



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Misc Crim Appli 55 of 2007

NKATHA MIRIAM NCHEBERE APPLICANT

VERSUS

REPUBLIC 1ST RESPONDENT

FRANCIS MBURUKU MUCHENA 2ND RESPONDENT

RULING

This application is for the transfer of Tigania Senior Resident Magistrate Criminal Case No.185 of 2007 in which the 2nd respondent is charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

It is alleged in the charge sheet laid before the trial court that the respondent unlawfully killed Peter Gitonga on 6th December, 2006 at Ithamare Village in Miathene Location. So far the prosecution has called four witnesses.

The trial has been adjourned for the calling of the doctor. Meanwhile the applicant herein, Nkatha Miriam Nchebere, a sister to the deceased has brought this application arguing that the mother of the accused person has been bragging that the trial is a waste of time as the accused will finally be acquitted. In order to achieve this, according to the applicant, the mother of the 2nd respondent sent out invitations for contributions to raise funds to bribe the trial magistrate, the prosecutor and the Executive Officer.

Two other persons, Raphael Muriuki and Harun Muthomi have also sworn a joint affidavit in which they state that they heard the 2nd respondent's mother explaining to a group of women how she had raised Kshs.70,000/= which was to be taken to court officials a day before the hearing. It is alleged that subsequently the trial was conducted in such a manner that left the applicant with no doubt that the 2nd respondent's mother meant business.

The 2nd respondent has filed a replying affidavit in which he has denied the allegations of bribery. He has urged the court to let the trial proceed at Tigania as he stands to suffer financially given the distance that he will have to travel to Meru Court to attend his trial.

Learned Counsel for the 1st respondent argued from the bar that the applicant has no capacity to bring the application. That the application ought to have been brought by the Republic.

Two issues to be considered are whether the applicant has the *locus standi* to bring this application and whether, in view of the events as perceived by the applicant, the case ought to be transferred.

Section 81 of the Criminal Procedure Code under which the power of this court to transfer a criminal case from one subordinate court to another is vested provides for three means of moving the court. The court can move *suo moto*, or on the report of the lower court or on the application of a party interested.

It has been argued that the applicant is a party interested in the sense that the victim who was killed was her brother. The Constitution confers on the Attorney General Prosecutorial powers in all criminal matters. In a criminal trial, therefore, there are two main players, the Republic represented by the Attorney General or by officers acting in accordance with this general or special instructions and the accused person. I understand the term "party interested" in Section 81(2) of the Criminal Procedure Code to mean either the Attorney General or the accused person. Indeed Section 81 (3) and (4) makes a distinction between an application brought by the accused person, which must be supported by an affidavit, a notice thereof must be given to the Attorney General in writing together with the grounds it is based. If the application is brought by the Attorney General, it would appear, these conditions do not apply. I come to the conclusion that the applicant has no *locus standi* to bring this application. It is erroneous to equate her position to an interested party in a judicial review application or an application for *habeas corpus*, where the term a "person interested" has a wide meaning than here.

The applicant's complaint ought to have been channeled through the Attorney General. The second matter, which in view of my holding above, has been rendered academic, the law is now settled that for the High Court to transfer a criminal case from a court, it must be satisfied that the applicant has a reasonable apprehension which must be real and honestly held.

Secondly the court must not only look at the allegations against the trial court but must also weigh the effect of the order of a transfer on the overall administration of justice. The court must guard against opening of flood-gates of similar applications which may have the effect of crippling the administration of criminal justice and encouraging forum shopping. The seriousness of this was explained in Shilenje V R (1980) KLR 132 as follows;

"The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer"

The applicant's fears are based on what she says the 2nd respondent's mother told her personally, was heard saying and the fund raising allegedly for purposes of the 2nd respondent's trial. The apprehension culminated with the conduct of the trial magistrate and the prosecutor in either rushing the witnesses or failing to lead evidence that appeared to incriminate the 2nd respondent.

Learned counsel for the applicant applied for the transmission of the lower court file to this court. I have therefore perused the proceedings and without going into the merits, I find no basis in the allegations. The trial has progressed fairly well. I find nothing untoward with the evidence of the eye witnesses.

In other words the applicant's apprehension is not reasonable. It is not real or reasonably based. I highly doubt that the 2nd respondent's mother would be as reckless as she is being portrayed to the extent of hosting a public "*harambee*" for an illegal venture. If the applicant was serious and concerned she ought to have done more than what she did.

The application must fail and is dismissed. The lower court file shall be returned to Tigania for hearing and determination.

DATED AND DELIVERED AT MERU THIS 2ND DAY OF JULY 2007.

W. OUKO

JUDGE