



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS
CRIMINAL APPLICATION 286 OF 2009

JAMES IRERI MWANIKIAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

In the application dated 9th July 2009 the applicant seeks;

(a) *Criminal Case No.1260/2005 of Principal Magistrates court Kikuyu be transferred to chief magistrates Kiambu Court for hearing and disposal thereon as trial magistrate had implicated me another contempt charge while I was cross examining the prosecution witnesses, and that the said trial magistrates is a complainant and Key prosecution witness and said trial magistrate has also to try the same had declined to disqualify herself as I have applied and that am definitely sure that she cannot give a fair trial and the same to commence denovo by tendering vivavoce evidence and charges or charges be dismissed.*

The applicant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code in Kikuyu Criminal Case No.1260 of 2005. The charges preferred against the applicant is as a result of a complaint by one Peris Wairimu Mburu who from the evidence on record appears to be his younger sister. Plea in criminal case 1260 of 2005 was taken on 2nd November 2005. From the evidence on record hearing commenced before L. M. Wachira – Resident magistrate where the matter proceeded to hearing and after the close of the prosecution case the applicant moved to the High Court to restrain the said court from proceeding with the matter. The objection was canvassed before Lesiit J and the same was dismissed on 3rd May 2007. During that time the applicant questioned the integrity of Ms L. M. Wachira as a person who has shown open bias and who frequented the house of his sister who is the complainant in the criminal case. He sought a transfer of the case in order to get a fair and free trial since the said court was biased against him.

After considering the submission and evidence presented before court Lesiit J had this to say:

“The High Court will always require some very strong grounds for transferring a case from one Judicial Officer to another, if it is stated that a fair and impartial trial cannot be held by him, especially when the statement implies a personal censure of such officer. What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding magistrate against the accused but also whether incidents have not happened which though may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as can be calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. The apprehension should be of

reasonable character. See Commentary and notes (14th edition) 1906 by Sir H. T. Prinsep and Criminal Procedure in British India (1926) by Sir John Woodroffe. It was suggested in the two cited notes that whether an apprehension is reasonable or not should be determined with reference to the mind of the court not the accused person.

I have considered the Applicant's affidavit and the learned trial magistrate's response. I see nothing in them to support reasonable apprehension of partiality or unfairness on the trial magistrate's part. The Applicant's allegations are more against his sister who happens to be the Complainant in the case and not the learned trial magistrate. The accusations that the Applicant's Complainant sister frequented the learned trial magistrate's Chambers at the law courts, among others were denied. I have no reason to doubt the learned trial magistrate. In any event the accusation was very vague, general, lacked any specifics as to date and time and are evident of being basic wild accusations without proof. I think that the Applicant is exaggerating in order to secure a transfer from the entire Kikuyu Law Courts. The Applicant seems to have ulterior motives by going out of his way to specifically require that the trial be transferred to Kiambu law Courts."

The matter was then remitted to the trial court who nevertheless disqualified herself on 18th July 2007. The magistrate felt that her reputation had been sufficiently scandalized by the allegations made by the applicant. The matter was then transferred to court No.1 and on 15th April 2008 the matter proceeded de novo before Ms Karani S.R.M. Three witnesses testified before the said court and sometimes in June 2007 the applicant wrote to the Registrar of High Court complaining that the said court had acted unprofessionally towards him by calling him stupid and denying him an opportunity to cross examine the witnesses. It appears the said court did not conclude the matter resulting in the present court to take over the matter so that it could be concluded once and for all.

On 4th December 2008 the matter again proceeded de novo before Doreen Mulekyo Principal Magistrate Kikuyu for the third time. From the evidence on record it is clear that when the present complaint was raised by the applicant, three witnesses had testified and the last witness who is the investigating officer was at the dock being cross examined by the applicant.

In his complaint before this court the applicant complains that the trial court had called him stupid and denied himself a chance to cross examine PW4. He also says that the trial court had conspired with the complainant and others by entertaining them in her chambers on several occasions in the month of June 2009. It is interesting to note that in paragraph 10 of his supporting affidavit the applicant states as follows;

"That the said magistrate has frustrated the applicant and has openly placed justice for sale as she entertains the complainant's mother in her private chambers who later openly speaks to me in front of public and told me I will definitely be jailed."

In deciding whether or not to transfer a case from one court to another the test is whether the applicant has made out a case by discharging on a balance of probability by showing that apprehension in his mind that he may not get a fair and impartial trial is of reasonable nature. The transfer of cases from one subordinate court to another by the High Court is set out in Section 81 of the Criminal Procedure Code. Section 81 specifies the grounds upon which the High Court may either upon an application or on its own motion, transfer a case from one subordinate court to another for trial. It is also clear that there is nothing to prevent a Magistrate to stepping down from hearing a particular case either on her own motion or upon a proper application. In this case the applicant says that he would not get a fair and impartial trial before the Magistrate who is handling his case. And that it is expedient for the ends of justice to transfer his case from the said trial court. As a start I must say transfer of cases from one trial court to another by the High Court is a matter of judicial discretion. The discretion must be exercised on some principles and not on irrelevant grounds simply meant to gain a favourable cause of action. The yardstick is to protect the administrative machinery of the courts by removing magistrates from hearing cases where a litigant or an accused person thinks that he may not be favoured with a particular outcome. In the case of ***Republic v Hashimu [1968]EA 656*** it was held that an accused person must make out a clear case before a transfer of any trial is granted on his application and the apprehension in his mind that he would not have a fair

and impartial trial before a particular court must be persuasive and reasonable.

In the matter of an application by *M S Patel [1913] 5KLR Hamilton CJ* held;

“I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial and I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian courts and I would refer particularly to the judgement of the Calcutta High Court in *Dupeyron v Driver.....where the judges say:*

“where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.”

The applicant now contends that it is in the interest of justice that this case be transferred to Kiambu Principal Magistrate for hearing to that the ends of justice may be met. The question that arises is whether there is sufficient and credible evidence to say that in the eyes of the public that the case of the applicant had been prejudiced or would be prejudiced by the trial court. In cases where a person makes an allegation of bias or misconduct against a judicial officer it is important to establish the strength or the weakness of such allegations.

It is a principle of fair play and natural justice that a party shall not make preposterous allegations against judicial officers simply because he wants to delay, derail, frustrate and postpone the happening/occurring of an eventuality which is the conclusion of his case which he thinks has the potential to result in a conclusion which may not be favourable to him. It is for that reason for a person making an allegation of bias against a judicial officer to demonstrate the basis of the bias or embarrassment that may result from the conduct of the judicial officers in hearing and determining his/her case.

I must say that I for one have always protested against judicial officers refusing to disqualify themselves while being called upon by litigants. Perhaps my position was based on false premise that the allegations made by a litigant was honest, reasonable and foreseeable in the circumstances of the case and apprehension expressed by him or her. In my humble view the allegation of violation or threatened violation expressed by a litigant against a judicial officer must be one which in the eyes to a reasonable man would mean that aggrieved party is unlikely to get justice and fairness. The question is not whether the magistrate is biased but whether in the eyes of the public the allegations made against the judicial officer would result in a situation where the applicant is unlikely to get justice and fairness.

The question is whether a person who has persistently and constantly made similar allegations against judicial officers at the crucial time when his case is about to end can be favoured with an order removing a magistrate who is about to conclude his case. In my humble opinion strange results would follow if judicial officers are made to quit a cases on flimsy or flippant allegations put forward by a person disinterested in the conclusion or determination of his matter before court. It is clear that the applicant made several baseless allegations against three judicial officers in a criminal matter where the complainant is his own sister. He also complains that his brother and his mother have conspired with the three magistrates in order to fix him. How come the applicant complains against all judicial officers who have handled or who are handling his case are biased against him or that they have conspired towards him. No doubt the charges against the applicant is a simple assault charge where the complainant is his own sister. It appears the applicant is a man who is at war with his own relatives but who wants to extend his dispute with his family members by employing dirty tactics to make allegations against judicial officers whose duty is to know and determine the truth of the allegations made against him. It is not the mandate of judicial officers to intermeddle in the family affairs of a litigant but our judicial mandate is meant to ensure that justice is given to all parties. In short we do not give kidgloves to a particular litigant or an accused person who is appearing before court. Ours is to ensure justice is done to all parties.

The basis of that allegation cannot be verified on the strength of the evidence on record. What I gather is that it had become habitual for the applicant to make unfounded and unsubstantiated allegations against judicial officers having the conduct of his case. In my assessment the idea is to derail the conclusion of the criminal case that is pending against him and it would be difficult to get a person who would be in a position to satisfy the intention and behaviour of the applicant. In that regard I make a finding that the applicant has not demonstrated a case to show that the trial court acted in a manner to suggest that she had violated or is about to violate the rights and interests of applicant.

It is therefore my position that the allegation made by the applicant against the Principal Magistrate Kikuyu is nothing but an attempt to shop for a judicial officer who is favourable to him and who may rule in the way he desires. I have no such judicial officer who would be in a position to favour the applicant in the determination of his case. As judicial officers we are guided by the law and we have a duty to safeguard and protect the interests of all parties however obnoxious they may be in the fulfillment of our judicial mandate. Ours is fidelity to the law and in that regard it cannot be the business of parties to make baseless and ridiculous allegations against judicial officers simply because they think that their case might not succeed before that court. I reckon that the basis of making these hopeless and countless allegations against the magistrates is simply to derail the determination of the charges preferred against the applicant way back in 2005. That is unacceptable in this era where delay is causing ripples in the public eye. I have no hesitation in concluding that the allegations against the trial magistrate was made in bad faith and simply to derail the case filed against the applicant way back in 2005. The allegations is nothing but an attempt to delay the conclusion of criminal case No.1260 of 2005 Kikuyu. The allegations by the applicant is motivated by malice and outright attempt to delay the outcome of his case. It is not an attempt to get justice but a design employed by the applicant to delay the determination of his case or to ensure that his case is determined in a particular manner favourable to him. That is unacceptable, that is unfair, that is unreasonable and above all that is illegal and cannot be entertained by this court. I am able to see through the designs and desires employed by the applicant. I have refused to be hoodwinked by the baseless allegations made by the applicant. In the end the application is dismissed. I direct the trial court to proceed with the hearing on priority basis with effect from 28th September 2009. I direct the applicant to appear before the trial court on 28th September 2009 for further orders and direction.

Dated, signed and delivered at Nairobi this 24th September 2009.

M. WARSAME

JUDGE