



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 134 of 2008

DONALD ONDAYO OMODOOAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

Donald Ondayo Omodoo, the applicant herein, took out a notice of motion pursuant to the provisions of Sections 81 and 135(1) and (2) of the Criminal Procedure code. In the aforesaid motion, the applicant sought for the Kwale SRMC.CR. Cases No. 2232 of 2007 and 28 of 2008 to be withdrawn and transferred from Kwale to Mombasa for hearing and determination by another Magistrate other than the Hon. Mr. Ogembo, learned Senior Resident Magistrate. The motion is supported by the affidavit sworn by the applicant. The Attorney General did not file a replying affidavit despite having been given leave to do so, hence this court will decide the application on the basis of what the applicant has put forward.

When the application came up for interpartes hearing, the applicant urged this court to grant him the orders as prayed in the motion. He even presented to this court typed certified proceedings from the Kwale Senior Resident Magistrate's Court. A close perusal of the motion and the supporting affidavit reveals that the applicant jointly with another are before the Kwale SRM's Court facing a charge of robbery with violence. The case is partly heard before Mr. Ogembo, the learned Senior Resident Magistrate. The motion was filed on 3rd October 2008. By then a total of nine (9) witnesses had testified in support of the prosecution's case. The record indicates that the applicant participated in the whole trial right from the beginning. He even had a chance of cross-examining all the 9 witnesses. He has now come to this court with a view of applying for the case to be transferred to Mombasa. His main reason is that he has no faith with the trial magistrate. In fact he has made the following averments in paragraph 3 of his affidavit:

“3. That during the hearing of his case the complainant when giving his evidence in chief and when I cross-examined, he assured me that he would make sure in any way that this court would convict me and I would be sentenced to death.”

In paragraph 4, the applicant went ahead also to state as follows:

“4. That after I complained and raised the reason with the magistrate, he told me that if I had no faith in him to write my application to the High Court and to have the case transferred to Mombasa Law Courts where my case should be heard by another magistrate due to those reasons.”

The applicant has alleged that unless the order is granted he would be denied justice. This court has a wide discretion to change the venue of the trial of criminals case pending before the subordinate courts. The reasons to be considered are enumerated under Section 81 of the Criminal Procedure Code as follows:

“81. (1) Whenever it is made to appear to the High Court-

- (a) That a fair and impartial trial cannot be heard 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 classes 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.
- (3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney-General, be supported by affidavit.
- (4) An accused person making any such application shall give to the Attorney-General notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.
- (5) When an accused person makes any such application, the High court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.”

It is evident from the above section that before making a decision as to whether or not to transfer of a criminal case, this court must consider the following reasons inter alia:

- (i) *Whether or not a fair and impartial trial will take place.*
- (ii) *A view of the place where the offence took place*
- (iii) *The general convenience of parties and witnesses.*
- (iv) *That such an order is expedient for the ends of justice.*
- (v) *That some questions of law of unusual difficulty is likely to arise.*

The conditions to be considered are clearly laid out by the law. It is apparent from the motion that the applicant is saying he will not get a fair before Mr. Ogembo, learned Senior Resident Magistrate. His main complaint against the learned Senior Resident Magistrate is that he did not take seriously the allegations made by the complainant. It is alleged that the complainant told the applicant that he will ensure that the applicant is convicted and sentenced to death by all means. I have perused the recorded proceedings presented to this court by the applicant. It is clear from the proceedings of 25th August 2008, that the applicant applied for the case facing him to be transferred to Mombasa court for hearing and determination. The basis of the application appears to have been the allegations made by one Jacob Manyara (P.W.7). The applicant alleged that P.W.7 had said that he had already hanged him. In fact the learned Senior Resident Magistrate, stated to the applicant that he had no jurisdiction to make an order of transfer. He was perfectly right to make such an order in view of the express provisions of Section 81 of the Criminal Procedure Code. I have carefully perused the proceedings presented to me and it is clear that the learned Senior Resident Magistrate has not made any personal comment over the case. At the end of the day, the decision on conviction and sentence will be made by the trial magistrate on the basis of the evidence presented by both the prosecution and the defence. The allegations relied by the applicant to buttress the motion are allegations made by a witness who happens to be a complainant. The allegations appear to have been made outside court. It cannot be said the allegations have influenced the manner in which the trial has been conducted. In the end I find no evidence to establish the allegation of bias on the part of the learned Senior Resident Magistrate. The motion does not meet the conditions set out under S.81 of the Criminal Procedure Code. I dismiss the motion with no order as to costs. The applicant should be presented before the learned Senior Resident

Magistrate, Kwale, on 4th May 2009 for fixing a further hearing date of the cases. The learned Senior Resident Magistrate is hereby directed to give priority hearing date for the case to avoid further procrastination of the cases.

Dated and delivered at Mombasa this 30th day of April 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Monda for state and the applicant in person.