



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 452 of 2006

YUSUF SHARIF AHMED.....APPLICANT

VERSUS

REPUBLICRESPONDENT

(CORAM: LESIIT, J.)

R U L I N G

The Applicant seeks to have his case transferred from Makadara Law Courts to any other “independent” Court or for any other orders the Honourable Court deems fit. The Applicant complains of mishandling by the trial court and specified an incident where he was forced to proceed with the case in chambers even though he was sick. The Applicant was apprehensive he may not get justice because before the trial commenced, he was taken to the magistrate’s chambers where he found the Complainant and Court Prosecutor also seated.

The Applicant also stated that the learned trial magistrate declined to recall the Complainant for cross-examination, as he had no re-recollection of having cross-examined him and further because he was suffering from Malaria. He also complained that his applications were ignored.

Mr. Ikol for the State opposed the application citing **Section 81** of the **Criminal Procedure Code** as not having been satisfied. Counsel submitted that the Applicant had not demonstrated that he would not have a fair trial and that no bias or partiality had been demonstrated.

I have carefully considered the application before me together with the submissions made by both the Applicant and the Respondent. I have also perused the proceedings of the lower court.

An application for transfer of a criminal case from one subordinate court to another is governed under **Section 81** of the **Criminal Procedure Code**. In such an application, the Applicant must establish that “a fair and impartial trial cannot be had in the court trying the case”. In the instant case, the Applicant complained of not having been given an opportunity to cross-examine the Complainant and of the court proceeding with the hearing when the Applicant was unwell and also of the Court’s habit of ignoring the Applicant’s applications.

As stated earlier, I have perused the record of the proceedings. I see that the Applicant was not only given an opportunity to cross-examine the Complainant but did so at length. The Applicant’s complaint that he was not given an opportunity to cross-examine the Complainant was therefore not correct from the record. The Applicant submitted that he had no recollection of cross-examining the Complainant if the record indicated so. He said that he was suffering from Malaria when the court insisted the case should

proceed. The Applicant did not produce any record to show that he was ever treated for the illness. The record did however indicate clearly that the Applicant, on 3rd March 2006 applied to the trial court to re-call the Complainant for further cross-examination. The learned trial magistrate rejected the application because: -

“I consider the application to be an afterthought and indeed a waste of courts time...”

Since making that ruling, the learned trial magistrate has proceeded to adjourn the trial of the Applicant on 6th April 2006, 22nd May 2006, 26th June 2006, 24th July 2006 and 29th August 2006 on the applications by the prosecution despite objections raised by the Applicant.

In determining whether there was likelihood that the trial court may be impartial or biased against the Applicant the test applicable was well set out in **KINYATI vs. REPUBLIC [1985] KLR 562** at page 569 where **KNELLER JA, CHESONI and NYARANGI Ag. JJA**, quoting from **HAMILTON CJ In the Matter of an Application by Ms. Patel [1913/1914] 5 KLR 66** thus: -

“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 judgment of the Calcutta High Court in Dupeyron v Driverwhere 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 question is whether the Applicant’s apprehension that he may not have an impartial trial is reasonable. The question is not whether the trial magistrate may in fact be impartial but the reasonableness of the Applicant’s apprehension.

The facts of the incidents that the Applicant has raised in this matter could cause a reasonable apprehension that the Applicant may not get an impartial trial before the trial court. It is evident that the Applicant’s request to re-call the Complainant was declined on grounds it was a waste of time but the court proceeded to grant the prosecution five adjournments despite objection from the Applicant. These facts, together with the Applicant’s complaint that the only witness heard by the court, the Complainant, he was forced to proceed despite complaining of illness. That witness was heard on 28th July 2005. This further demonstrates that since all adjournments in this case have been caused by the prosecution, the trial court has given the prosecution latitude to delay the case for more than 2 years from the date of plea and at the same time not taking serious considerations of the Applicant’s sentiments.

I find and hold that the Applicant’s apprehension that he will not have an impartial and fair trial before the trial court is reasonable. I will allow the application and order that the applicant’s criminal charge against him in **Makadara Case No. 2014/05** be and is hereby removed from hearing before the trial Magistrate, **MISS KARANI SRM** and transferred for hearing *denovo* before any other competent magistrate in Makadara Law Courts. I would also direct that the case be heard and finalized expeditiously.

Dated at Nairobi this 23rd January 2007.

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LESIIT, J.

JUDGE

Ruling read and delivered in presence of:

Applicant present

Mr. Ikol for State

Tabitha CC

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LESITT, J.

JUDGE