



IN THE HIGH COURT OF KENYA

AT MACHAKOS

Crim Misc Appli 9 of 2006

**MASAKU TEACHERS SAVINGS & CREDIT SOCIETY.....APPLICANT
VERSUS**

**THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA..RESPONDENT
R U L I N G**

The application before the court is dated 1/3/06. It seeks a transfer of Machakos Chief Magistrate's court's Criminal Case No. 2603 of 2005 from Machakos to Nairobi or to any other court with jurisdiction to hear it. Mr Otieno of Lumumba Mumma, & Kaluma Advocates represented the applicants who are the complainants in the case. Mr O'Mirera appeared for the Attorney General. On the other side Mrs Mutua, Mr Ngolya, Sila and O.N. Makau, represented the respondents who are the accused persons in the case.

The application is brought under Section 81 (1) of the Criminal Procedure Code and in particular under subsections (a) and (e) of the said provision. The application is supported by an affidavit sworn by Solomon Mbili Ngomo, the General Manager of the complainant Cooperative Society.

Other information is that the accused persons in the court case sought to be transferred, are 15 in number and the case was instituted in the lower court, way back in December, 2005 but this application, as earlier pointed out was filed on 1/3/06. The relevant provisions of Section 81 under which this application is brought state as follows:-

“81 (1) whenever it is made to appear the High Court

a) that a fair and impartial trial cannot be held in any criminal court subordinate to thereto, or

e) that such an order is expedient for the ends of justice or is required by any provision of this Code it may order

ii. that any particular criminal casebe transferred from any courtto any other court of equal jurisdiction.

2) The High Court may act either on the report of the lower court or on the application of a party interested, or on its own initiative.

3)

4)

5)”

Examination of the Supporting Affidavit sworn by Solomon Mbili Ngomo depones the grounds upon which the transfer of the case is sought. That ground as far as I can gather from the affidavit, is that the complainant is apprehensive on the basis of anecdotal evidence, that justice will not be done or be seen to be done, if the case is heard at Machakos. I further gather that the reasonable apprehension referred to arises from the fact that accused persons have worked within Machakos area for many years or are resident within its environs where they enjoy reasonable influence.

When the application started being argued, Mr Otieno narrowed the provisions under which he based the application by stating that he relied only on Section 81 (1) (a), thus dropping subsection (1) (e).

The application was strenuously opposed by the Attorney-General through the state counsel Mr O'Mirera and by the accused persons' advocates in the lower court case, whose names have already been mentioned herein above.

Having perused the application and the supporting and replying affidavits, and having also examined the arguments advanced by both sides, I am of the view that the following issues need to be resolved:-

- 1) Whether the complainant has a locus standi under Section 81 of Criminal Procedure Code and whether therefore he is entitled to be an applicant herein.
- 2) Whether the applicant established grounds for transfer of the case on the balance of probability to be entitled to the order sought.

Mr Otieno, argued that the complainant is an "Interested Party" in the result that will come out of the trial in Machakos Chief Magistrate Criminal Case No. 2603 of 2005 and that he is therefore entitled to bring this application. Mr Otieno, argued that the complainant is the one whose property was stolen. It is the one that filed a complaint with the police before investigations that finally resulted in the arrest of the accused persons began.

It is observed that in our adversarial system, based on the English Common Law upon which our Criminal Procedure Code is also based, the people recognized by the said Code as parties, are two – the prosecution on the one side, and the accused, on the other side the court, is merely the arbitrator. In such a system, the prosecution to support and prove its case, calls witnesses. The complainant is merely regarded as one of the witnesses. The accused on the other hand leads his lot which also may consist of witnesses. For some reasons probably historical the complainant is not recognized by the Criminal Procedure Code as a party.

I have considered Section 81 (1) of the Criminal Procedure Code aforesaid. It provides that an application for transfer can be brought by a party interested in the case, unless the High Court on its own motion raises up the issue. The question then is, whether a complainant is a party interested in the case under the Code as envisaged under Section 81.

I have anxiously examined the issue. I am however of the view that the Criminal Procedure Code and in particular Section 81 thereof does not explain who the "party interested in the case" would be. Where as under sub-section (4) of the section accused is the one making such an application, the Parliament declare the manner the accused should go about it. I observe that where the Attorney-General is the party applying for such transfer, he is not required to swear supporting affidavit. I understand this to mean that any other party interested would need to file a supporting affidavit. This should include the accused.

If then the only other party who might be interested in the transfer of the case apart from the Attorney-General, would be the accused, why would the Parliament use a general language? Why would it not specifically mention the accused and proceed to state how he should apply for such transfer in the same manner it provided for the Attorney-General?

In my view, Section 81 of Criminal Procedure Code envisages applications being made by other parties other than the accused and the Attorney-General. That is why the section's provisions are general in construction and not restrictive to the Attorney-General and the accused person. Indeed to argue that a complainant in a criminal case which starts only due to his complaint, has no interest in it, is to be too restrictive to the point of denying a citizen basic rights. For example in this case before me the complainant filed a complaint with the police who investigated it, and came to the conclusion that the complainant has lost its

property through theft. The complaint thus laid, is the basis of the lower court case, and therefore the subject of this application. The complainant would therefore directly or through its agents, be the main witness. To hold that it has no interest in the case or that it is not a party interested in the case, despite the fact that the Criminal Procedure Code looks at the complainant merely as a witness, would be tantamount to denying reality. It is my finding therefore that the complainant in this application is a party interested in the case, and who can therefore apply for a transfer of a criminal case subject to the fulfillment of the conditions under Section 81 of Criminal Procedure Code.

Having come to the conclusion that the complainant is a person interested in the case before the lower court the next issue is whether the applicant advanced adequate grounds upon which this court can act to transfer the case in question.

Mr Otieno, argued that the case may not have a fair and impartial trial at Machakos Law Courts, on the basis that the accused persons live and have lived in Machakos and work and have worked there, for a long period. He did not state how the living and working at Machakos for long would make their trial unfair or partial. I understood him to be saying although not very clearly, that the long stay in Machakos has made them be known well in Machakos. He did not argue that the accused persons are personally known to the magistrates in Machakos and in particular the magistrate hearing the case, which might enable them to influence the trial in their favour. Mr Otieno, did not either argue that the magistrates themselves have worked long in Machakos and will be influenced. Infact he did not allege any possible familiarity or contact between the trial magistrate and other magistrates, and the accused persons. In short, Mr Otieno, did not even attempt to show the basis of his client's apprehension that the trial will not be fair and impartial.

I am conscious of the fact that the burden of proof of such a proposition is extremely light. It was said to be "on the balance of probabilities" in *Kinyatti versus Republic* (1985) KLR 562. In the case of *Republic versus Hashimu* (1968) E.A 656 the standard of proof was put this way:-

"Before a transfer of any trial is granted on the application of an accused person, a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred."

In the above immediate case it was further held that there must be in existence, distinct incidents giving rise to reasonable apprehension in the mind of the accused that he will not have a fair or impartial trial before the magistrate in question. In the case of *Shillenje versus Republic* reported in *Kenya Law Reports of 1980*, the court decided to express the required standard of proof in the following terms:-

"a really apprehension, honestly held and reasonably based..." basing the same on expressions found in the *Republic versus Hashimu* (supra). The court in *Shillenje* case approved a provision from "*Criminal Procedure in British India*" (1926) at page 646 which stated:-

"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 personal censure on such officer."

I have carefully considered all the above authorities. I have taken the view, in addition to what the authorities say, that whether the apprehension by applicant is reasonable or not, "reasonable" must be determined with reference to the balance to be created between the subjective and objective tests. In my view this court cannot just leave it to the applicant

(accused or otherwise) to alone decide if such apprehension is reasonable or not reasonable. Such must, be finally determined with reference to the mind of the court rather than the mind of the applicant alone. The court should not accept as reasonable, grounds which the court, on examination, finds are infact insufficient and unreasonable, just because the applicant presents them as “reasonable and sufficient.” This is because the applicant may have reached his conclusion without a reasonable basis.

Finally, it should always be borne in mind that an application for a transfer of a case from one court officer to another, is, in a way, a challenge upon the trust, integrity and independency bestowed upon our court system and may only be granted where it has merit. While it is therefore, the duty of this court to have regard to the importance of securing the confidence of the public generally in upholding and appearing to uphold, the fairness and impartiality of the trial that is to be held, it is equally its duty to see that no undue regard should be shown to the abnormal susceptibilities of any individual or section of the public from any apprehension of ulterior consequences. Put differently, this court should act in a manner appearing to censure a court officer by transfer of a case under trial before him, only in the clearest of cases; cases where very clearest of grounds exist to justify such a course of action. I am in this regard also conscious of the view that it is also the duty of the high Court to act in such a manner as to allay the apprehension of the applicant for transfer and the public at large. It is my opinion however, that it is not every apprehension of every applicant, however unreasonable, that should be allayed. The apprehension should be based on reasonable or probable grounds.

In the case before me, the applicant has not based its apprehension on any reasonable or probable grounds. Indeed, its supporting affidavit sworn by Solomon Mbili Ngomo, the General Manager is almost bare. Staying and working in Machakos by the accused, for a long time, is not alone and unexplained, a reason for holding an apprehension for an impartial or unfair trial. Indeed on being confronted on the bareness of the affidavit, by the court, Mr Otieno, explained that his firm had failed to receive adequate information from the police and from the complainant, thus admitting the inadequacy of the supporting affidavit. He also admitted that as he argued this application, he had not received adequate information to file a supplementary affidavit and turned down an opportunity given him to swear a supplementary affidavit.

Before I make my final comments, it should be observed that the Attorney-General, who alone has the supremacy of prosecuting the lower court case, was not having any similar apprehension that the trial would not be fair and impartial. That is why Mr O’Mirera, for the Attorney-General, strongly opposed this application. In his submission to the court, Mr O’Mirera, expressed misapprehension of this application which he said, should be rejected. In my view, however, had the court shown probable grounds for seeking a transfer, the Attorney General might have been placed in a position to defend its position. But I have held that no such probable or reasonable grounds were advanced by the applicant. For the above reasons, this court holds that this application shows no merit and is hereby rejected and dismissed.

Dated and delivered at Machakos this 22nd day of September 2006.

D.A. ONYANCHA
JUDGE