IN THE HIGH COURT

AT HOMA BAY

MISC. CRIMINAL APPLICATION NO. 24 OF 2014

BETWEEN

LUCAS MASA HURA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

RULING

1. The applicant in this matter is on trial at the Kehancha Senior Resident Magistrate's Court. He is facing a principal charge of defilement contrary to **section 8(1)** as read with **section 8(3)** of the ***Sexual Offences Act, 2006*** and an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the principal charge are that on 11th May 2014 at Ntimaru Shopping Centre in Kuria East District within Migori County, he intentionally caused his penis to penetrate the vagina of DBC, a child of 13 years. The alternative charge is grounded on the same facts.

2. The second count is that of escape from lawful custody contrary to **section 123** as read with **section 36** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It is alleged that on 11th May 2014 at Ntimaru Shopping Centre in Kuria East District, being in the lawful custody of S/SGT JK , PC JO and PC PG, he escaped from lawful custody.

3. On 20th May 2014 he pleaded not guilty. He has now moved this court by a Notice of Motion dated 22nd July 2014 made pursuant to **section 81** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** and **Article 50(2)(c)(g)(i)** and **(k)** of the Constitution. The application seeks the following order, ***"The court be pleased to transfer Criminal Case No. 312 of 2014 from Kehancha Law Court to any other Court of competent jurisdiction."***

4. The grounds of the application are set out on the face of the Motion and the applicant's supporting deposition sworn on 22nd July 2014. The applicant states that he was arrested and arraigned on 20th May 2014. He complains that his application for bail was not determined until 3rd July 2014 and thereafter the magistrate failed to approve sureties for 7 days without giving reasons.

5. The applicant avers that the matter was conspicuously missing from the course list when it was scheduled for hearing on 10th July 2014. The applicant stated that while he was in custody he appointed a new advocate to proceed with the matter. When the advocate went to court to acquaint himself with the matter, the court file could not be traced in the court registry. The applicant states that when his advocate

sought audience with the magistrate who had the court file, she could not explain why she was keeping it. The applicant further deposed that his advocate applied for an adjournment to enable him prepare for hearing but the application was rejected after the learned magistrate took four hours to deliver the ruling.

6. After the ruling, counsel for the applicant's advocate applied for stay of proceedings and prayed for the approval of the pending sureties. The applicant complains that it is only at about 4.00 pm that the court ruled that the proceedings could not be stayed and that the sureties could only be approved after the hearing of the witnesses in court which the applicant argues was contrary to the bond terms issued on 3rd July 2014. At this point the defence counsel declined to proceed with the matter and indicated to the court that he did not wish to participate in further proceedings.

7. The applicant deposes that when the court resumed, he was beaten by four court orderlies and dragged back to the court to attend proceedings. He alleges that the beatings were done in presence of the trial magistrate. As a result of the beatings, the applicant alleges that he had to be rushed to hospital for medical attention and the magistrate had to approve the sureties.

8. The applicant contends that he was denied his fundamental rights guaranteed under **Article 50(2)(c), (g), (i)** and **(k)** of the Constitution. These include the right to have adequate time and facilities to prepare for hearing, to choose and be represented by an advocate of his choice and to be informed in advance of the prosecution evidence and to adduce and challenge the evidence at the hearing. The applicant counsel, Mr Gichana, argued that the facts outlined by the applicant showed that the court was biased and that the accused was unlikely to get a fair trial. He submitted that justice must not only be done but also be seen to be done and it is in the interests of justice that the matter be transferred for hearing to the Migori Law Courts for hearing. Counsel cited the cases of ***Stephen Mutinda Kalai v Republic*** **MKS HC Misc. Crim. Appl. No. 38 of 2005 [2006]eKLR** and ***Ndungu Gathamga v Republic*** **NRB HC Misc. Crim. Appl. No. 17 of 2007 [2008]eKLR** to support his application.

9. The application was opposed by the State through the deposition of Inspector David Kiptanui Kemboi, the officer investigating the matter, sworn on 28th July 2014. The State denies that the rights of the applicant have been violated or may be violated. Ms Owenga, counsel for the State, argued that the terms for release of the applicant were that he would be released after the evidence of the State's witnesses had been taken as they were considered vulnerable due to the applicant's position and his relation to the witnesses. Counsel submitted that the action taken by the court was in accordance with the provisions of the ***Children Act, 2006***.

10. The respondent contends the allegation that the magistrate kept the file in her chambers or that she declined to approve the sureties are without foundation and are intended to paint the learned magistrate in bad light. As regards the failure to list the matter in the cause list, counsel contended that the file was always available and that no injustice was occasioned to the applicant on that day as the matter was dealt with in open court on that date.

11. Ms Owenga submitted that the intention of the applicant is to transfer the case in order to shop for a magistrate who appeared sympathetic to the accused and that the application was an attempt to derail the hearing of the case with a view to tampering with witnesses and compromising the entire case. She urged the court to dismiss the application.

12. In addition to the parties' depositions and submissions, I called for the original court file which I have studied in making this decision.

13. The application before the court is made under **section 81** of the ***Criminal Procedure Code*** which empowers the High Court to transfer a criminal case from one subordinate court to another or to itself. It states 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.

14. In ***Maina Kinyatti v Republic*** **[1984]eKLR**, the Court of Appeal considered the test to be applied in such a case and stated that, *"Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."* The Court of Appeal further observed that it is the reasonableness of the accused person's apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case. The same test was applied in ***John Brown Shilenje v Republic*** **Nairobi Cr. Appeal No. 180 of 1980** by Trevelyan J., who stated that the test of that of, *"Reasonable apprehension in the applicants or any right thinking person's mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations."* The cases cited by the applicant's counsel are to the same effect.

15. In order to determine the application I have considered the applicant's stated apprehension vis-à-vis the actual record of the proceedings. The applicant contends that he remained in custody after the grant of bail and that the learned magistrate deliberately declined to approve his sureties. The record shows that the applicant pleaded not guilty when he was arraigned in court on 20th May 2014. The magistrate heard the application for bail and reserved the ruling for 23rd May 2014 which is the date she also fixed for hearing. On 23rd May 2014, the learned magistrate granted bail but she called for a pre-bail report before setting the bond terms as the accused was a person of note and the issues of absconding and interference with witnesses had been raised. She thereafter ordered that the matter be mentioned on 12th June 2014 for receiving and considering the pre-bail report. The matter did not proceed for hearing as scheduled as the defence counsel applied for an adjournment as he was not prepared. The adjournment was allowed and the hearing scheduled for 5th and 6th June 2014 upon the defence counsel's request.

16. When the matter came up of hearing on 5th June 2014, Ms Owenga, the Prosecution Counsel, appeared before the court with instructions to proceed with the matter in place of the police prosecutor. She applied for an adjournment on the basis that key exhibits were being analysed by the Government Chemist. The application for adjournment was vehemently opposed by defence counsel. The learned magistrate allowed the prosecution application for adjournment. After the ruling was delivered, the parties agreed that the matter be heard on 3rd July 2014.

17. On 12th June 2014, the matter came up for consideration of the pre-bail report but the trial magistrate was not sitting on the date. It was adjourned to 18th June 2014 and once again the trial magistrate was not sitting. The matter was then fixed for mention on 25th June 2014.

18. On 25th June 2014, both the prosecution and the defence made submissions on the pre-bail report filed in court on 12th June 2013. The court reserved its ruling on the matter. In the meantime and upon application of the defence counsel, the court allowed the accused to be escorted to the County Assembly to attend sittings. The orders for the accused to attend County Assembly sitting while in custody were further extended on 27th June 2014.

19. On 3rd July 2014 when the matter came up for hearing the learned magistrate stated that the main reason by the prosecution for opposing bail was the likelihood of interference with witnesses and in the circumstances, bond terms would be set after the witnesses had testified on that date. The prosecution was ready with three witnesses but the defence counsel sought an adjournment on the ground that he was unwell. The prosecution did not object to the application. The defence counsel then applied for and was granted leave to withdraw from acting for the accused. The accused thereafter requested for time to instruct another advocate. Thereafter the court set the bond terms and fixed the hearing for 10th and 11th July 2014.

20. When the matter came up for hearing on 10th July 2014, the prosecution was ready to proceed with 6 witnesses. The defence counsel applied for an adjournment on the ground that he had just been requested to act for the accused the day before and that he needed time to seek instructions from his client who was still in custody. The application was opposed by the prosecution. In a ruling delivered at 1 pm on the same day, the learned magistrate declined to grant the adjournment on the ground that the defence has been given adequate time to make arrangements and that the matter involved a school going child whose interests required that the matter be dealt with expeditiously.

21. After the ruling was delivered, defence counsel applied for stay of proceeding pending application to the High Court. The learned magistrate, in a reserved ruling delivered later in the day, denied the application for stay of proceedings. Thereafter the accused's counsel indicated that he would not participate in the proceedings. He and the accused walked out of court. The court however ordered the accused back to the court in order to explain to him how the matter would proceed.

22. According to the court record the accused started wailing, threw himself down under the seat and put his fingers in his mouth to induce vomiting. The court noted that the accused was rolling all over and hitting himself on the ground thereby injuring himself. The court noted that the accused had rendered the proceedings impossible. The court thereafter directed the matter to proceed but because of the accused behavior in court, the child was clearly affected and the matter could not proceed and was adjourned for directions on 16th July 2014. The court thereafter proceeded to approve the sureties for the accused as directed previously.

23. Having considered the proceedings, which I have outlined above, I do not think the learned magistrate erred in the manner in which she dealt with the issue of bail. Although the learned magistrate had granted bail, she stated that she would consider the bail terms after receiving a pre-bail report. Thereafter, she was satisfied that it would be proper to approve the sureties only after the child had testified in order to protect the child and witnesses from interference. The learned magistrate cannot be faulted in taking this course as it balances the rights of the child, who is a vulnerable witness, and the right of the accused to bail. It must be recalled that whereas the right of the accused to bail is guaranteed under **Article 49** of the Constitution, the principle of the best interests of the child in all matters concerning a child is also enshrined in **Article 53(2)** of the Constitution. In this instance, the court sought and obtained a proper balance by ensuring that the vulnerable witnesses were able to testify as soon as was practicable before releasing the accused on bail.

24. The defence counsel did not raise the issue of bond when he applied for the adjournment on 10th July 2014. The learned magistrate had clearly indicated that she would approve the sureties once the witnesses had testified and despite what transpired on that date, the sureties were approved on 11th July 2014. I therefore do not find any reasonable basis for the apprehension of bias on the part of the learned magistrate founded on the argument that bail was denied.

25. The complaint that the case was not listed on 10th July 2014 does not imply that the learned magistrate was biased. What is true is that the matter was before the magistrate and the accused, who was in custody, was present in court. In his application for adjournment, the defence counsel noted that he had had a chance to peruse the court file but he did not raise the issue that the matter was not listed. On the same day, the applicant claims he was injured by court orderlies. The record though is clear that it is the accused who, when the learned magistrate had declined to grant the adjournment, started wailing, inducing vomiting and rolling on the floor in a manner that he got injured. I find that the accused's behavior was intended to intimidate the court and derail the proceedings after the application for adjournment had been rejected.

26. On the whole, I do not find any ground to allege bias on the part of the learned magistrate. She dealt with each and every application by considering the arguments and material before her carefully weighing the position of the accused and the child, who is a vulnerable witness. It must always be remembered that he court had wide discretion in considering matters such as adjournments. The accusation that she took time to write her rulings in the face of the numerous applications made in the matter cannot be taken to imply that she was biased. I take a dim view of the conduct of the defence which seems to be stalling the matter and making unwarranted accusations against the learned magistrate.

27. This application must however be determined on legal principles. While I have no doubt that the learned magistrate handling the matter will be fair and just is dealing with it, I must also consider the perception of the public in light of the events that have transpired. A reasonable person may perceive the matter differently and indeed feel that the accused may not obtain a fair trial as a result of what transpired in the proceedings.

28. I am also alive to the fact that the offence alleged involves a child and other witnesses who are in a safe house and the duty of the court to deal with matters concerning school going children expeditiously. I take judicial notice that schools have closed and will be re-opening in early September. The accused has also had sufficient time to fully instruct his counsel to prepare his defence.

29. In order to avoid further delays in the matter and ensure that justice is done to the parties, I direct as follows;

> ***a. Kehancha Criminal Case No. 312 of 2014 shall be transferred to the Resident Magistrates Court in Rongo and shall be heard by the Ag Senior Resident Magistrate.***
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> ***b. The case shall be mentioned in that court on 18th August 2014 for directions and fixing hearing dates. The hearing shall commence no later than 7 days thereafter and the matter shall be heard on a day to day basis until it is finalized.***

DATED and DELIVERED at HOMA BAY this 11th August 2014

D.S. MAJANJA

JUDGE

Mr Gichana instructed by Ben K. Gichana and Company Advocates for the applicant.

Ms Owenga, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.