- b. *that some question of law of unusual difficulty is likely to arise; or*
- c. *that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or*
- d. *that an order under this section will tend to the general convenience of the parties or witnesses;*
or

e. *that such an order is expedient for the ends of justice or is required by any provision of this Code,*

it may order—

- i. *that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;*
- ii. *that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;*
- iii. *that an accused person be committed for trial to itself.*

4. Having regard to the provisions I have set out and the facts I have outlined, no case has been made for transfer to the case. The magistrate acted fairly and in accordance with the procedure particularly where the mental status of the accused was in doubt. My perception is that this application had been occasioned by the failure of the prosecutor to communicate with the complainant on the progress of the case.

5. The application is dismissed.

DATED and DELIVERED at HOMA BAY this 16th December 2015

D.S. MAJANJA

JUDGE

Applicant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.