



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Case 6 of 2006

CHARLES MBAI MATIKU

LUKAS MWEU MUTISYA

DICKSON MUSYOKA MUTISYA

JOSHUA MBATHA MUTISYA

JOSEPHAT KISILU

MULINGEAPPLICANTS

VERSUS

REPUBLICRESPONDENT

RULING

The applicants are the 5 accused persons in Chief Magistrate Criminal Case No. 2558 of 2003. They are facing charges of robbery with violence. They seek that the case be transferred from the court hearing it to any other court of competent jurisdiction. They argued that they no longer feel comfortable before the honourable magistrate, Mr V.W Wandera, Acting Principal Magistrate who is trying the case. The reasons they have advanced for their stand is that the trial magistrate insisted that they should call witnesses to support their defences when they give such defences. They argue that when he found that they each had a case to answer and put each on his defence, they each said they would give defence by sworn statement except one of them who said, he would given an unsworn statement.

They asserted further that the trial magistrate then told them that they must call witness each to support each accused’s defence. That is why they felt the honourable magistrate had no right to force them to call witnesses and thereby questioned his motive. They for that reason lost confidence in him, for which reason, they want a transfer.

I have perused the record and confirm that the trial magistrate indeed put each one of the accused on his defence on 25/1/2006 by a ruling he delivered in open court in the presence of each accused. He then had Section 211 of Criminal Procedure Code complied with and then explained to them their rights under the said Section.

Then the 1st and 2nd accused selected to give their defence statement on oath while the 3rd, 4th and 5th accused opted for an unsworn defence. Each chose not to call any witnesses. They each nevertheless

applied for adjournment for them to prepare their defences which the honourable trial magistrate granted as he referred the file to the Chief Magistrate in court No. 1 for allocating a date for accused's defences.

On the same day the Chief Magistrate fixed a further trial on 30/1/06 for accused's defence before the trial magistrate. The record shows that on 30/1/06 all accused/applicants herein were present. When asked to give their defences each said that the trial magistrate should disqualify himself from hearing the case further on the ground that the court had asked each accused whether accused would call witnesses to support the defence evidence each wanted to give. Accused No. 2 argued that the court had not explained why accused was placed in his defence. One or two accused gave no reason at all.

In this court accused No. 1 who spoke for others went further and stated that the trial magistrate had tried to force them to call witnesses when they did not want to call any witnesses.

I have carefully considered the accused's application to have the trial transferred to another court. I first note that Mr Wandera's court took over the trial from another magistrate under Section 200 of Criminal Procedure Code. Secondly the grounds being advanced in support of the application do not make much sense and are not logical or credible. I do not see a situation where the trial magistrate would try to force accused person to call witnesses to support the defence. That would be none of courts business. Thirdly, I carefully listened and tried to understand the accused's quest. They did not make an impression that they were genuinely aggrieved. Finally, the grounds do not amount to any reason that this court would find lawful enough to grant the transfer order sought.

The record of what happened stands clearly out to the effect that the trial magistrate did nothing wrong or unlawful or one that would prejudice the accused persons. The magistrate was under legal obligation to comply with Section 211 of the Criminal Procedure Code which he carefully did. Such compliance cannot be a cause of complaint or a reason to transfer the trial to another court.

For the above reasons the application for transfer of the case to another court has no merit and is rejected. The trial will proceed before Mr Wandera.

Order:

Mention case before the Chief Magistrate today for reallocation.

D.A. ONYANCHA

JUDGE

12/7/06