REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Misc. Crim. Appli. 15 of 2008

GEOFREY AGINALO ……..……. 1ST APPLICANT

PETER OMIMBA …..…..……. 2ND APPLICANT

MAGANGA AMUNGA ….....……. 3RD APPLICANT

SAMSON CHAHIKA ..….....……. 4TH APPLICANT

CHARLES OMBAKA …..……. 5TH APPLICANT

V E R S U S

REPUBLIC ……. RESPONDENT

R U L I N G

The five applicants have brought this application by way of a Chamber Summons, through which they seek an order for the transfer of their case, from the SRM's Court, Vihiga, to any other court of similar or superior jurisdiction.

It is the applicants' case that the case against them had been pending for a very long time. They say that since 2006, the case had not been fixed for hearing.

The applicants stated that the trial court had adjourned the case on numerous occasions. On the said occasions, there were no witnesses, and the applicants say that they objected to the prosecution's applications for adjournment.

When the applicants did object to the adjournments, they say that the trial court subjected them to verbal attacks.

In answer to the application, the learned State Counsel, Mr. Karuri, faulted the applicants for failing to make it possible for this court to have the benefit of perusing the records from the trial court, so as to verify the facts.

In reply to that submission, the applicants' advocate, Mr. Chegenye, argued that this court had power to call for the file from Vihiga Court.

In any event, the applicants say that their affidavits in support of the application constituted evidence given on oath. Therefore, Mr. Chegenye submitted that should the court find anything in the said affidavits, which was a lie, the court was reminded that it could always recommend that perjury proceedings be commenced against the applicant concerned.

To my mind both sides to the application have made a valid point. I say so because the best practice requires an applicant to annex to his application, copies of the proceedings against which he is complaining. By so doing, the state counsel who was instructed by the respondent would be in a position to make an informed decision on the issues raised in an application.

The applicants herein were thus wrong to have omitted the copy of the proceedings from the affidavit in support of the application.

Meanwhile, there is no doubt that this court has jurisdiction to ask for a copy of the record of the proceedings from the lower court. Indeed, in the exercise of the authority so to do, I did call for the file from the Vihiga court.

However, that does not in any way help the learned state counsel in his answer to the application, as the court file was called for after the parties had concluded making their respective submissions before this court. It is for that reason that I reiterate the need for an applicant to provide the court and the respondent with a copy of the proceedings before the court from which he wants a case to be transferred.

The learned state counsel submitted that the trial court has the discretion to determine whether or not to grant an adjournment.

The applicants concede that the courts do have the discretion to grant or to reject applications for adjournments. However, the applicants feel that the grant of adjournments ought not to override their rights to a speedy trial.

There is no doubt that pursuant to the provisions of section 77 (1) of the Constitution of the Republic of Kenya, an accused person;

"***shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."***

Therefore, whenever a trial court was deciding whether or not to grant an adjournment in a trial, the decision should be informed by the constitutional requirement, to afford the accused a trial within a reasonable time.

In this case, as the applicants' failed to provide the state with a copy of the proceedings, the learned state counsel was correct to have said that he was not aware of the alleged inflammatory language which the court used against the applicants.

Mr. Chegenye explained that any language perceived to be personally targeted at the applicants, would be deemed to take away the impartiality of the court. When such language was used, the applicants submitted that that gave them a right to raise a complaint with the court which had supervisory power over the court making the said utterances.

In a nutshell, the applicants failed to pinpoint the exact language about which they were complaining. It is as if the applicants were saying to this court;

"***You call for the file from the Vihiga court, as you have the authority to do so. Then, please to read the record, and you can then ascertain for yourself the language about which we have complained."***

If that is the view taken by the applicants, I feel obliged to remind them that the burden of making out a case rests squarely upon the party seeking to persuade the court to issue the orders sought. The

applicant cannot persuade the court when it leaves gaps which may or may not be filled up by the court after the said court will have, hopefully, perused the records, which the applicant hopes the court will have called for.

The respondent submitted that if the case were to be moved from Vihiga, the prosecution witnesses would be inconvenienced in terms of traveling expenses.

On the other hand, the applicants' view was that expenses cannot impede the transfer of a case, as the state must meet the expenses of witnesses.

Whilst it may be the obligation of the state to meet the traveling expenses of witnesses, it is nonetheless necessary for a court which has been asked to transfer a case, to take into account both the financial and practical impact that any transfer would have on the complainant and the other witnesses. However, convenience and expense is not the primary factor to be taken into account.

In this case, the plea was taken on 8th December, 2006. Thereafter, the prosecution consolidated the charge against five accused persons. The consolidation was necessitated by the fact that originally the charges were read out against four accused persons. Thereafter, when another person was charged alongside the original four, the charges had to be consolidated, so as to reflect the fact that there were five accused persons.

The order for the consolidation of the charges was made by the court on 11th April, 2007.

After the trial court had taken the plea on the consolidated charge, the case was fixed for hearing on 31st May, 2007.

The record of the proceedings shows that on 24th May, 2007, the 5th accused lodged a complaint before the court, regarding a Mr. Ongoe, who is alleged to have misled the wife to the said accused, to hand over to him, some of the property of the 5th accused.

The court ordered the Officer Commanding Vihiga Police Station to investigate the complaint, and to report to the court on 31st May, 2007, when the trial was scheduled to begin. The court also advised the 5th Accused that his wife ought to make a formal complaint to the police.

Regrettably, on 31st May, 2007, the 1st accused was unable to attend court, as he had been taken ill. As a result, the trial could not start, as had been scheduled.

The case was put-off to 7th June, 2007, for mention. The court hoped that by that date, the status of the 1st accused would be such that a fresh hearing date could be fixed.

On 7th June 2007, the accused persons were all in court, and the case was fixed for hearing on 22nd June 2007.

When the trial was set to commence, on 22nd June, 2007, the court was informed that the prosecutor had been transferred. The case was then adjourned to 13th July, 2007, when the court expected the hearing to commence.

Unfortunately, on 13th July, 2007, the accused persons were not produced before the court. Similarly, on 18th, 23rd and 25th July 2007, the accused were not brought before the court, even though the court had directed that production orders be issued, for their production.

Even on 8th August 2007, the accused were not brought to court.

From the record of the proceedings, it is not clear why the police had failed to produce the accused persons before the court on those many occasions.

However, it is clear that on 22nd August 2007, all the accused were produced in court. On that date, the 1st accused sought the transfer of the case from Vihiga Law Courts.

The record of the proceedings shows that the 6th Accused expressed a lack of faith in the trial court. His view was that the court had failed to care about the welfare of the accused, as the accused had not been taken for mentions every 14 days.

The court before which the accused complained was presided over by the Hon. MS. T. N. BOSIBORI, RM. The learned magistrate informed the accused that she lacked jurisdiction to either hear the case or to even entertain the application for the transfer of the case. She advised the accused to make an appropriate application before the Hon. P.W. MACHARIA, SRM, who was the judicial officer scheduled to preside over the trial.

On 6th September, 2007, 20th September, 2007, 3rd October 2007 and 17th October 2007, the case was listed for mentions, but the accused were not brought before the court.

Then on 31st October 2007, all the accused were in court, and the trial was set down for 10th December, 2007.

When the trial was supposed to start, the prosecution notified the court that the witnesses had not been bonded.

All the accused persons raised strong objections to the prosecution's application for an adjournment.

In his ruling, the learned trial magistrate noted that the accused were entitled to a fair and speedy trial. He nonetheless allowed the prosecution one last adjournment.

Notwithstanding that last adjournment, the trial court put-off the case from 2nd April, 2008, to 7th April, 2008, at the request of the prosecution. That change of dates was made so as to accommodate the complainant, who was said to be scheduled to sit for examinations on 14th April, 2008.

Even though the date was fixed so as to accommodate the complainant, she did not attend court on 7th April, 2008. Instead, the prosecution told the trial court that the complainant was attending a course at Kaimosi Teachers Training college.

The accused persons protested a lot, against the attempt to have the case adjourned, but the trial court granted an adjournment nonetheless.

On 16th April 2008, the prosecution had two witnesses in court. It looked like the case would finally start.

But then, the court noted that in respect of count 3, each of the accused persons who are alleged to have defiled the complainant, should have been charged separately. The court therefore gave to the prosecution an opportunity to rectify the charge.

On 21/4/08, the trial court noted that the substituted charge was still defective. The prosecution was again allowed a chance to get it right.

On 23/4/2008, the newly substituted charge was presented to court, and a fresh plea was taken. On the next day, 24/4/2008, the trial finally started. PW1 testified, was cross-examined, and finally she was re-examined. The hearing was then adjourned to 6th June, 2008.

Meanwhile, on 3rd March 2008, the accused persons had brought this application before the High Court.

The applicants position was that the case had never been fixed for hearing since 2006.

Clearly, that is not factually correct. As I have illustrated hereinabove, the case had been fixed for hearing on 31st May 2007, 22nd June 2007, 13th July 2007 and 10th December 2007. All those dates were fixed before the application before me was filed.

Therefore, the applicants were well aware of that fact. It is therefore not at all clear why the applicants and their advocate still submitted that the case had never been fixed for hearing.

It would certainly have been accurate had the applicants made the point that although the case had been fixed for hearing on many occasions, the trial had never taken off, by the time they filed the application herein.

The applicants allege that the trial court had used "inflammatory utterances and or threats and intimidation."

Although that deposition is made under oath, and even though there was no replying affidavit sworn by the learned trial magistrate, I do not have any material before me, from which I could determine what utterances, if any, were construed by the applicants to be inflammatory, or that constituted either threats or intimidation.

Certainly, a perusal of the record reveals no such utterances.

Had the allegations been made against the prosecution or anybody else, I would have expected the person to swear an affidavit to respond to the claims. But, in my considered view, it would be improper to expect the judicial officer who was presiding over a case to swear affidavits, in answer to allegations made against him, by one of the parties, in the very case which he might end up having to continue presiding over.

To my mind, the most objective mode of ascertaining what transpired in court is by perusing the record of proceedings.

Of course, there might be instances in which the court might have inadvertently or otherwise omitted some things from the record. If that were the position, the party alleging that some items were omitted from the record would need to specify what the said items were. He would then, preferably, ask the judicial officer who was presiding over the case to disqualify himself. And if the said judicial officer declined to disqualify himself, the party making the application would then be entitled to appeal against the decision.

In this case, the accused persons have not asserted that the record was incomplete. Therefore, this court has no grounds upon which to make any assumptions, such as that the inflammatory utterances or threats or intimidations were made in court, but were then excluded from the record of the proceedings.

In arriving at that conclusion, I am influenced by the fact that allegations of impropriety are very serious, and even more so when made against a judge or magistrate, who, by virtue of his oath of office, is under an obligation to discharge his function without fear or favour.

The learned trial magistrate herein had, on 10th December 2007, noted that the accused were entitled to a fair and speedy trial. He therefore granted the last adjournment to the prosecution. Yet thereafter, the trial court readily granted more adjournments to the prosecution, even when the prosecution sought a change of a date that the prosecution had sought, so as to be suitable for the complainant.

It is little wonder that the applicants felt that they were not being accorded a fair and speedy trial.

Having given due consideration to all the issues raised before me, I find merit in the application.

Accordingly, in the exercise of the authority bestowed upon me by ***section 81 (a)*** and ***(e)*** of the Criminal Procedure Code, I hereby order that the Vihiga SRM Criminal Case No.1950 of 2006 be transferred to the Kakamega Chief Magistrate's Court for hearing and determination.

Dated, Signed and Delivered at Kakamega this 30th day of June, 2008

FRED A. OCHIENG

J U D G E