



No. 79/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL MISC. NO. 106 OF 2013

UVITO KIIA KITUU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Uvito Kiia Kituu** hereinafter “*the applicant*” filed an application dated 4th July 2013 seeking transfer of the Makindu Criminal case No. 823 of 2012 from Makindu Court to Machakos Chief Magistrate's Court for hearing. He is charged with the offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code.
2. The application is supported by an affidavit where the applicant depones that he has many criminal cases in Makindu Law Courts –
 - Principal Magistrate's Criminal case No. 7/1998
 - Principal Magistrate's Criminal Case No. 197/2004
 - Principal Magistrate's Criminal Case No. 2/2006
 - Principal Magistrate's Criminal case No. 25/2006
 - Principal Magistrate's Criminal Case No. 1098/2008
 - Principal Magistrate's Criminal Case No. 289/2009
 - Principal Magistrate's Criminal Case No. 841/2009
 - Principal Magistrate's Criminal Case No. 1111/2009
 - Principal Magistrate's Criminal Case No. 1112/2009
 - Principal Magistrate's Criminal Case No. 823/2012
3. He averred that he made an application to have the case transferred elsewhere before the trial magistrate because his cases have been publicized such that the community around has formed a negative opinion about him but the magistrate declined.
4. He was denied bail at the outset.
5. He has complained to the Judges and Magistrate's Vetting Board about a former magistrate at the station, one Hon. **Bildad Ochieng**, therefore he believes that it is within the knowledge of other magistrates at the station, and the trial magistrate had threatened him.
6. He has noted that the trial magistrate has developed a negative attitude towards him; he treats him with contempt and does not record some of the questions he asks in cross-examination. Therefore he doubts if he can get fair trial at Makindu Law Courts.
7. In his oral application he stated that **Hon. Bildad Ochieng** has been visiting Makindu and has been seen in company of the **Hon. Wambugu** who is presiding over his case.
8. **Mrs. Abuga**, the learned state counsel opposed the application to have the case transferred from

- Makindu Law Courts. She submitted that the lower court could not have transferred the case because it lacked jurisdiction to make such an order.
9. Further, that the complaint made to the Judge's and Magistrate's Vetting Board against a magistrate who had been transferred from the station did not affect the presiding officer in the case.
 10. Regarding the allegation of the officer failing to record evidence, she stated that it could not be taken to be true because there was no indication that the applicant had asked the judicial officer to do so. There was no evidence of the trial magistrate having threatened him as alleged. He had failed to show that he reported the threat to the police. She called upon the court not to allow the applicant to choose particular courts to go to an action that would open a floodgate of such applications.
 11. I have carefully considered the application by the applicant and the response thereto by the learned State Counsel.
 12. A perusal of the court record reveals that when the applicant was arraigned in court for purposes of taking plea he applied to be released on bail. His application was opposed by the prosecution. It was stated that at the time of the applicant's arrest his life was in danger. People had allegedly rioted and blocked the highway. Tension was said to be high.
 13. In denying him bail the Honourable magistrate took into consideration the applicant's security. His life was in danger.
 14. Bail as a constitutional right is not absolute. If there are compelling reasons it may be denied. The magistrate cannot be faulted to have made such an order which was in fact in the interest of the applicant.
 15. The applicant was granted bail seven (7) days later. On the material date the complainant in the matter sought to withdraw the case, but the applicant opposed the application. Following the refusal to have the case withdrawn it was fixed for hearing.
 16. On the 22nd November 2012 the case did not proceed because the applicant had not been supplied with prosecution witnesses' statements. On the 14th March 2013 the case did not proceed because the applicant did not turn up for trial. The court adjourned the case on the basis of a letter written by the applicant that he was before the High Court. Subsequently, the case took off on the 23.5.2013.
 17. The applicant is recorded as having said that he was ready to proceed. He did not raise any complaint. He participated in proceedings. Three (3) witnesses testified and he duly cross-examined them. Thereafter he filed the present application in the High Court.
 18. It is important to note that when the case came up on 10th July 2013 the last prosecution witness, the Investigating officer was ready to testify. The accused sought an adjournment. The basis was that he had filed an application in the High Court to have case transferred. Although no stay order was in existence the trial magistrate adjourned the case giving the applicant an opportunity of being heard by the High Court. There is absolutely nothing on record to suggest that the applicant was threatened as alleged. Indeed he was accorded a fair trial as envisaged by Article 50 of the Constitution.
 19. Section 81 of the Criminal Procedure Code gives the High Court the power to transfer criminal cases from a criminal court subordinate to its authority to any other court of equal jurisdiction. This would be the case whenever it appears to the High Court that a fair and impartial trial cannot be heard in the subordinate court (*See Section 81(1) (a) of the Criminal Procedure Code*).
 20. The test of such an apprehension was stated in the case of ***John Brown Shilenje versus Republic Cr. Appeal No. 180 of 1980*** by **Trevelyan, J** who said;-

“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”.

21. The Applicant has demonstrated that he lodged a complaint against **Hon. Bildad Ochieng** before the Judges and Magistrate’s Vetting Board. In paragraph 6 of his affidavit in support of the application he states thus;-

“That I have a pending complaint before the Judge’s and Magistrate’s Vetting

Board concerning a former magistrate of the station one Hon. Bildad Ochieng and I believe the magistrates in the station are aware of the same”.

22. What is evident is the fact that the applicant is apprehensive that he will not get justice because of the complaint lodged. Orally he alleged that **Hon. Ochieng** has been visiting Makindu and was seen with **Hon Wambugu**. This was not averred in his affidavit evidence. If a case has to be transferred to another court on that ground then it must be noted that all magistrates in subordinate courts are colleagues of Hon Ochieng. This would mean that no subordinate court would hear the applicant's case for it would be feared that he/she would also not be fair as he/she would get to know about the complaint.
23. The applicant has demonstrated that he has had a myriad of cases at Makindu Law Courts. However, he has not alleged that the **Hon. Wambugu** is presiding over any other of his cases. Some of the cases must have been concluded.
24. Looking at the record, there is absolutely nothing to suggest that the trial magistrate was unjust.
25. Looking further at the nature of the application, it is specific as to which court the applicant wants the case to go to. In case of a case being transferred from a court, the convenience of witnesses must be considered; the distance from where the offence was allegedly committed to where the trial should take place must also be taken into consideration (*see section 81(1) (c) (d) of the Criminal Procedure Code*). Machakos is about 200 kilometers away from Makindu. There are other courts that are near Makindu that would be convenient to parties. Taking all these into consideration, the apprehension by the applicant, following allegations made up are not reasonable grounds to have the case transferred from the Hon Magistrate to another court.
26. In the premises, I find the application lacking merit. It is dismissed. I therefore direct that the file be placed before **Makindu Senior Resident Magistrate, Hon. Wambugu** for hearing and determination of the case.
27. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 10TH day of SEPTEMBER, 2013.

L.N. MUTENDE

JUDGE