



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Miscellaneous Application 29 of 2010**

1.           **SHABAN SHANDALA ABDALLA**  
2.           **ENOS SIMBILI JOTHAM ..... APPLICANTS**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**RULING**

This matter has been brought to the attention of this court pursuant to the provisions of S. 81(1) and S. 81(2) of the Criminal Procedure Code which empowers the High Court acting upon a report from the lower court, an interested party or on its own initiative to transfer a criminal trial from one subordinate court to another. In this particular instance the two accused persons namely **SHABAN SHANDALA ABDALLA** (Accused 1) and **ENOS SIMBILI JOTHAM** (Accused 2) had demanded that the trial magistrate **HON. ANDAYI** disqualify himself from proceeding further with their matter on the grounds that he was biased.

I have carefully perused the record of proceedings from the lower court. I am unable to find any evidence of this so-called bias. On the contrary I find that the accused persons did raise complaints when they were brought to court, regarding theft of their personal items and mistreatment in the hands of the prison authorities. These complaints were taken on board and were acted upon by the trial magistrate. The court even summoned the Officer Commanding Station Mariakani Police Station to appear in court and give a report on the complaints raised by the accused. Finally the court directed that the accused be allowed to channel their complaints through Kilifi Officer Commanding Police Division. Indeed the fact that the accused recognized and appreciated the efforts by the local magistrate to address their issues is evident on 8<sup>th</sup> March 2010 when at page 9 line 9 Accused 1 states

***“I wish to inform court that all our problems that we had have been resolved”***

The court responds

***“Court – The officer-in-charge Kaloleni Prison is present and confirms that all the issues have been sorted out”***

Therefore far from being biased against the accused the record shows that the trial magistrate bent over backwards to accommodate and resolve the complaints raised by the accused and the accused expressed satisfaction that the issues they raised had been satisfactorily resolved.

The problem leading to this call for the disqualification of the trial magistrate has arisen because the accused are not happy with the manner in which the evidence is being received and recorded by the court. It is not for an accused to dictate to any court how to proceed with its work. The trial magistrate remains at all times in charge of his court and it is he who determines how proceedings will be conducted. For the accused to decline to come to court on flimsy grounds amounts to contempt and indeed the trial magistrate may proceed with the trial in their absence if they persist in such unwarranted and juvenile behaviour. The accuseds are in effect attempting to **‘shop’** for a favourable court and as a High Court, I will not accept or condone this kind of behaviour. I find no evidence at all of bias on the part of the learned trial magistrate. On the whole I find that he has conducted the trial in an impartial and judicious manner. The accused’s complaints have absolutely no basis and I decline to transfer this matter to another court. This matter to proceed before **Hon. Andayi** to its logical conclusion.

**Dated this 2<sup>nd</sup> day of July 2010.**

**M. ODERO**

**JUDGE**