



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

MISCELLANEOUS APPLICATION 25 OF 2012

JULIUS GITONGA.....1ST APPLICANT

ROBERT MUGAMBI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Application was brought by a Notice of Motion under Articles 50 and 51 of the Constitution and Section 81 of the Criminal Procedure Code. Two prayers were sought that is, a transfer of the Marimanti Criminal Case No.227/2011 from Marimanti Court to Meru Law Courts and secondly that the Applicants be admitted to bail pending trial.

The grounds upon which the application is premised are that the Applicants no longer have faith that the trial court will give them a fair and impartial trial, and secondly that the typed proceedings do not reflect the evidence adduced in court by the prosecutor.

The application is opposed. The learned trial magistrate, following this courts direction, filed a replying affidavit sworn on 8th May, 2012. The gist of the application is a denial that the learned trial magistrate was ever asked to remove himself from hearing the case by the Applicants throughout the trial and that the Applicants attitude changed when they were placed on their defence. The learned trial magistrate has sworn that he has conducted the case impartially and fairly. The trial magistrate admitted cancelling the Applicants bail after receiving a Pre Bail Report on them by the Probation Officer.

There is a second replying affidavit sworn on 16th May, 2012 by Mr. Jackson Motende learned State Counsel. I have considered the affidavit. The gist of the affidavit is to show that the Applicants have not shown any good grounds why the application should be granted.

Mr. B. G. Kariuki urged the application on behalf of both Applicants. The learned State Counsel Mr. Mungai, opposed the application on behalf of the State. I have considered the rival arguments by both counsels.

Mr. B. G. Kariuki urged that the Applicants were not confident that they would get a fair trial from the court at Marimanti based on two grounds.

The first ground is that the antecedents of the Applicants were exposed to the learned trial magistrate before the case was concluded through the Pre-Bail Report on them by the Probation Officer and also thorough remarks made by the prosecutor at the trial on the 24th May, 2011. Second ground is that the trial court cancelled the Applicants bond during the pendency of the case and in the circumstances the learned trial magistrate's mind was poisoned against the Applicants and that they are unlikely to receive a fair trial.

Mr. Mungai learned State Counsel contended that a transfer could only be made if the trial magistrate was in a compromised position in relation to the accused person before him. Counsel urged that the learned trial magistrate gave the reasons why he cancelled the Applicants bail after receiving the Pre Bail Report on the Applicants. Mr. Mungai urged that the purpose of the Pre Bail Report was to aid the court to make a decision on bail and that the indication of the position on the ground in the report ought not to be regarded as prejudicial to the Applicants or accused persons.

Having carefully considered the rival arguments by both counsels in this case I have come to the following conclusions.

The arguments advanced by Mr. Kariuki in regard to admission of inadmissible evidence is not a ground for ordering the transfer of the case from one court to the other. That complaint can only be raised at the appeal stage of the proceedings.

Mr. Kariuki also relied on the supporting affidavit of the 1st Applicant in which he raised an issue with the record of the proceedings stating that they were not a true reflection of what transpired at the trial. That ground too is one which can only be raised at the hearing of the appeal as one of the grounds of appeal.

Section 81(1) (a) (b) and (c) of the Criminal Procedure Code is the legal provisions Counsel for the Applicants invoked. The section provides:

“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;”

I also referred to **Khan vs Republic**. It is a persuasive case and is good law on the matter Bosire J. (as he then was held:

1. The High Court has power under s.81 of the Criminal Procedure Code to transfer the trial of a criminal case from one subordinate court to another. However, this power can only be properly exercised in circumstances where it is obviously clear that the trial magistrate seized of the case either has an interest in the case or is in a compromising position with regard to the accused.

2. In considering whether or not to order a transfer, the court must not only look at the allegations made by the accused but it must also look at the effect the order of transfer will have on the overall administration of justice.

Section 81(1)(b) and (c) are not relevant to the instant case. Subsection (a) is the one which is relevant to the application. The section makes it imperative for this court to be satisfied that a fair and impartial trial cannot be had in the subordinate court trying the case. The complaint about the admission of evidence or of the proceedings being poorly or otherwise recorded cannot be a ground to support the requirements of S.81 (1) (a) of the Criminal Procedure Code.

The other danger I see in this application is an attempt by the Applicants to draw the High Court into supervising the actual trial process in the lower court on procedural or legal issues. That attempt should be resisted strongly since this court was not intended to look over the shoulders of the subordinate courts to see what those courts are doing, to an extent of seeing whether in recording the proceedings they are crossing the T's. That may be done at the appeals stage but not at the stage of the proceedings where the case has reached. The complaints raised should be urged on appeal, if at all the Applicants are convicted of the case.

In regard to the Pre-Bail Reports by Probation Officers I think it is the issue of content. Article 49(1) (h) of the Constitution provides:

49. (1) An arrested person has the right—

“(h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons”

The article is clear. A court must grant bail to accused persons unless there are compelling reasons not to grant bail. The learned trial magistrate received such a report albeit after making an order granting the Applicants bail.

However, it is clear that the Applicants had not been released from custody for reason one of the Applicants, the 1st accused in the case was a convict serving sentence at the time. Mr. Kariuki decries the fact the prosecutor informed the court that the 1st accused was a convict.

I have considered the proceedings and have noted that the court could not have avoided receiving the information. The prosecutor was explaining why the 1st accused had not been produced in court for the hearing of the case that morning. Besides, whether a person is serving sentence is a relevant factor in determining viability or suitability of granting them bail.

The Applicants have complained that their bonds were cancelled by the court after being granted. I am satisfied from the proceedings that the reason why their bonds were cancelled were given on record. The trial magistrate did not act capriciously. The court has power to cancel orders it has made so long as it is judicious to do so.

It is my considered view that the fact the trial court became aware that the 1st accused before him was serving a sentence from a previous case was inevitable. Besides it is my considered view that a person's antecedents are relevant factors to take into account when determining the question of bond. I see no way of preventing such relevant information from being given to a court when considering bail.

I have come to the conclusion that the Applicants' application to have the case transferred from Marimanti Law Court to any other court has no merit and is dismissed.

The application for bail as sought is also lacking in merit since the facts before this court are similar to those placed before the learned trial magistrate when he considered bail for the accused, I do not find any good ground to vary the learned trial magistrate's ruling on bail. The application for bail is therefore dismissed.

The file should be returned to Marimanti Law Courts for hearing of the Defence and or finalization of the case.

Those are my orders.

DATED SIGNED AND DELIVERED THIS 28TH DAY OF JUNE 2012.

LESIT, J

JUDGE.