REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Misc Crim Appli 31 of 2007

PATRICK SHIEKO

BERNARD KARORI

KENNEDY KWEYU ....………………………….. APPLICANTS

BILLINGTON MUYA

V E R S U S

REPUBLIC ……………………….……………. RESPONDENT

R U L I N G

The applicants have moved this court by way of a Chamber Summons which was filed under a certificate of urgency. The application seeks the transfer of the case which is pending before the Senior Resident Magistrate's Court at Vihiga, to the Chief Magistrate's Court at Kakamega or to any other court of similar or superior jurisdiction.

The applicants say that they were charged with the offence of robbery. In the course of the proceedings before the trial court, the applicants lodged a complaint against some police officers who had allegedly assaulted them.

It is the applicant's case that on 23/7/2007, the trial court issued warrants for the arrest of the police officers, and that the court then directed that the case be mentioned on 7/8/2007. However, the learned trial magistrate is said to have brought forward the mention of the case, to 26/7/2007.

Thereafter, the charges against the applicants was, reportedly, withdrawn, after the case had been moved from Court No.2 to Court No.3.

Thereafter, the applicants were charged before the Senior Resident Magistrate's Court Vihiga. The new charges were also for robbery.

The applicants say that the complainant in the charges facing them was Ms. Alice Makaya Mary, who is said to be a court clerk at the Vihiga Law Courts.

In the light of that position, the applicants contend that they have no confidence in the Senior Resident Magistrate's Court, Vihiga. It is for that reason that the applicants asked this court to order that their case be transferred either to the Chief Magistrate's Court, Kakamega, or to any other court of the rank of

Senior Resident Magistrate or of a rank higher than that.

The applicants said that when they had told the trial court that they did not have confidence in it, the learned trial magistrate explained to them that there was no other magistrate who had the requisite jurisdiction to hear and determine the case at Vihiga.

The applicants' submitted that they did not have confidence in the trial court because of four reasons;

(a) that the complainant was an employee at the Vihiga Law Courts, whereat the applicants are facing trial,

(b) That the learned trial magistrate insisted on taking a plea, even though the applicants had already complained to that court that they did not have confidence in the said court;

(c) That after the applicants had pleaded not guilty, they renewed their complaint to the trial court. At that point, the court is accused of having thrown out the applicants from court. Thereafter, the 1st accused, Patrick Shiekh Shiloho (who is also the 1st applicant herein) learnt that the trial court had jailed him for three years; and

(d) When the applicants next appeared before the trial court, the complainant is said to have told the applicants that the case would not be transferred from the Vihiga Law Courts. The complainant is said to have boasted to the applicants that they would all be jailed.

In answer to the application the learned State Counsel, Mr. Karuri, submitted that as a matter of fact, the learned Senior Resident Magistrate, Mr. P. W. Macharia, did have the requisite jurisdiction to hear and determine the case.

To my mind, there is no doubt that the said learned trial magistrate has the requisite jurisdiction to hear and determine the case. Indeed, even the applicants do not appear to be questioning the jurisdiction of the court per se. Their problem is that they do not have confidence in the said court.

I will now give due consideration to the reasons given by the applicants, as a basis for their alleged lack of confidence in the court.

First, it is because the complainant was an employee within the law courts at which the applicants were being tried. In that regard, the learned State Counsel described the applicant's contention as nothing more than mere hearsay.

On my part, I note that in the affidavit in support of the application, the applicants described the complainant as a court clerk at the SRM's court, Vihiga. However, when canvassing the application, the applicants said that the complainant was a secretary at the Vihiga Law Courts. In effect, the applicants are not sure about the nature of the job, if any, that the complainant is engaged in. That therefore lends some credence to the State's contention that the allegations about the complainant's proximity to the trial court, in terms of how closely the two work, is not proven. For now it remains nothing more than an allegation, as the applicants failed to discharge the onus of proving their contention regarding the job which the complainant does.

However, even assuming that the complainant was an employee at the Vihiga Law Courts, I hold the considered view that that alone would not be reason enough to warrant the transfer of the case to another court. The reason for so saying is that judicial officers who preside over the trial of cases, are obliged to act independently. Neither the secretary nor the clerk to the magistrate or judge has any role in the manner in which the court determines cases.

In this case, the applicants have not as much as suggested that the complainant has any influence over the trial court.

And if the applicants have proof of any influence that the complainant has over the learned trial magistrate, it is incumbent upon them to cause a report to be made to the police, as the magistrate may be committing a criminal offence.

Until and unless there was proof that the trial court was not acting independently, as it is obliged to do, it would be wrong for me to order that the case be transferred.

In the course of hearing and determining the application before me, I did call for the case file from the trial court.

Upon perusing the said record of proceedings, I noted that the applicants all lodged complaints against the police officers who had arrested them. After the trial court had received the said complaints, the said court ordered that the police officer in charge should investigate the applicants' allegations of assault and theft of their personal property. The court directed the police officer to provide the court with his report, on the hearing date.

Nowhere in the court records was there any order for warrants of arrest to issue against any two police officers, as the applicants had contended when they were canvassing their application before me.

Furthermore, the records from the trial court show that the case was first in court on 30/7/2007, when the plea was taken. In other words, the case was not in court on 23/7/2007, as was asserted by the applicants.

After the trial court entered a plea of "Not guilty" for each and every one of the applicants, the case was fixed for mention on 13/8/2007, and it was also fixed for hearing on 17/10/2007.

But, perhaps the applicants were making reference to matters which transpired before the law courts at Kakamega. If that be the case, I have no idea whether or not the complainants were justified, as I did not have the opportunity of perusing a copy of the record of the proceedings in Kakamega Criminal Case No.2238/07.

What strikes me as being very odd is that the applicants complained that the removal of their case from Kakamega to Vihiga was ridiculous. Yet again, they now ask that the case be returned to the court which had acted in the alleged ridiculous manner. I am afraid that I do not understand the rationale behind such a wish. Why would one wish to have his case transferred back to a court which had previously transferred the same case away, in a manner described as ridiculous?

The other point worthy of note is that the High Court is a court of record. Therefore if it is asked to take action in relation to proceedings before the courts that are subordinate to it, the High Court will verify the ongoings before the subordinate court, by perusing the record of that court.

In this instance, I failed to trace any record about the applicants' alleged expression of lack of confidence in the trial court. There is also no record to demonstrate that the applicants had indicated that they did not wish to have the trial court take their respective pleas to the charges preferred against them.

However, there is a clear record of what transpired in court on 27/8/2007; and that is as follows;

> "***27/8/07***
>
> ***Before – T. N. Bosibori RM***
>
> ***c/p – IP Milimu***
>
> ***All accused i/c present***
>
> ***Hearing 17/10/07 Mention 11/9/07***

Accused 1 – The court is foolish

How can it enter a case against me?

Court – charges of contempt of court be preferred against Accused 1.Court – following the disrespect the accused has displayed against the court in open court, I hereby charge the A1 with contempt of court under s.132 of the Penal Code.Sentence: The accused is hereby sentenced to 3 years in prison. Right of Appeal, 14 days."

Two issues arise from the aforegoing record. First, the applicant was convicted for the offence of contempt of court, after he is reported to have stated that the court was foolish.

In that respect, if the applicant concerned was dissatisfied with his conviction and sentence, he could have lodged an appeal.

The second issue is that the conviction and sentence were handed down by the Hon. T. N. Bosibori RM. In effect, it is not the learned trial magistrate who convicted or sentenced that applicant. Therefore, I find no basis for the applicants' laying blame against the learned trial magistrate for something which he did not do.

The applicants complained that they had not been taken to court since October, 2007. However, the records of the proceedings before the trial court shows that on 22/10/2007, CPL Benjamin N. Kiminglile gave a report to the trial court. The said report was in relation to the complaints that the applicants herein had been assaulted, and also that the police had stolen the applicants mobile phones.

CPL Benjamin Kiminglile was the Investigating Officer in the case against the applicants. He reported that the applicants had been assaulted by the members of the public. He also said that the applicants were handed over to the police, by Administration Police Officers. Therefore, CPL Kiminglile expressed the view that the CID officers could not have stolen anything from the applicants, as the applicants did not have any property on them, when they were handed over to the CID officers. However, as regards the 4th accused, the Investigating Officer said that he had a Nokia cell phone, when he was arrested. The said phone was duly noted in the Occurrence Book.

After the Investigating Officer had made his report to the trial court, and after he had been cross-examined by the applicants herein, the trial court ordered that the issue of the alleged assault and the alleged theft from the applicants would only be determined after the court had received evidence during the trial.

The trial was then fixed for 2/11/2007. However, on that date only the 1st accused was produced in court. The case was then put off to 5/11/2007 for mention.

But again, on 5/11/2007 only the 1st accused was produced in court, forcing the court to adjourn the matter to 7/11/2007.

On 7/11/2007 all the accused persons were produced in court, and the trial was then fixed for 30/11/2007.

When the trial was scheduled to commence on 30/11/2007, the prosecution had one witness.

Significantly, the 1st accused was unwell; the 2nd accused was not ready to have his case heard, as he too was undergoing medical treatment; and the 3rd accused had not yet received copies of the witness statements.

The hearing was adjourned so that the prosecution could provide copies of witness statements to the accused persons. The court directed that the cost of producing copies of the statements would be met by

the court itself.

From the aforegoing, it is self evident that the applicants had been to court since last October.

It is also clear that the case was fixed for mention on 5/3/2008, but by that date, this court has called for the case file from the trial court, in order to assist this court verify the factual position in the criminal case. Because of that development, there could not have been a mention on 5/3/2008.

Having given due consideration to all the facts of the application before me, I find no justifiable reason to order that the case be transferred from Vihiga to either Kakamega or to any other magistrate's court.

The application is thus dismissed.

But even as I do so, I feel obliged to re-emphasize the importance of the complainant ensuring that she does not in any manner do anything which may be deemed to be capable of subverting the course of justice. And as for the learned trial magistrate, I am sure that there is absolutely no need to remind him of his obligation to act independently and in such manner as will enable justice to be done and also to be seen as having been done.

Delivered, dated and signed at Kakamega this 6th day of May, 2008

FRED A. OCHIENG

J U D G E