



REPUBLIC OF KENYA

High Court at Meru

Criminal Miscellaneous Application 50 of 2012

**MOHAMED HULLUFOAPPELLANT
VERSUS**

REPUBLIC.....RESPONDENT

RULING

The Applicant Mohammed Hullufo is facing a charge of Defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. He is charged before the Maua Court. He has approached this court with an application seeking to have his case transferred from the magistrate who is trying him to any other court. The application states as follows:

- 1. I am not conversant with Kiswahili language.**
- 2. That I was arrested on 23.9.2010.**
- 3. That I was charged with defilement.**
- 4. That on 9.12.2011, I made an application to the trial court to recall the complainant PW2 to the witness box in order to re-examine him because during the first examination I did not have their statements and I got it later but the trial court denied me the right.**
- 5. That I have no faith in that court because they always ignore my requests.**

The Applicant appeared in person and he urged the application through an interpreter in the Borana language. In his submissions before this court he urged that he had pointed out to the court that the only language he understood was Borana language and that the trial magistrate forced him to proceed with the case in Kiswahili which he was not fluent in. He submitted that when the trial began he had not been supplied with Witness Statements. He urged that when he was finally supplied with the statements he sought to recall the witnesses who had testified earlier in order to cross examine them again but the same was denied.

The State was represented by Mr. Moses Mungai. The application was opposed. Mr. Mungai submitted that the Applicant had not demonstrated that there were compelling grounds to show that the trial magistrate was biased against him. The learned State Counsel urged that the grounds raised in the application could form a basis of an appeal but not a transfer of the case from one court to another. He urged the court to dismiss this application.

The court has power under section 81 of the Criminal Procedure Code to transfer a case from one court to another. That section 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.”

I have considered the application and the submissions by the Applicant and the learned State Counsel. This case falls under section 81(a) of the CPC. The Applicant alleges that he is unlikely to have a fair trial in view of the complaints he has raised. The Court of Appeal dealt with the test to be applied in determining whether an accused may not have a fair and impartial trial and observed in **KINYATTI VS REPUBLIC [1985]KLR 562:**

“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.”

The burden lies on the Applicant to show that he may not have a fair and impartial trial on a balance of probabilities. The Applicant alleges that he has been forced to proceed with the case in other languages other than the Borana language which he understands. He also claims that the trial court declined to recall witnesses as he had requested. For the latter ground, a trial court has the power to exercise its discretion and make a ruling once an application is made before it. If the ruling grieves the accused person, he may take up that point as a ground of appeal.

I have perused the lower court record and have confirmed that indeed Borana language was not used at any time during the trial. This raises procedural issues which is a ground best argued as a ground of appeal. This is for the simple reason that, if indeed the language used in the proceedings at the trial was not understood by the accused, then there is a defect in the proceedings caused by a procedural error under section 198(1) of the Criminal Procedure Code. The said error can be blamed squarely at the

doorstep of the trial court. What should happen depends with the court where the issue is raised. If it is raised at the trial, the court would have to determine the best order to make that best serves the interest of justice in that case. If the accused decides to take it up with the Superior Court, that determination ought not to be entertained at a preliminary stage of the trial. Doing so would open avenues that may lead to clogging the judicial system if every time a trial court made a procedural error the accused runs to the appellate court to challenge the mistake and or act. That kind of swiftness in dealing with trials by rushing to the court with supervisory powers over the court perceived to have committed errors, slips and or mistakes is not a procedure that can be entertained or adopted. We simply lack capacity in terms of human resources to handle such kind of applications at an interlocutory stage.

The test to apply in this case is whether the complaints raised by the Applicant 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. In view of the fact the complaint was of a procedural nature, I am not satisfied that the Applicant had discharged his burden of proof that his apprehension was reasonable. The trial Magistrate has not been shown to have taken deliberate acts or omissions to deny the Applicant a fair and impartial trial.

For the foregoing reasons the application is dismissed.

The Applicant should be presented before the trial court for directions as to the further hearing of his case on the 12th February, 2012.

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

**LESIIT, J.
JUDGE**