



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Miscellaneous Criminal Appeal 70 of 2009

FARAH IBRAHIM ABDI SALAH LABANAPPLICANTS
VERSUS
REPUBLICRESPONDENT

RULING

Farah Ibrahim and Abdi Salah Laban (the applicants) have made this application by way of Notice of Motion dated 17th November 2009 seeking that criminal case no. 159 of 2009 which is pending before the Resident magistrate Garsen be transferred to any other court of equal or superior jurisdiction, away from the location. It is based on ground that:

- (1) The circumstances surrounding the case are such that applicants cannot have a fair and impartial trial before the Garsen Court.
- (2) Justice should not only be done but must be seen to be done.

The same is supported by an affidavit sworn by the first applicant who says that on 20-10-09, he was shot by police while on his way home from the *shamba* where he had been planting maize, and woke up at Garsen Hospital at about 9.30pm. The police then removed him from the hospital and took him to Malindi police station. Then the second applicant who had been left to take care of him in the hospital at night was also pushed into the police motor vehicle and charged along with first applicant.

He was then hurriedly charged with a series of offenses in Garsen. Applicants' concern is that the officer who shot him and his colleagues who investigated the matter are all based and serving in Garsen. There is only one magistrate in Garsen and he is known to socialize with the police officers concerned, so applicants are apprehensive that they are likely to be prejudiced and denied justice. The officers in the matter are Pc Joseph Dokta Mongot Pc No. 9197 and No. 93243 Pc Sammy Mwendwa and the magistrate is named as Justus Kituku.

There is no reply to these allegations and Mr. Naulikha who appeared on behalf of the State, indicated he had no objection to the application. What is alleged is a real likelihood of bias and it is not denied that the magistrate under whose jurisdiction this matter falls, socializes with the named police officers. In that case then applicant's apprehensions are genuine and based on good reasons that there may not be impartiality in the matters.

Indeed justice must not only be done but be seen to be done. The application has merit and I direct that the said file be transferred to Chief Magistrate's Court at Malindi for hearing and determination.

Dated this 15th day of **December 2009** at Malindi.

H. A. Omondi

JUDGE