



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR.MISC. NO.21 OF 2011

- 1. FRANCIS KYALO NZIOKA.....1ST APPLICANT**
- 2. JACKSON MWANGANGI KIITI.....2ND APPLICANT**

VERSUS

REPUBLIC.....RESPONDENT

AND

HC.CR.APPLICATION NO.164 OF 2010

JACKSO MWANGANGI KIITI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

(1) Jackson Mwangangi Kiiti the first Applicant/Accused and Francis Kyalo Nzioka (the second Applicant/Accused) are charged with three (3) counts of the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. Both Applicants having pleaded not guilty to the offence, their trial commenced before the learned Senior Resident Magistrate’s Court at Machakos on the 2nd August, 2010. Following allegations by the first Applicant that he was tortured and personal items stolen from him, the learned trial Magistrate ordered that the OCS Muthaiga Police Station to carry out investigations and file a report. After cross-examining Daniel Mbivya Mathuka [PW 1] on the 8th November, 2010, the first Applicant sought that the learned trial Magistrate do disqualify himself as the first Applicant contended that he had not been given enough time to prove that the complainant killed his wife. That application was rejected and dismissed by the learned Magistrate who noted that the application was not based on any valid complaint and that the first Applicant had been given more than forty five (45) minutes to cross-examine the witness.

(2) It is that ruling of the learned trial Magistrate that would appear to have provoked the Chamber Summons application the first Applicant brought to this court on the 30th November, 2010 and dated 23rd November, 2010 seeking orders that Criminal case No.670 of 2010 pending before the subordinate court be moved therefrom to any other court within Kenya and that it be heard on priority basis. The application is supported by the first Applicant’s own affidavit made on the 23rd November, 2010 in

which he sets out a brief history of events following his arrest on the 13th March, 2010.

(3) The first Applicant goes on to depone as follows in paragraphs 5 to 28 (inclusive) of his affidavit:

“5. That on 25th March, 2010 I was taken before Chief Magistrate’s Court Machakos and charged with counts of robbery with violence.

6. That, the honourable Chief Magistrate demanded to know why the Nairobi case was brought to Machakos instead of being taken to Nairobi.

7. That the Prosecution applied to be given time to find out why the case was brought to Machakos instead of Nairobi.

8. That on 25th March, 2010 I was joined with another person who is accused two in the case and the case was referred to 31st March, 2010 for Mention.

9. That when the case came up on 31st March, 2010 it was listed for hearing on 5th May, 2010 before court 2.

10. That on 5th May, 2010 the file was taken from court No.2 by a lady who works at the registry to court No.3 which is court No.4 now.

11. That when I inquired from my co-accused person as to why the case was brought to Machakos and now being moved from court No.2 to Court No.3, the answer which my co-accused gave me was that when the police dusted the car of the complainant, his finger prints appeared in that dusting and he would like the case to be heard by a magistrate who can be compromised.

12. That when the case came up for hearing on 5th May, 2010 it was adjourned by the prosecution side for reasons that there were no photographs and we were given another date of 2.8.10.

13. That when the case came up again for hearing on 2nd August, 2010 we proceeded with one witness who is the complainant in this case but he was stood before completing his evidence in chief and we were again given another hearing date of 8th November,2010.

14. That when the complainant was giving evidence on 2nd August, 2010 he mentioned me as the person who went to his house and robbed him.

15. That when I was charged and joined with my co-accused he reviewed to me how him and the complainant killed the wife, and how the complainant is paying his house rent, lawyer’s fee and money to use while in custody.

16. That between second and fourth day of August, 2010 the complainant called my co-accused through mobile phone and told him to tell me that he was forced by police officers from Athi River to come and mention my name and requested my co-accused to give him my mobile phone number so that he could explain to me.

17. That between 2nd and 6th August, 2010 the complainant called me to say sorry for mentioning me in court on 2nd August, 2010 but I refused the apology and threatened to tell the court the truth, that him and my co-accused are the ones who killed his wife.

18. That the complainant pleaded with me not to say anything and offered me money which he deposited in my KCB account.

19. That I made an effort and took the mobile phone number of the provincial CID officer who I called and reported the matter.

20. That I also wrote a complaint letter to the Attorney General, complaining about police torture and the way the police had framed me with a case I was not involved.

21. That on 8th November, 2010 when the case came up for hearing I informed the Hon. Court on what has been happening between August and November, and made an application for adjournment for reasons that there are exhibits I wanted to use during the cross-examination of the complainant especially the CCTV print when he went to deposit money in my account and the communication line when he called me through mobile phone. Another exhibit

was how he has been sending money to my co-accused person.

22. That the prosecution side agreed with my application but Hon. trial Magistrate turned my application down and forced me to proceed.

23. That when I started cross-examining the complainant on how he identified me the time of the robbery and called a prison warder who was my escort to stand with me for the complainant to give description the Hon. Trial Magistrate refused.

24. That the problem started when I requested the complainant to tell the court why he deposited money to my account and what he was buying from me.

25. That the hon. Trial Magistrate intervened and told me not to ask the complainant questions touching on money. That if I have any exhibit on him (complainant) depositing money in my account I can produce them at my defence.

26. That I was shocked and surprised by the hon. Trial Magistrate's words to talk about I, the accused producing exhibits at my defence at this stage of the case noting that it is one witness who had testified.

27. That there are some court officials together with my co-accused person who have conspired to defeat justice through dubious means.

28. That, therefore I make an application to the Hon. High Court to intervene and safeguard the flow of justice through moving criminal case No.672/10 of Chief Magistrate's Court Machakos to any other court".

(4) The second Applicant filed his replying affidavit in opposition to the application on the 23rd March, 2011 in which he denies each and every allegation of fact deposed to in the first Applicant's supporting affidavit other than the contents of paragraph 14 thereof. The second Applicant also contends that he will suffer irreparable loss unless the orders staying the proceedings of the lower court made on the 3rd February, 2011 (Waweru, J.) are set aside and that such order of stay violates the second Applicant's rights to a fair trial under Article 50(2) of the Constitution.

(5) In his application also by way of Chamber Summons filed on the 7th March, 2011 and brought under Article 50(2) (e) of the Constitution, the second Applicant seeks orders to expunge from the record paragraphs 11, 15, 16, 21 and 27 of the first Applicant's supporting affidavit dated the 23rd November, 2010; that Criminal Case No.670 of 2010 pending before the lower court be dispensed with without any further delay; that the first Applicant's application be declared illegal, null and void; and that the delay in proceedings occasioned to the second Applicant by the first Applicant's said application be quantified and the costs borne by the party proved to be wasting and abusing the court process. The application is supported by the affidavit of the second Applicant sworn on the 7th March, 2011 in which he reiterates his constitutional right to a fair trial without unreasonable delay; contends that the first Applicant's application has been made without justification and is therefore frivolous and vexatious.

The first Applicant responded to this application in his replying affidavit filed on the 28th March, 2010 in which he opposes the application by reiterating some of the averments made in the supporting affidavit to his application.

(6) The court directed that both applications be consolidated and I heard submissions made thereon respectively by the first applicant (who represented himself), the second Applicant (who was represented by learned counsel) and by learned Senior State Counsel. I have considered all such submissions in conjunction with both applications and the record of proceedings before the learned trial Magistrate.

(7) I have noted that the serious allegations made by the first Applicant against the learned trial Magistrate and the second Applicant, among others, have not been supported by any evidence. This court is therefore unable to determine the veracity of the contents of the first Applicant's supporting affidavit which are denied by the second Applicant in his replying affidavit. The record of the lower court shows that the court was conducted in a proper manner and the first Applicant has not established any basis for this court's intervention. Accordingly, the first Applicant's application that the Criminal Case No.670 of 2010 be moved to another court in Kenya must fail. The second Applicant's application for orders to expunge various paragraphs of the first Applicant's supporting affidavit must also, and for the same reasons I have given, also fail.

(8) In the result, the following orders be and are hereby made:

(a)The orders of stay of proceedings in Machakos Chief Magistrate's Criminal Case No.670 of 2010 made on the 3rd February, 2011 be and are hereby set aside and discharged and vacated. The lower court file be and is hereby remitted

back to the learned trial magistrate for further hearing and disposal.

(b) The DCIO Machakos Police Station be and is hereby ordered to investigate the contents of the first Applicant's supporting affidavit sworn on the 23rd November, 2010 and do file a report in this court within the next sixty (60) days of this date.

Orders accordingly.

Dated and delivered at Machakos this **28th** day of **June**, 2011.

P. Kihara Kariuki
Judge