



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Misc Crim Appli 46 of 2007

STANELY MUTUMA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The applicant by his application expressed to be brought under Section 81(1) (b) of the Criminal Procedure Code is seeking that;

- (a)
- (b) Proceedings in Tigania Cr.Case No.260/2006 be stayed pending hearing and determination of the instant application.
- (c) Criminal Case No.260/2006 be transferred from Tigania Law Courts to C.M. Court at Meru.

Clearly the prayer for stay of proceedings have been overtaken by reason that it was not granted *exparte*.

The only issue falling for determination is the prayer for transfer of the case. The reasons advanced for seeking a transfer of the case are that the applicant is apprehensive that he will not get a fair trial in Tigania Court, as the trial magistrate has been forcing him to proceed with the trial in the absence of his counsel; that the trial magistrate has made scaring comments about the applicant; and that the trial magistrate appears to have made up his mind on the case.

The application was opposed by counsel for the respondent who urged the court to dismiss the application as it discloses no reasonable apprehension of bias. That no material has been placed before the court to enable me exercise my discretion in favour of the applicant. I have duly considered the application and the opposition and take the following view of the matter.

The application, as I have stated, is expressed to be brought under Section 81(1) (b) of the Criminal Procedure Code, which is clearly not the correct provision as it deals with transfer of a case where some question of law of unusual difficulty is likely to be raised. There is none in this application. What the application discloses comes under Sub-Section (1) (a), namely that a fair trial cannot be had in the subordinate court.

The second observation is that sub-section (3) provides that an application for the transfer of a case shall be made by motion and not Chamber Summons as in this case.

Turning to the substance of the application, it is trite that the applicant seeking a transfer of a criminal

case must make out a clear case why the transfer is necessary. His apprehension that he will not have a fair and impartial trial must be reasonable. See Tanzanian Case of R V Hashimu (1961) EA 656. But the test for transferring a criminal case from one court to another was set out In the Matter of an application by MS Patel(1913/1914) 5 KLR 66 in which Hamilton CJ citing the Calcutta High Court decision in Dupeyron V Driver ILR XXIII Cal.495 said;

“I am not here concerned with an issue as to whether the magistrate was infact 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 Driver..... where 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, these, notwithstanding that there may be no real bias in the matter, the facts of the incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer”

See also Kinyatti V R (1985) KLR 562 where the same test was applied. The applicant in the instant case is apprehensive of bias because the learned trial magistrate has;

- (i) refused to grant him adjournment
- (ii) proceeded with the hearing in the absence of his counsel
- (iii) commented about him in a scaring manner.

Are these matters which are likely to cause a reasonable apprehension in the mind of the applicant that he may not have a fair and impartial trial before Tigania Law Courts?

The applicant was expected to make out a clear case for a transfer of this case. He has based his grounds on matters that could have become apparent had he annexed to his application copies of the proceedings in Tigania Cr.Case No.260/2006. That would have accorded this court a chance to see the number of adjournments, who applied and the reasons recorded. The court would have also been in a position to confirm that on some days the applicant was forced to proceed without counsel.

Finally the applicant has not disclosed the nature of comments made by the trial magistrate which made him conclude that the latter would be biased.

For the reasons stated this application must fail and the same is dismissed.

DATED AND DELIVERED AT MERU THIS 15TH . DAY JUNE, 2007

W. OUKO

JUDGE