



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 58 of 2012

EMILIO GITONGA MUTEGLI.....1ST APPELLANT

DANIEL NJUE KANYI.....2ND APPELLANT

ALEXANDER MURIITHI.....3RD APPELLANT

PETERSON NYAGA MUCHAK.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Originating from Principal Magistrates Court Chuka Criminal Case No. 359 of 2012 by Hon. M. N. Murage Principal Magistrate)

RULING

The Application is a notice of motion dated 21st September 2012. It is brought under Section 81(1) of the CPC. It seeks the following orders:

1. That this honorable court be pleased to order the transfer of Criminal Case No. 35 9/2012 from Chuka Court to any other court.
2. That all trials proceedings in Criminal Case No. 359/2012 be stayed in High Court until hearing and determination of this application.
3. That this honorable court be pleased to order what the court may deem fair and just pending the haring and final determination of the case.
4. The application of transfer of Criminal Case No. 359 of 2012 for the accused which application is based upon the annexed affidavit of the applicant and general grounds set forth below.
 - (a) That the learned magistrate refused to sign the bail bond of the 3rd accused claiming that title deeds from Embu County cannot be used to guarantee anybody in Tharaka Nithi County. Whereby title deeds were confirmed at Siakago Lands Adjudication headquarters and valued by Chuka values.
 - (b) That the learned magistrate violated our constitutional rights by refusing to issue us with Investigation Diary and statements for the investigation officers claiming thatare prosecution sides secrets and accused has no right to know them.

(c) That the learned trial magistrate hooting (sic) section 50(2) of the provisions of the Constitution.

(d) That the court clerk is a close relation of the complainant in this case.

Affidavit

(a) That we are adults Kenyans of sound mind hence competent to swear this affidavit.

(b) That this honourable court be pleased to order that the criminal case stated above be transferred from Chuka Principal Magistrates Court to any other law court in the Republic.

(c) That in the alternative this application be herein filed and admitted and be heard without any delay.

(d) That the applicants are reasonably apprehensive that the hearing and final determination of this case in Principal Magistrates Chuka Court will not be fair and justice will be denied.

(e) That it is for the foretasted reasons that we seek for prayers contained in the notice of motion.

When the Applicants came to court to argue the application they nominated the 3rd Applicant to argue the application on their behalf. In his submissions the 3rd applicant stated that they would like their file to be removed from Chuka Law Courts for hearing in any other court. He then enumerated the various complains that the complaints have against the trial magistrate.

The first one is that in May 22012 they were given a bond of 2 million they sought a review and it was reduced to 500.000 in June 2012. That the sureties were rejected because they came from Embu. And that the trial magistrate ordered them to pay 500,000/ cash in order to be released on bail. He said that it is only much later when the trial magistrate went to mention their matters in the prison that he indicated to them that he would accept their sureties the other complaint was that they requested to be supplied with the investigating diary but the trial magistrate declined their request. Lastly they said that the trial magistrate is harsh and they feel they shall not get justice in that court.

The state was represented by Moses Mungai learned State Counsel. Mr. Mungai opposed the application and submitted that it was frivolous vexious and an abuse of the court process. Mr. Mungai referred the court to page 9 of the proceedings and urged that the record was very clear that the bond terms were reduced by the court and that the prosecution had no objection and that The bonds were approved. He then referred to page 6 of the proceedings and said the court ordered for the applicants to be supplied with the statements of witnesses and that that was sufficient. He urged that the grounds argued by the applicant do not show any compelling reasons to have the case transferred to a different court. There is no evidence of bias or likelihood of bias.

The grounds upon which a case can be transferred from one court to another are set out under section 81(1) of the Criminal Procedure Code which stipulates 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.

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.”

The court has also had occasion to determine which is the best test to apply in determine whether grounds exist to have a case transferred from one court to another. In the Court of Appeal case of KINYATTI VS REPUBLIC [1985]KLR 562 it was held:

“In deciding whether or not to transfer a case from one court to another, the test was whether the appellant had made out a clear case by discharging on the balance of probabilities the burden of showing that the apprehension in his mind that he may not have a fair and impartial trial is of a reasonable character.

The test was whether the apprehension in the mind of the applicant/accused that he may not have a fair and impartial trial before the Chief Magistrate was of a reasonable character regardless of the fact that there may be no unfair or partial or biased trial in the matter. That was the test the trial magistrate ought to have applied.”

I have considered the application and find that the grounds raised by the Applicants why they want the case transferred from one court to another do not meet the set test. The applicants are complaining about temperament of the trial magistrate which is not a good ground. They are also complaining about not being supplied with the Investigation Diary. The Constitution is very clear under Article 50(2)(j) of the Constitution that an accused person has a right to evidence the prosecution he intends to rely on. That Article provides:

“50. (2) Every accused person has the right to a fair trial, which Includes the right—

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

The constitution gives an accused person the right to be informed of the evidence the prosecution intends to use in the case against them. By evidence it means both oral and documentary evidence the prosecution has in support of their case and against an accused person. This evidence includes witness statement and any documents expert reports and such like evidence that they intend to use against an accused person. An Investigation Diary is a record of the investigations carried out by the prosecution and does not really constitute the evidence that the prosecution will rely on. It is not a requirement that such a record is provided to an accused person before his trial. However if the accused felt that it was necessary to have that report in support of their case then they should make a an application for the same.

In the instant case I see the accused persons requested to be supplied with copies with copies of the investigation officers statements and Investigation Diary on the 19th July, 2012 however, the learned trial magistrate made no ruling on that request. All he wrote is that copies of statements be supplied. I think that the learned trial magistrate should rule on that application by the accused persons and make the necessary orders. With regard to the application at hand the grounds advanced by the applicants to have

the matter transferred to another court do not meet the test required in law as they do not demonstrate reasonable grounds of apprehension on the part of the Applicants to show that they may not have a fair and impartial trial. Omissions or mistakes by the trial court do not constitute grounds upon which to find that the applicants will not have a fair and impartial trial. For these reasons I do find that the applicants have not made out a clear case and therefore have not discharged on a balance of probabilities the burden of showing that the apprehension they had in their mind that they may not have a fair and impartial trial is of a reasonable character.

The application has no merit and is dismissed

SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY, 2013.

J. LESIIT

JUDGE