



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 17 of 2007

NDUNGU GATHAMGAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Before me is an application by way of Notice of Motion dated 16th January 2007 purported to be brought under section 81 Criminal Penal Code filed by **M/s ABWAO ERIC & COMPANY** advocates on behalf of the applicants **NDUNGU GATHANGA**. It seeks a number of prayers, some of which have been spent. The substantive prayer which I am now required to make a decision on is that ?

Ø This Honourable Court be pleased to transfer Criminal Case Number 3206 of 2006 and all proceedings herein from Chief Magistrate's Court at Makadara to the Chief Magistrate's Court Nairobi Law Courts for trial and disposal.

The application has two grounds on the face of the Notice of Motion. It is also supported by the affidavit of the applicant **NDUNGU GATHANGA** sworn on 16th January 2007. The grounds of the application are firstly, that the accused person feels that a fair and impartial trial cannot be heard in the Chief Magistrates Courts at Makadara Law Courts. Secondly, that it is expedient for the ends of justice that the Criminal Case Number 3206 of 2006 be heard at the Chief Magistrates Court at Nairobi Law Courts. Before the application was heard, proceedings of the case in the Makadara Court were stayed.

When the application came up for hearing, Ms. Nanjala for the applicant submitted that the applicant had been charged in a previous case, that is Criminal Case No.1586 of 2006 which was still pending at the Makadara Court. Counsel submitted that one of the police officers who was a witness, assaulted the applicant, and a complaint was made to the Ministry.

In addition, the prosecutor, the complainant and the mother of the complainant were found in the Magistrate's Chambers together. The applicant informed the Registrar in writing to transfer the case, but was advised in writing to file an application. That was the reason for filing this application, which was to ensure that justice was seen to be done.

The State Counsel, Ms. Gatheru, opposed the application. Counsel submitted that no sufficient basis had been laid for the transfer of the case. The counsel contended that, from the record of the proceedings, it was clear that the magistrate acted judiciously, and there was no evidence of bias. Therefore the allegations of the applicant were without basis, as what transpired in the magistrate's chambers could not be a sufficient reason to transfer the case.

This court has jurisdiction under section 81 of the Criminal Procedure Code (cap.75) to transfer a case

from one subordinate court to another. The consideration to be taken by this court for the transfer of cases are clearly spelt out under section 81(1), the relevant parts of which provides ?

81. (1) Whenever it is made to appear to the

High Court ?

- (a) that a fair trial cannot be had 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 an 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)**
- (j) that a particular criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.**

Our present application is based on an allegation that a fair and impartial trial might not be heard by the court at Makadara. Learned State Counsel has opposed the application, but there is denial on the allegations on record from the magistrate, especially the allegation that complainant, the mother of the complainant and the prosecutor were seen in Magistrate’s Chambers together, discussing together. There is no disclosure as to what they were discussing. Maybe they were discussing something genuine. Maybe not. However, we do not know what it is that they discussed.

I am alive to the adage that justice should not only be done but must be actually seen to be done. In our present case there is a doubt that justice will be seen to have been done if the case proceeds for hearing at Makadara. Because of that I will allow the application for transfer of the case.

Consequently, I allow the application and order that the case in the magistrate’s court be transferred to the Chief Magistrate’s Court Nairobi for trial and disposal, by any magistrate of competent jurisdiction, who should not be the magistrate complained of.

Dated and delivered at Nairobi this 25th day of February 2008.

George Dulu

Judge

In the presence of ?

Ms. Nanjala for applicant

Ms. Gateru for State - absent

Mwangi – court clerk