



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 60 of 2005

TOM GITAU NG'ETHE APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The Applicant is an accused person in Criminal Case Number 577 of 2005 in the Senior resident Magistrate’s Court at Githunguri. He faces one count of grievous harm contrary to Section 234 of the Penal code and another count of being in possession of Bhang contrary to Section 3 (1) of the narcotic Drugs and Psychotropic substances Control Act No. 4. of 1994.

The Applicant entered a plea of not guilty to both counts and the case was set down for hearing. In the meantime he was released on bond of Kshs.100,000/= plus one surety of similar amount. The Applicant then lodged a complaint with the presiding Magistrate to the effect that he been badly beaten by the officer who arrested him. That he had been reported the incident to the OCS but he had not been taken to hospital. The presiding Magistrate then ordered that in the event that the Applicant was unable to fulfill the bond terms, the OCS, Githunguri Police Station was to escort the Applicant to hospital for treatment. The presiding Magistrate further directed that a medical report be filed in Court after treatment.

On 24. 6. 2005, the hearing of the case commenced with the Complainant testifying. She was extensively cross-examined by the Applicant. Thereafter the Prosecution sought an adjournment and it was granted. The Applicant then applied to be remanded at Githunguri Police Station as he was unwell. Upon hearing the Application, the trial Magistrate ordered that the in-charge of Industrial Area Remand Prison to escort the Applicant to Kenyatta National Hospital for treatment.

On 22. 7. 2005, when the case came up for mention, the Applicant applied to Court to recall the Complainant. It is not clear from the record the purpose for which the Applicant wanted the Complainant recalled. Suffice to say that the applicant wanted the Complainant recalled because, when she testified, the Applicant was sick. In response to the application, the Court ruled that the Applicant did not state that he was sick when the Complainant testified and proceeded to refuse the Application. When the case came for mention again on 21. 10. 2005, the Applicant made an Application seeking to have the case transferred to another Court for hearing on the basis that the instant trial Court had refused to recall the Complainant. The Court’s order on the request was that the Applicant should make an appropriate Application.

On the 28. 10. 2005 when the case came up for hearing, the Prosecution applied to amend the charge. The Applicant not objecting, the Application was granted and further hearing of the case commenced with PW2 in the dock. Suddenly the Applicant indicated to the Court that he was unwell and sought an adjournment. The Prosecution objected to the Application on the basis that the Applicant was merely employing delaying tactics by claiming to be sick, when he was not. The Court took the view that though

the Applicant had not been keen to pursue the case, nonetheless the Court ordered that the Applicant be escorted to Githunguri sub-district hospital for mental and physical examination and report filed with the Court. Later the report was filed which suggested that the Applicant could be having Psychiatric problems. The Court then ordered that the applicant be escorted to Mathare Mental Hospital for treatment. Following this order the Applicant was escorted to the said hospital and subsequent thereto his medical report was furnished to Court. The report indicated that the Applicant was of normal mental status. The matter was then set down for hearing on 13. 12. 2005. On that day the Applicant informed the Court that he had made this Application for the transfer of the case from Githunguri Law Courts.

In support of the instant Application the Applicant has deponed to what I have basically set out hereinabove. Suffice to say that the Applicant seeks the transfer of the case from Githunguri Law Courts on the ground that during the hearing of the case, on 24/6/05 the trial magistrate proceeded with the case even after the Applicant had informed her that he was unwell and needed time to recover. Secondly, that the administration Police who assaulted and caused injuries to the Applicant's private parts had not been summoned. In his oral submissions in support of the Application, the Applicant reiterated the fact that he had no faith in the trial Court.

The Application was opposed by the State. Mr. Makura, Learned State Counsel submitted that the Applicant had not demonstrated that he was not going to get a fair and impartial trial. That the allegation that the Applicant was tried whilst sick is not true because on that day the Applicant cross-examined the Complainant. Counsel further submitted that there was an order that the Applicant be taken to hospital. It cannot therefore be said that the Applicant has no faith in the Court. Mr. Makura further submitted that the Applicant had also sought the transfer of the case on the basis that the Court had refused the Complainant to withdraw the case. This submission by Counsel is not borne out by the record. It is clear from the record that at no time did the Complainant seek to withdraw the complaint and it was refused. The Applicant himself has not raised it in his Application, the supporting Affidavit and or in his oral submissions.

I have carefully considered the Application, the supporting Affidavit, the Applicant's as well as the State's submissions on the Application. Under Section 81 of the Criminal Procedure Code this Court has powers to change the venue of the hearing of a case. In other words this Court has powers to transfer the hearing of a Criminal Case from one subordinate Court to another. However this power is not exercised will nilly. It is provided by Section 81 of the Criminal Procedure Code that:-

“whenever it is made to appear to the High Court:-

(a). That a fair and impartial trial cannot be had in any Criminal Court subordinate thereto; or

(b).

(c).

(d).

(e).

It may order.

(i).

(ii). That a particular Criminal case or class of cases be transferred from a Criminal Court subordinate to its authority to any other Criminal Court of equal or superior jurisdiction.

For an Applicant to succeed in an Application of this nature he must satisfy the Court that he will not get a fair and impartial hearing from the Court that he seeks to have the case transferred from. In my view the provision for the transfer of Criminal cases is based more on the principle of meeting the ends of

justice and securing public confidence in the independence and integrity of the Court than imposing a check and balance on the presiding Magistrate.

Cases are transferred to allay any fears on the part of the litigants that justice may not be done if the proceedings are allowed to commence or proceed before a particular Magistrate. The burden is on the Applicant to show that circumstances exist that make him apprehensive that he will not get a fair and impartial trial. The Apprehension must be reasonable in the words of Trevelyn J.

“.....Reasonable apprehension in the Applicant’s or any right thinking person’s mind that a fair and impartial trial might not be had before the Magistrate.....”

(See ***JOHN BROWN SHILENJE VS REPUBLIC, CRIMINAL APPLICANT NO. 180.*** In the instant Application, the Applicant seeks the transfer of the case on the basis that the Court has refused to recall the Complainant who gave his evidence when the Applicant was allegedly sick. Secondly that the Police officer who arrested and seriously assaulted him had not been summoned. As can be seen from the history of the matter that I have endeavoured to set out in detail in this ruling, the trial Court has severally bent backwards to accommodate the Applicant’s requests, some of which were in my view quite frivolous. The trial Magistrate has not demonstrated any bias towards the Applicant. She has not done anything that would remotely suggest that the Applicant would not get a fair and impartial hearing before her. If anything the trial Magistrate has been too accommodative to the Applicant when it was clear that some of the Applications made by the Applicant were clearly meant to stall the proceedings.

It is clear from the record that before the Complainant testified, the Applicant did not indicate to the Court that he was unwell. Indeed he effectively participated in the proceedings and cross-examined the Complainant at length. It was only much later after the Prosecution sought an adjournment for lack of witness that the Applicant indicated to the Court that he was unwell and would prefer to be remanded at Githunguri Police Station. In any event, the Applicant has not said exactly why he requires the Complainant to be recalled. Is it for further cross-examination or what? In my view the Learned trial Magistrate was right in rejecting the Applicant’s Application for the Complainant to be recalled. The Applicant should have laid the basis for the recalling of the Complainant. The applicant claimed that he was sick when the Complainant testified. However and as already stated he never alerted the Court before hand of his sickly condition. In my view the Applicant’s demand for the recalling of the Complainant was clearly an afterthought calculated to attain ulterior motive i.e. stall the hearing of the case.

As for the summoning of the Police officer who arrested and assaulted the Applicant, it is too early to say whether or not he will be summoned to testify. In saying that the said Police officer has not been summoned, the Applicant is merely engaging in speculation. Only one witness has so far testified. In any event even if the said officer is not summoned to testify, can it be said therefore that the trial Court is biased or impartial? I do not think so. Further, should the said officer not be summoned, there is nothing to stop the applicant from summoning him.

For all the foregoing reasons, I find the Application to be devoid of merit. Accordingly it is dismissed. The original record should be transmitted back to the Senior resident Magistrate’s Court Githunguri, for the hearing of the case to continue.

Dated at Nairobi this 8th day of May, 2006

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MAKHANDIA

JUDGE