



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL MISC. APPLICATION NO. 99 OF 2011**

**JOSEPH MUTUA KILUNGU ..... APPLICANT**

**VERSUS**

**1. DANIEL MUSYOKI MUSIU**

**2. TITUS MUTETI KILUNGU**

**3. UVYU ISIKA**

**4. KITUKU KATIKU**

**5. REPUBLIC .**

**.....  
..... RESPONDENTS**

**RULING**

This is an application by way of Notice of Motion brought by the Applicants under Section 81 (1) (a) (e) and (2) of the Criminal Procedure Code (Cap 75 Laws of Kenya). The Applicant (who is the alleged assaulted person) has asked that Criminal Case No. 237 of 2010 pending in the Senior Resident Magistrate's Court at Makueni be transferred to the Chief Magistrates Court Machakos or any other court of competent jurisdiction in Kenya.

The application was filed with a supporting affidavit sworn by the Applicant on 26<sup>th</sup> October 2011. It was deponed that the Applicant was assaulted and injured by the 1<sup>st</sup> to 4<sup>th</sup> Respondents, who were charged in the subordinate court at Makueni Senior Resident Magistrate's Court with the offence of causing grievous harm. That the said Respondents were boasting that they knew everybody in Makueni Law Courts including the magistrate. That the prosecutor at the Makueni Senior Resident Magistrate's Court has been hostile and has told the Applicant on numerous occasions that his case will not succeed and that he will not prosecute the case.

The Applicant also filed a further affidavit sworn by himself on 16<sup>th</sup> November 2011 annexing a copy of the charge sheet, which shows that he is the victim of the alleged offence of assault.

The application is opposed. An affidavit sworn by Daniel Musyoki Musiu, the 1<sup>st</sup> Respondent (1<sup>st</sup> Accused in the subordinate Court) was filed. It is deponed that the criminal case arose out of a land dispute in which the Applicant forcefully took possession of land. That the Applicant's attempts to transfer the criminal case to Machakos was a scheme to deny the Respondents the ability to call their witnesses due to the prohibitory cost of fare to Machakos from Makueni, which was more than 100 kilometers away. That the delay in the prosecution of the case was mainly caused by the Applicant's failure to avail the P3 form to the prosecutor.

At the hearing, Mr Ndungi, learned Counsel for the Applicant submitted in support of the application. Counsel stated that the case should be transferred to any court with competent jurisdiction. Counsel submitted that the accused persons would suffer no prejudice if the case was so transferred.

The learned State Counsel, Mrs Gakobo for the Republic opposed the application. It was Counsel's contention that it was not for the prosecutor, but for the court to ensure that fair trial was conducted. Secondly, the complaints raised by the Applicant had no relevance to the provisions of Section 81 of the Criminal Procedure Code, under which the application was made.

Mr Kisongoa, learned Counsel for 1<sup>st</sup> to 4<sup>th</sup> Respondents opposed the application. Counsel contended that the prosecutor had asked for adjournments for 10 months in order to get the completed P3 form. This was actually in favour of the Applicant (Complainant). In addition, no specific or particular allegation was leveled by the Appellant against any court official or person, to justify the allegation that the trial would not be fair.

I have considered the application, documents filed and submissions of counsel.

This application was brought under Section 81 of the Criminal Procedure Code (Cap 75) the relevant parts of which provide:-

**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) .....**

**(c) .....**

**(d) .....**

**(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 Applicant herein is the person allegedly assaulted. In my view, he is an interested party and has therefore *locus standi* to bring this application.

The Applicant has come to this court complaining that a fair trial will not be held because firstly, of the conduct of the prosecutor. Learned State Counsel Mrs Gakobo has submitted that the prosecutor is not the one to guarantee a fair trial. In Counsel's view, that is an exclusive function of the court. I agree that the court has a crucial and special role in ensuring that a fair trial is conducted. However, a prosecutor is part and parcel of the conduct of criminal court proceedings. Therefore, in my view, a prosecutor can also be culpable when matters of fair trial are raised. Whether a prosecutor is culpable will of course depend on the factual situation regarding what the prosecutor has or has failed to do, and how he conducts himself with regard to the proceedings. In the present case the Applicant has not demonstrated that the prosecutor is culpable. Merely alleging that the prosecutor has been hostile without giving any further particulars is not enough.

The Applicant has secondly, complained of the 1<sup>st</sup> to 4<sup>th</sup> Respondents boasting of knowing everybody at the Makueni Law Courts including the magistrate and the prosecutor. He calls upon the court to exercise its discretion to transfer the case from Makueni Senior Resident Magistrate's Court to another court of competent jurisdiction. He has however not demonstrated how that boasting has affected the magistrate or court officials.

Indeed, this court, as per the provisions of Section 81 of the Criminal Procedure Code (Cap 75) has wide discretion in transferring criminal cases from one subordinate court to another, and also to itself. However, that discretion, being judicial discretion has to be exercised judicially. The court has to act on tangible reasons that clearly demonstrate that a fair trial will not be had if the case is not transferred to another court. In coming to this court, the Applicant has levelled serious allegations. However he has not given any particulars and facts to demonstrate or support his allegations. The burden was on him to demonstrate the particular facts that would persuade the court to exercise its discretion. He failed to provide the said facts or particulars. This court cannot act on mere allegations, however alarming those allegations might be.

The Applicant having failed to demonstrate the facts or particulars that would legally justify the exercise of this court's discretion in his request for transfer of the criminal case, the application has to fail.

Consequently, I find that the application has no merits and I dismiss the same. The stay orders granted against the subject proceedings at Makueni Court are hereby vacated. It is so ordered.

Dated and delivered at Machakos this 15<sup>th</sup> day of **February** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Mr Ndungi for the Applicants

Mr Mukofu for the State

Nyalo – Court clerk