



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

MISCELLANEOUS APPLICATION 257 OF 2010

DAVID KIAGANO MBISIAPPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. **Section 72** of the **Criminal Procedure Code** (the “Code”) is ensconced in **Part IV** of the **Code** entitled “*Place of Trial.*” It reads:

When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.

2. The import of **section 72** of the **Code** is clear: a person should be tried in a court which has the local geographical jurisdiction of the place where the act was done or consequences of the act felt.

3. The Applicant herein is **David Kiagano Mbisi** (“Applicant”). He is charged in Machakos Criminal Case No.3182 of 2009 with the offence of forgery contrary to **section 349** of the **Penal Code**. As per the charge sheet the particulars of the offence read as follows:

On the 6th day of July 2009 at the National Bank of Kenya Kitui Branch, in Kitui District within Eastern province, forged a false document namely a National Bank of Kenya cash withdrawal voucher slip of Kshs. 50,000/- (fifty thousand shillings) purporting it to be a genuine National Bank of Kenya cash withdrawal voucher slip valid for payment and signed by other authorized signatories of Wambua Kalutu and Beatrice Kamumbe James.

4. The charge sheet is quite clear: the alleged criminal act took place in **Kitui District** within **Kitui County**. The criminal case, however, was brought in the Machakos Law Courts. By a Notice of Motion dated **19/10/2010**, the Applicant challenges the decision to try the case at Machakos Law Courts. He prays that the same be transferred to the **Kitui Law Courts** for hearing and determination.

5. The Applicant says that the case ought to be transferred to Kitui Law Courts due to the following cumulative reasons:

a. The alleged crime took place in Kitui and therefore the law courts with local geographical jurisdiction

is the Kitui Law Court;

b. The Applicant as well as all the prosecution witnesses are ordinarily resident in Kitui District hence the mutual convenience of the parties dictates that the case be heard in Kitui;

c. Owing to factors (a) and (b) above, the decision to prosecute the case in Machakos has left the Applicant apprehensive that he will not be afforded a fair hearing. The Applicant, in fact, goes one up and affirmatively accuses the Prosecution of bad faith, abuse of the process of the Court and conspiracy with a judicial officer in Machakos to make sure that the Applicant is convicted. Indeed, I find it imperative to quote from the Applicant's affidavit:

...I have reason to believe that I will not be afforded a fair trial at Machakos Law Courts because one of the prosecution witnesses has openly abused and misused the court process. He recklessly and carelessly peddled lies and convinced the police to file this matter in Machakos and he has alleged openly that he has a senior relative in the police force who knows the Presiding Magistrate and prosecutor in Machakos Law Courts. I thus have good reason to doubt whether I will be afforded a fair trial.

6. As part of his Application, the Applicant has put on record an affidavit by **Wambua Kulutu** who describes himself as the former Chairman of **Kanguu Primary School** in **Kitui District**. This school is the complainant in the criminal case. **Mr. Wambua Kulutu** is listed on the charge sheet and in the copies of witness statements provided to the Applicant as a prosecution witness. However, in this affidavit duly sworn on **25/10/2010**, **Mr. Wambua Kulutu** prospectively recants any adverse testimony he is likely to give against the Applicant and makes the very serious allegation that he was coerced by a Senior Police Officer by the name **Kilonzi** to sign a statement alleging that the Applicant had engaged in financial impropriety. **Mr. Wambua Kulutu** now says that the allegations against the Applicant are fabricated and he will be unable to stand by them in Court during the trial.

7. The State, on the other hand, resists the Application and has filed two affidavits. The affidavit of **ACP Stanley Tito Kilonzi** describes him as the Patron of the complainant school. He depones that his role in the case started and ended with him recommending to the head teacher of the school, **Mr. Joshua Ngala Kimanzi** to file an official complaint with the District Education Officer and the Police. He says that he is not at all involved in the investigations of the case and he has never coerced anyone to sign any statements or in any way seek to subvert justice as alleged in the affidavit of **Mr. Wambua Kulutu**.

8. On the other hand, the affidavit of **SP Edwin Kamau**, in addition to corroborating that **Stanley Tito Kilonzi** is not involved in the investigations, gives reasons why the case was brought in **Machakos** and not **Kitui**. He gives two reasons.

9. First, **SP Kamau** says that it is imperative to try the Applicant in **Machakos** in order to "safeguard" the integrity of Kitui Law Courts as well as safeguard public interest and the interests of justice. I will let him explain that in his own words. At **paragraph 5** of his affidavit he depones:

That when it became imminent that the Applicant was to be arraigned in court to face theft and forgery charges, he started bragging openly that he was known within the judiciary at Kitui Law Courts and that the case would not be sustained.

10. Second, **SP Kamau** claims that the Applicant is interfering with prosecution witnesses and gives the recanting by **Mr. Wambua Kulutu** as demonstration of such interference.

11. In his oral submissions before *Justice Kihara*, **Ms. Mutuku** for the Applicant relied on two authorities to urge the Applicant's case: *Hosea Kibiwott Bargoyet v R* [2004] eKLR and *Mberwa Muya Mberwa v R* (Bungoma HCCC Crim. Misc. No. 9 of 2004). She submitted that the allegations that the Applicant is well connected within the Kitui Law Courts are not substantiated and the Court should not act on them. She also said it has not been shown that the Applicant has interfered with witnesses.

12. I have read the authorities cited to me. They both apply **section 81** of the **Criminal Procedure Code**

the same section the Applicant relies on here. That section reads as under:

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.

13. I have no doubt that the High Court has jurisdiction and authority to grant the prayers sought if it finds, on merit, that they are deserved.

14. On her part, **Ms. Gakobo** for the State, concentrated her submissions on the allegations by the Applicant about the prosecution is acting in bad faith and that the police fabricated charges against the Applicant. She complained that the Applicant should have moved to the trial court to disqualify itself. She asks the Court to consider what effect allowing such an application would have on the administration of justice.

15. I gladly accept this invitation by **Ms. Gakobo**.

16. First, I must protest the tendency of both sides to mudsling judicial officers through not-so-subtle innuendos contained in their respective affidavits. The Applicant opens the salvo by doubting that he will receive a fair trial in Machakos Law Courts because the prosecutor at Kitui Law Courts says he knows the Presiding Magistrate at Machakos Law Courts. The implication is that the prosecutor will interfere with the decisional independence of the Presiding Magistrate of Machakos Law Courts, who, in turn will prevail upon whichever magistrate will hear the matter to render a decision favorable to the prosecution. This is as cheap a shot as it is a reckless accusation considering that the Applicant's affidavit was drawn by counsel. The Applicant provides absolutely no proof or substantiation to these onerous accusations. Yet, by a stroke of adversarial pen, the counsel, through the mouth of his client, unjustifiably maligns the Presiding Magistrate of Machakos Law Courts as well as the entire magisterial bench at the Machakos Station.

17. No one denies the Applicant the right to bring the present Application. My view is that, however, the Applicant ought to have been a lot more responsible in the kind of claims he makes against judicial officers who are not parties to the proceedings and are therefore defenseless to the baseless claims he makes. A time has come to hold lawyers and their clients accountable for utterances they make about judicial officers in judicial proceedings without offering any proof. Judicial officers have nothing but their

reputation as the most important asset in their professional duties. Careless utterances such as the ones breathed into the mouth of the Applicant here only serve to undeservedly strip a defenseless judicial officer of her integrity through reckless innuendo. It is the duty of this Court to call out lawyers and their clients who participate in this type of scorch-earth damnation of the institution of the judiciary when everyone is trying so hard to rebuild and reform the judiciary.

18. Yet, the State has fared no better in this light. In this case, it would appear that one cheap shot deserves another. In response to the Applicant's unsubstantiated claims which verge on defaming a judicial officer, the State has a senior Police Officer put on record the claim that he elected to charge the Applicant in Machakos so as to "safeguard" the integrity of the Kitui Law Courts. Why was it necessary for this senior Police Officer to take the unprecedented step of "*safeguarding*" the integrity of the Kitui Law Courts? Because, apparently, he believed the Applicant when he "brag[ged] openly that he was known within the judiciary at Kitui Law Courts and that the case would not be sustained."

19. It takes no leap of imagination to realize that what this Senior Police Officer and the State have done here is to send a message that, indeed, the judiciary at Kitui Law Courts is amenable to such influence-peddling by the Applicant. The State is subtly but effectively announcing its belief that the only way to protect the Kitui Law Courts is to remove this case from Kitui. There is no mistaking that the Prosecution fears that the Kitui Law Courts will not be able to withstand the "*influence*" that the Applicant apparently has.

20. In my view, this is as damaging to the judicial institution as the Applicant's claims. The action by the State only feeds the perception that the judiciary is indeed amenable to extraneous influences. And, on what evidence did the State act? None whatsoever! Yet, the action by the State serves the purpose of eroding the public's confidence in the judiciary; it undeservedly paints the judiciary at Kitui Law Courts with a broad brush as a weak institution incapable of withstanding the shenanigans of the likes of the Applicant. The State here acts as an unwanted saviour: "protecting" the judiciary in order to kill it through innuendo. I consider it this Court's duty to equally call out the State and its officers when they act irresponsibly in a manner that detracts from judicial independence and integrity.

21. So, to accept Ms. Gakobo's challenge, what is the impact on the administration of justice on applications such as the one before the Court? The prior question is a lot more important: what is the impact on the overall administration of justice on decisions such as the one made by the State in this case?

22. The answer is as obvious as the resolution of this Application seems clear to me. The State must not be allowed to forum-shop in criminal cases in the guise of "*safeguarding*" judicial integrity. The overall impact, in my view, is worse than the feared injury to the judiciary itself. Even accepting the State's action as benign or well-intended as I do, this is a case of the medicine being worse than the ailment.

23. The view of the Court is that it is both expedient for the ends of justice as well as appropriate for the convenience of the parties and their witnesses that this case be heard in **Kitui**. The provisions of the Criminal Procedure Code also require that it be tried there and the Court has heard no good reasons for it to be tried elsewhere. On the contrary, trying this case in **Machakos** only serves to impugn the integrity of the judiciary at **Kitui Law Courts** on account of flimsy and unsubstantiated claims.

24. I therefore order that this case be transferred to the **Senior Principal Magistrate's Court** in **Kitui** for trial or assignment to another magistrate within that station who has jurisdiction to hear the matter. Those will be the orders of the Court.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of JANUARY 2012.

J.M. NGUGI
JUDGE