

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Crim Appli 42 of 2006

JUMA FARAJI SERENGE alias JUMA HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant in this matter is the accused person in Kwale SRM Criminal Case number 3285 of 2005 in which he is charged with two counts of capital robbery and one count of being in possession of a firearm without a firearm certificate. He was initially jointly charged with another person, one Michael Muchiri Kariuki, in all the three counts but the charges against the co-accused in counts 1 and 2 have since been withdrawn for reasons I will advert to in a moment.

He has in his application expressed to be brought under Section 77(1) of the Criminal Procedure Code which I suppose to be Section 77(1) of the Constitution, applied for the transfer of that case from the court of the Senior Resident Magistrate manned by Mr. Daniel Mundanyi Ochenja to another court. The application is based on the grounds that on the 18th April 2006 when the Applicant went to court for trial that magistrate called him into his chambers where he found the complainant. He asked him to pay to the complainant a sum of Sh.30,000/= and the matter could be settled. As he did not have that amount he was taken back to cells.

When the hearing commenced the magistrate did not allow him to impeach the credit of the complainant by referring him to his previous statement to police. At lunch time he saw the magistrate go out with the complainant. In the circumstances he does not think he will get a fair trial before that magistrate and wants the case to be transferred to any other magistrate of competent jurisdiction for hearing and final disposal. The learned Senior Resident Magistrate has filed a replying affidavit denying those allegations.

I agree with Miss Mwaniki, learned State Counsel, that we should not allow judicial officers to be vilified by spurious and frivolous allegations of accused persons charged before them and that as was decided in **Shilenje –VS- Republic [1980] KLR 132** the High Court should always require very strong grounds before transferring a case from one judicial officer to another. In his case, however, I am disturbed by the allegations made against the learned trial magistrate and what transpired in the case.

The lower court record shows that on the application of the complainants in the two count of capital robbery those charges were withdrawn against the Applicant's co-accused and he was acquitted under section 204 of the Criminal Procedure Code. That is highly irregular.

To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176... of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code of enter a *nolle prosequi* when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn.

To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system. In the circumstances the purported acquittal of the co-accused person in that case cannot be allowed to stand. I therefore set it aside and order that the co-accused, Michael Muchiri Kariuki be arrested forthwith and be jointly charged with the Appellant with the same offences.

I am alive to the fact that I have made this order reversing the accused "acquittal" without first according him a chance to be heard on it. But his was not an acquittal following a regular trial. He was "acquitted" under dubious circumstances in which he was the architect and principal participant and did not therefore require to be given any audience before the order is made.

As regards the Applicant's plea that the case be transferred to another court I am satisfied that his allegations of impropriety on the part of the trial magistrate are not without foundation. I therefore grant the application and order that the case against the Applicant be heard *de novo* before another magistrate at Mombasa.

DATED and delivered this 15th day of January 2007

D.K. MARAGA

JUDGE