**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 12 OF 2014**

**CAROLYNE KUTHII KARANJA …….1ST APPLICANT**

**PRISCILLAH WANGITHI KARIUKI ……...2ND APPLICANT**

**-VERSUS-**

**REPUBLIC……..…….RESPONDENT**

**RULING**

Caroline Kuthii Karanja and Priscillah Wangithi Kariuki , the applicants herein are on trial before Kerugoya Chief Magistrate's Court criminal case NO. 279 of 2012. The applicants are facing various counts ranging from conspiracy to defraud contrary to **Section 317** of the **Penal Code** to obtaining money by false pretences contrary to **Section 313**, forgery contrary to **Section 349** of **Penal Code** to impersonating a public officer contrary to **Section 105** of the **Penal Code**. The trial commenced in the subordinate court on 12th April, 2012 and the case has been going on well. The record shows that the case had reached defence stage after the prosecution closed their case after calling ten witnesses and the trial court having found the applicants with a case to answer.

The above applicants have now moved this court vide a notice of Motion dated 6th June, 2014 under **Section 81** of **Criminal Procedure Code** for a transfer of their case from Hon. Juliet Kasam the Senior Magistrates court to any other court of competent jurisdiction for a retrial.

The applicants in their application have listed six grounds for transfer of the case and the grounds are listed on the face of the application as follows:

1. That the honourable magistrate addressed the Applicants on 4th June, 2014 in a manner to suggest that she has already made up her mind.
2. That the Applicant's rights were disregarded.
3. That they are unlikely to have a fair/impartial trial in the said court.
4. That ends of justice shall be met if the case is transferred from the said court.
5. That justice shall not be seen to be done in the trial court.

The Applicants have jointly sworn a 34 paragraph affidavit sworn by Caroline Kuthii Karanja and although the jurat of the affidavit appears not failing to state the date when it was sworn contrary to Oaths and Statutory Declaration Act (cap 15 Laws of Kenya) this court shall nevertheless consider it on the merits.

The court has looked at the contents of affidavit and the proceedings at length to try and establish the basis for the notice of motion before court. The allegations made are on the face of it serious and quite

onerous on the trial court. The Applicants have pointed out at least four occasions where they felt the trial court exhibited biasness towards them.

The Applicants have complained of the proceedings of 11th March, 2014. However it is clear that it the accused persons who sought adjournment when the prosecution had three witnesses ready to proceed. They also requested for time to engage an advocate and for the case to start denovo. Their application for adjournment was allowed and their plea to have the case start afresh granted. The prosecution objected to the application for adjournment but the court granted the adjournment stating that the accused persons had a right to legal representation which I find correct. I do not see anything to suggest bias on this occasion. If anything it is the prosecution which should have felt slighted because they were overruled.

The Applicants have also complained about the proceedings of 29th April, 2014. On this occasion the Mr Githinj I Counsel for the Applicants went to court made about turn and told the trial magistrate the following:

***"After consultation with the accused persons we wish to proceed from where the matter reached".***

This position taken by the Applicants contrasted the position taken on 11th March 2014 where the accused persons in their exercise of their rights under **Section 200 Criminal Procedure Code** had opted for denovo. The trial court nevertheless granted the Applicants the request to have the case proceed from where it had reached. The prosecution on this occasion appears to have been caught unawares by the turn of events and consequently applied for adjournment. The Applicants perfectly understood the predicament they had caused the prosecution and this is what the counsel stated to court, (concerning Application for adjournment by the state),

***" I have no objection I understand the reasons as stated. We propose 4th June, 2014".***

The trial court then adjourned the case to 4th June 2014 as proposed by the Applicants. This court does not see any evidence of malpractice on record either by the trial court or the prosecution and this court finds it hard to see any basis for the Applicants to feel uncomfortable at that stage especially after being allowed to change their earlier position of starting the case afresh.

The Applicants then goes to make allegations of sickness of their counsel when the date of hearing approached , owing to the seriousness of allegations contained under paragraph 13 to 17 of the affidavit in support of this motion, one would have expected the Applicant as a sign of good faith demonstrate that indeed their advocate was unwell and also demonstrate that there is another case involving the complainant where they have subjected to unfair trial. The Applicants are properly represented in this motion before court and this court expects the counsel for the Applicants to have advised his clients against making allegations termed "***wild"*** by the state without any evidence to demonstrate that there is basis to make the same.

This court has looked at the proceedings of 4th June 2014 where another advocate a Mr Kinyanjui came on record. On this occasion the prosecution had lined up three witnesses ready to proceed from where the other trial magistrate had left pursuant to the order made on 29th April 2014 at the request of the Applicants. The applicants' counsel however made another application for adjournment and attempted to make another about turn concerning the order of proceedings from where the former trail court left. This court finds that Mr Kinyanjui was cognizant of the difficulty of making such an application and that is why he termed his application "***strained".*** The prosecution objected to the application seeing the same as a delaying tactic by the accused persons. The prosecution had line up three expert witnesses whose attendance was difficult to procure. The court in her exercise of discretion disallowed the application for adjournment. This court does not see any bias in that exercise of discretion. The same appears to have been done in the interest of justice and in the circumstances obtaining at the time, it was in order for the trial court to reject the application for adjournment or go back once again and review the order to have the case proceed from where the other trial magistrate had left .

The Applicants have also complained about the proceedings saying that they were given typed proceedings and yet they wanted handwritten. This court has looked at the proceedings both typed and hand written and finds no discrepancy. The Applicants as a matter of fact through their advocate Mr Kinyanjui prior to withdrawing had applied for certified copy of the ruling which was granted subject to payment of court fees. The Applicants appears not to have made any payments as this court was unable to trace any record of payment. The Applicants made a written letter dated 25th August, 2014 asking for certified handwritten proceedings of 25th July, 2014 and this time paid vide receipt NO. 5802177. The handwritten proceedings were duly supplied and the Applicants were unable to appear before this court on 25th July 2014 to ventilate their grievances. The rights of the Applicants were observed and the record does not disclose anything that can reasonably raise any suspicion of mistreatment or bias in anyway.

The case at the trail court now is at defence stage and this court is being called upon to transfer the case to another magistrate on account of bias.

The power to transfer a case from one subordinate court another is donated under **Section 81(1) (a)** of **Criminal Procedure Code.** The relevant part to this motion states:,

" ***Whenever it is made to appear to the High Court ……that a fair and impartial trial cannot be had in any criminal court subordinate thereto…….it may order that the offence be tried by another court…….competent to try the offence".*** This provision of the law is fortified by **Article 50** of the **Constitution** which stated that;

***" Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or of appropriate another independent and impartial tribunal or body".***

The rights of the Applicants herein therefore under the law are well illustrated. However the law sets standards to be met before such provisions can be invoked and this is what this court shall apply in this application. For this court to order for a transfer of a case from one subordinate court too another, the following elements must be established.

i. Reasonable apprehension that a fair and impartial trail cannot be had.
ii. That some question of law of unusual difficulty is likely to arise.
iii. That it would be convenient to parties and witnesses to change the place of trial considering where the offence took place.
iv. That is would be expedient just and fair to transfer to meet the ends of justice.

I have looked at the proceedings and the allegations made which I have analysed above. The Applicant has established none of the above elements. This court can only transfer a case where it is clearly shown that there exist a reasonable apprehension of bias by a trial court. This position is informed by the decision in **Nairobi Miscellaneous Criminal NO. 314 of 2006 Roy Kiama Gichui –vs- Republic** where the court in dismissing the application for transfer stated that before any transfer is granted a clear case must be made out that the applicant has a **reasonable apprehension** that he will not have a fair and impartial trial. The court applied the standard in the case of **Bhang Singh-vs- Republic (1941) 1 TL R 133** which said;"

***In deciding what is reasonable apprehension regard must be had not to abstract standards of reasonable but to the standard or honestly and impartiality of the accused himself ".***

This court has pointed out the instances where the applicants appears to have been less than candid both in the trial court and in this court. The Applicants did not show to court any document to demonstrate that their counsel was unwell on 4th June 2014 instead a new advocate said he was coming on record and when his application for adjournment was rejected. He opted out by withdrawing from acting. The court having rejected the application for adjournment could not be derailed by cessation to act by the counsel for the applicant. Secondly and more importantly the applicants have casted aspersions against a judicial officer without any evidence. They say they were "fixed" by the same complainant in another court but

have failed to show the proceedings and any action they could have taken to address the grievances. The allegations of bias owing to the alleged conduct of the trial court are not sound and the same do not persuade the court. The holding by a similar court in the case of ***SHILENJE –VS- R (1980) 132*** is relevant in this motion before this court. The court stated in part;

"The ***High Court will always require some very strong grounds for transferring a case from one judicial officer to another if it is stated that a fair and impartial inquiry or trial cannot be held especially when statement implies a personal censure on such officer".*** Going by the ratio decidendi in above cases this court wishes to add that parties in a case whether accused persons, or parties in a case, should not be allowed a situation akin to forum shopping or choosing a judicial officer to hear and determine their case. This court cannot set a precedent where parties in a case be they accused persons or complainants can derail the course of justice by unnecessary delays and/or unnecessary applications or imputing improper conduct of the judicial officer trying the case to form a basis for transfer. The same is not only undesirable in the dispensation of justice but can lead to derailment of judicial process and injustice.

This court therefore finds no merit in the application dated 6th June 2014 and the same is dismissed. An in view of this finding , this court directs that the applicants do appear in trial court for tomorrow on 29th day of October 2014 at 9 O'clock for mention of their case to enable the said court to proceed with the trial .

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 28th DAY OF OCTOBER, 2014** in the presence of

The applicants

Mbogo Court Clerk