

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Crim Misc Appli 38 of 2005

STEPHEN MUTINDA KALAI APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

This is an application by the accused person, Stephen Mutinda Kalai, in Mwingi Resident Magistrate's Court Criminal case No. 179 of 2005, seeking a transfer of the case to any other court of competent jurisdiction.

The main ground upon which the applicant seeks the transfer, is that the presiding magistrate does not and has not, recorded evidence verbatim or faithfully. The applicant has sworn an affidavit to the effect that on or about 4/8/2005, the honourable presiding magistrate did not record of a witness who had testified that she was 23 years old and married to Joel Omina and that she got married in 2003. That the witness knew her father's friends and that the accused was not a friend of the witness's friends. The applicant argues that these facts were not recorded by the magistrate who on being requested by the applicant's advocate to record them and everything the witnesses, say, turned the request down. This apparently created fear in the mind of the applicant – accused and his advocate M/s Musyoka Wambua, that the recording left out important evidence to the detriment of the accused – applicant. The applicant further argued that the magistrate expressed the view that he was not under obligation to record evidence verbatim hence this application.

The application was opposed by Mr O'Mirera representing the Attorney – General.

I have carefully considered the application taking into account all that was advanced by both sides. I have no doubt in mind that a court's record should contain as much of what the witness say, as possible. That does not necessarily mean that the record should be verbatim. While my court for example records almost everything that is said, especially in primary proceedings, as opposed to appeal proceedings, other courts may decide to record important points in evidence, only.

In the case before me, the applicant has stated what was not recorded and it appears to have mattered to his case. That the presiding magistrate did not wish to include it even when it was brought to his attention might have been the cause of the fear eventually generated. What is important however is that the accused – applicant appears to have generated genuine fear and feels that he may not obtain justice before this particular court.

While difference circumstances may lead to different conclusions, my view in this case is that justice will be seen to be done if the case is transferred to another court. But lest the applicant tries to create an advantage over the facts already on record, the hearing will take off from where it was rested at the end of the hearing on 13/5/05.

Order:

1. Case is hereby transferred to Kitui Senior Resident Magistrate's Court for further hearing and final determination by another magistrate with jurisdiction.

2. Further hearing to commence from the proceedings recorded at the end of the day on 13/5/2005.
3. Mention of this case at Kitui on 18/10/2006.

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

D.A. ONYANCHA

JUDGE