



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Misc Crim Appli 11 of 2006

Retrial

Availability of witnesses

Transfer of criminal cases on account of bias

1. GEORGE LESIMON SAYAYA

2. ISSA NGUGI JUSTUS

3. JOSEPH MUCHIRI WANJE.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENTS

RULING

This is an application by the applicants by way of Notice of Motion brought pursuant to the provisions of Section 81 of the Criminal Procedure Code. In that motion filed on 26th May, 2006, the three applicants seek that this court orders that their case in P.M. Criminal Case No. 1694/2002 be transferred to another court for trial and final determination.

The application is based on the grounds that the trial court has not accorded them a fair trial due to numerous adjournments. That the trial court is biased against them. That as a result they have lost faith in the trial court and wish to have the case transferred. The respondent (the State) did not file any reply to these averments. However the learned counsel for the State submitted that the applicants ought to have made that application before the trial court and not this court. It was further argued that the reasons advanced by the applicants are not grounds for transfer of a case.

I have considered these arguments. The background to this application, briefly stated is that the applicants were charged with three counts of robbery with violence contrary to Section 296 (2) of the Penal Code in 2002. When the trial was nearing completion the learned trial magistrate ordered a retrial on the ground that the prosecution during the trial had been partially conducted by an officer below the rank of Assistant Inspection of Police Contrary to Section 85 (2) of the Criminal Procedure Code. This decision was taken at the time the court of Appeal decided the case of **Roy Richard Elirema & Another V R** Criminal Appeal No. 67 of 2002.

The first applicant then filed a Notice of Motion to the High Court challenging the decision of the trial

court. The High Court (Maraga J) dismissed that motion and confirmed the orders of the trial court for a retrial. That was in December 2003.

Fresh plea was taken on 9th March, 2004.

After several adjournments the fresh trial commenced on 10th May 2004 when a single witness was heard. Further hearing did not take place until 30th November, 2004 when once again, only one witness was heard. It was not until 9th March 2005 that the 3rd and 4th witnesses were heard. On 14th July 2005 the first prosecution witness was recalled. The 5th witness testified on 24th August, 2005. The following month on 27th September, 2005 the 6th witness gave evidence.

From that date to today no hearing has taken place. It has taken the prosecution two years to call six witnesses.

Section 77 of the constitution guarantees a person charged with a criminal offence a fair trial within a reasonable time by an independent and impartial court.

As I have started the application, although not reflected on it, is brought under Section 81 of the Criminal Procedure Code which stipulates that;

“81. (1) 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

(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”

The central consideration in an application for transfer is that a fair and impartial hearing cannot be had in the court seized of the case. In the instant matter there can be no doubt that there has been inordinate delay in the hearing and determination of the case. The complaint against the learned trial Magistrate is that he has accommodated the prosecution for far too long – all the time on the same grounds. That on several occasions he has overturned his own orders granting final adjournments. In order to uphold the provisions of Section 77 of the Constitution adjournments ought to be granted sparingly and only on sufficient grounds. They must not be granted as a matter of course.

Can there be a fair and impartial trial by the trial court?

Transfer of a suit from a Magistrate with Jurisdiction to another also with jurisdiction must be done only if real bias in the former has been shown.

In **Shilenje V R** (1980) KLR 132, Trevelyan, J. cited with approval Sir H.T. Prinsep and Sir John Woodroffe in their commentaries – **Commentary and Notes** (14th Edn) 1906 and **Criminal Procedure in British India** (1926) 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 a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer”

The test is objective. In the said case of **Shilenje** it was also observed that it is the duty of every court to have regard to the importance of securing the confidence of the public in the fairness and impartiality of the trial.

Whereas it is clear to me that the learned trial Magistrate has over-indulged the prosecution, given the numerous adjournments and bearing the history of this case in mind, I nonetheless do not think that the over indulgence of the prosecution *per se* would constitute bias on his part as to make him impartial.

In conclusion, I can only add that this is a classic example of the hazards brought about by orders of retrial.

One of the major considerations in ordering a retrial is the availability of witnesses. Where the main witnesses are not likely to be traced the court must not order for a retrial.

See **Nyakundi and Another V R** (2003) KLR 704.

The grounds relied upon are not sufficient to impute bias and impartiality on the trial Magistrate.

The applicants themselves must remember that another retrial might delay the conclusion of this matter even further. It can only be hoped that both the police and the trial court will give this matter the priority that it deserves.

For these reasons the application is hereby dismissed.

Dated and delivered at Malindi this 30th day of June 2006.

W.OUKO

JUDGE

30th June 2006

Coram

W. Ouko. J

Mr.Ogoti

Applicants

CC: Gladys

Ruling delivered.

W. OUKO

JUDGE