



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Crim Appli 419 of 2005**

**ABDULLAHI OSMAN.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

**ABDULLAHI OSMAN** is seeking an order directing Mrs. M. Mungai, Principal Magistrate to disqualify herself from conducting his trial before the lower court **Criminal Case No. 979/04**. The Applicant also seeks an order transferring the same case for hearing before another court. The Applicant's application is grounded on a supporting affidavit dated 4<sup>th</sup> August 2005.

The Applicant in his oral submission before the court stated that he wanted his case removed from the trial court because of one incident. He said that he was unwell one time and his advocate was absent. That he sought adjournment on those basis but the same was turned down. The Applicant submitted that as a result of that incident he felt that the court would not be fair to him and therefore asked for his application to be allowed.

**Mrs. Kagiri** for the State has opposed the application. Counsel submitted that the applicant had failed to demonstrate to this court why he should be heard by another court. Counsel submitted that considering the record of the proceedings in the lower court, there was no indication that the Applicant would be prejudiced if the trial court continued to hear his case. Counsel submitted further that at the time complained of, the trial magistrate clearly disclosed why the adjournment was denied.

The counsel then asked the court to note that 11 witnesses had testified and to consider the special circumstances of the case in regard to the fact that witnesses were being obtained from far and that a lot of resources had already been spent.

The Applicant faces 4 counts of **Grievous Harm** contrary to **section 234** of the **Penal Code**, two counts of **illegal possession of a firearm and ammunition** contrary to **Section 4(2)** of the **Firearms Act** and one count of being **unlawfully present in Kenya** contrary to **Section 13(2) (c)** of the **Immigration Act**. He was charged in court with these offences on 1<sup>st</sup> August 2004 and his case was allocated for hearing before her Honour Mrs. Mungai. All the witnesses who have so far testified have come from North Eastern Province which is where the alleged offences were committed. Five witnesses were in court from various parts of the same province ready for hearing on 23<sup>rd</sup> August 2005 when the learned trial magistrate stayed the matter following this application before this Court.

An application in the High Court for transfer of a case from one court to another is provided for under **Section 81(1) (c) of the Criminal Procedure Code**. The application can only be granted if it is demonstrated to the High Court that there is a likelihood that an accused person may not get a fair and impartial trial. The test applicable to an application of this nature is whether the court is satisfied that a clear case has been made out that the applicant has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate. The apprehension should be real, honestly held and reasonably based. See **Shilenya vs. The Republic 1980 KLR 132; The Republic vs. Hashimu 1968 EA 656.**

The basis of resolving the aforementioned test is if right minded people would have a suspicion that a fair trial was not to be held. Suspicion alone is not enough and I would adopt the objective approach given in the commentary of **SHJ Princep Commentary and Notes (14<sup>th</sup> Edition) (1906)** at page 646 as cited in **Shilenje's case**, Supra, thus: -

***“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.”***

It is therefore, quite clear that the clearest of grounds must exist based on a real and honest apprehension before the High Court can grant such a transfer from one court to another.

The Applicant's complaint is that the learned trial magistrate declined to grant him an adjournment at one time in the course of the trial. In his affidavit, the Applicant has given a chronology showing that he was arrested on 1<sup>st</sup> September 2003 and charged with murder arising from the same incident from which the present charges also arise. He depones that the current charges were preferred against him on 14<sup>th</sup> April 2004. The Applicant then complained of adjournment of the case by the trial magistrate on 16<sup>th</sup> September 2004 on grounds that the said magistrate was sick. The Applicant complains of a long wait of 3 months to be heard again on which day, 25<sup>th</sup> November 2004, his case was again adjourned to 28<sup>th</sup> February 2005. Even in February his case was not heard and was adjourned to 6<sup>th</sup> May 2005. The Applicant then complains that on 9<sup>th</sup> May 2005, it was him who was sick and his defence counsel happened to be away. It was on that date that his Application for adjournment was declined and that is his basis for applying for a transfer of his case to another court.

I have considered the Application and the grounds on which it is brought. This application does not meet the test required to allow it. The fact that the applicants application for adjournment in one instance was rejected considered either on its own or together with the background of persistent delay of the case due to adjournments caused by others cannot justify a finding that the applicants is unlikely to get a fair and impartial trial before the trial court. The applicant's apprehension in his mind is unreal and unreasonable. It is in my view not reasonably based and a right minded person faced with similar grounds would not have a suspicion that a fair trial would not be held by the trial court. The grounds advanced by the Applicant are not clear grounds based on a real and honest apprehension. I assess them rather to be mere suspicion based on imagined apprehension held out from an unreasonable basis. I have no doubt that in the Applicant's mind the basis of his apprehension may appear real to him. It is unreal and I find that it would be most unfortunate to allow such an application based on such imagined grounds. I am satisfied that the Applicant will receive an impartial trial. All I would implore the trial Court to do is hear the case expeditiously from now on to ensure that it is finalized and concluded within as reasonably short time as is judiciously possible.

The application itself is dismissed.

Dated at Nairobi this 29<sup>th</sup> day of June 2006.

**LESIT, J.**

**JUDGE**

**Ruling read in presence of:**

Applicant - present

Mrs. Kagiri for State

CC: Tabitha

**LESIIT, J.**

**JUDGE**

**Court:** Trial court file be returned to Chief Magistrate's Court for mention on 30.6.06 in order for the court to set hearing dates and issue production order for accused/applicant.

**LESIIT, J.**

**JUDGE**