REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CRIMINAL APPLICATION 1 OF 2005, 43 & 46 OF 2004

WAKO GALGALO ……..……. 1ST APPLICANT

VERSUS

REPUBLIC …….....…….. RESPONDENT

CR. MISC. APP. NO. 43 OF 2004

MOHAMED GALGALO …….....……..…. 2ND APPLICANT

VERSUS

REPUBLIC …….....…….. RESPONDENT

CR. MISC. APP NO. 46 OF 2004

WAKO GALGALLO & 4 OTHERS……...…….....….3RD APPLICANT

VERSUS

REPUBLIC ……..…….....…….. RESPONDENT

RULING OF THE COURT

The six applicants, Wako Galgallo, Mohammed Galgalo, Mohammed Halgao, Boru Saido, Audi Wako and Gorincha Wako filed their three applications separately on 14.1.2005, 24.9.2004 and 14.1.2005 respectively. On the day of the hearing on 3.2.2005, the applications were heard as one when the learned counsels adopted the same arguments that were advanced in Misc. Application No. 1 of 2005.

The applications were brought under section 81 of the Criminal Procedure Code (CPC) Cap 75 Laws of Kenya. The applicants in the main seek an order transferring their respective criminal cases from Marsabit Law Courts to Isiolo Law Courts for final hearing and determination. The first applicant, Wako Galgalo was charged in criminal case No. 374 of 2004 with the offence of creating a disturbance contrary to section 60(1) of the Police Act, the particulars thereof being that on the 22nd day of November 2004 at around 11.00hours at Marsabit District within the Eastern province he created a disturbance by shouting and abusing police officer while on duty.

The second applicant, Mohammed Galgalo was charged in Marsabit Criminal Case No. 341 of 2004 with obtaining money by false pretences contrary to section 313 of the Penal Code. The particulars of the charge were that on divers dates between the months of June and August 2004 at Dakabaricha Location of Marsabit District within Eastern Province, with intent to defraud, obtained from Omar Wario the sum of Kshs. 6,000/= by falsely pretending that it was to be used for transport charges to trace his lost daughter.

The third, fourth, fifth and sixth applicants were jointly charged in Marsabit Criminal Case No. 373 of 2004 with the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) of the penal code. The particulars of the charge being that on the 21st day of November 2004, at Dakabaricha Location in Marsabit District within Eastern Province jointly created disturbance in a manner likely to cause a breach of the peace by threatening to cut Omar Wario with a jembe.

The grounds upon which the applications are premised are:-

1. That a fair and impartial trial cannot be held in these matters in view of the witnesses discomfort with the court and the court prosecutor the latter himself being the investigating officer.

2. That the orders sought will tend to the general convenience of the applicants and their witnesses.

3. That the applicants come from Merile Town within the Eastern Province.

The applications are also supported by affidavits sworn by the applicants respectively, the main contention being that the complainant in the matter is a big businessman at Marsabit who has relatives working with the Spider Squad as well as the Kenya Police Reserve at Marsabit town. It is also contended that the complainant has been seen on two occasions in the company of the prosecutor at a members club in Marsabit town and that the said prosecutor is also the investigating officer in the case.

Mr. Ndombi, appearing for the applicants argued that the applicants are apprehensive that they are not likely to have a fair trial before the Marsabit Court for the reasons that the prosecutor is himself also the investigating officer in the case and secondly that the prosecutor has been threatening the applicants that more charges would be brought against them. Finally, Mr. Ndombi submitted that since the applicants come from Merile Town which is exactly halfway between Marsabit and Isiolo, it would be better for them to be tried in Isiolo. Finally, that the complainant is a wealthy businessman within Marsabit Town and that he has had great influence on the investigating officer who is also the prosecutor.

Mr. Oluoch for the state/respondent opposed the application. The main argument by the state is that since the applicants' complainant is not against the magistrate, their applications should not be allowed. Mr. Oluoch relied on the following authorities:-

1. **Republic V. Hashimu (1968) EA 656.**

2. **Shulenje V. the Republic (1980) KLR 132.**

That the applicants have not laid any basis for their apprehension of a possible partial trial and that the said apprehension is not only misplaced but it is also unreasonable and is not honestly held. Mr. Oluoch also submitted that the offences, the subject matter of the criminal cases were committed in Marsabit and that as such there would be no justification for an order of transfer. Finally, that it would be expensive for the prosecution to ferry its witnesses from Marsabit to Isiolo for the hearing of the case. Mr. Oluoch submitted that if this honourable court should be minded to allow the application, then the applicants should be made to comply with the provisions of section 81(5) of the CPC.

For the purpose of appreciating the gravity of the application before me, I will set out the whole of section 81 of the CPC which provides as follows:-

"**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:-

(b) That some question of law of unusual difficulty is likely to arise; or

(c) That a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) That an order under this section will tend to the general convenience of the parties or witnesses; 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-

(i) That an offence be tried by a court not empowered under the preceding section of this part but in other respects competent to try the offence.

(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.

(iii) That an accused person be committed for trial to itself.

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

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney General, be supported by affidavit.

(4) An accused person making any such application shall give to the Attorney General notice in writing of the application together with a copy of the grounds on which it is made and no order shall be made on the merits of the application unless at least twenty four hours have elapsed between the giving of the notice and the hearing of the application.]

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties conditioned that he will, if convicted pay the costs to the prosecutor."

On the authority of the cases cited to me by the learned state counsel, namely REPUBLIC V. HASHIM (above) and SHILENJE V. R (also above) my task is to determine whether indeed, the applicants are entitled to the orders sought. In this regard, I must be satisfied that a clear case has been made out that the applicants have a reasonable apprehension in their minds that they will not have a fair and impartial trial before the magistrate from whom they want the trial transferred.

In the HASHIMU case, the accused was charged with stealing a Raleigh Bicycle and some other articles which were on the bicycle, all of which were the property of the NEWALA District Council (the Council) (in Tanganyika). From the facts, it was stated that the bicycle was snatched from the hands of an employee of the council by two unknown persons on the night of February 28, 1968, when the said employee was pushing it along the road on his way back from one of the villages where he had been collecting local rates. The employee (called Herbert Ntumbati) did not recognize either of the two thieves because it was dark, and it was also raining at that time. The incident was immediately reported to the police and on March 22nd 1968, the police arrested the accused when they met him on the road pushing a Raleigh Bicycle which looked like the one reported stolen. Subsequent investigations revealed that this was the bicycle that had been stolen from the council employee.

The accused, while being tried on the charge of stealing a bicycle, was dissatisfied with the order in

which the prosecution witnesses gave evidence and applied for the case to be transferred to another magistrate. Saidi J, after considering the provisions of section 80 of the Tanganyika CPC (equivalent to section 81 of the CPC) said the following:-

"……. 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.

The test to be applied in such a matter was lucidly expressed by WILSON J in Herman Milde V R (1937) ITLR (R) 129. In that case, the accused was charged with failing to provide his servants with proper medicines and medical attention during illness. He was tried by a magistrate who was also an administrative officer. He applied for a transfer of the case to another magistrate and in his application he impugned the impartiality of the magistrate, alleging that as he was an administrative officer, part of whose duty it was to obtain from employers compliance with the provisions of the master and native servants ordinance, and in the district where he worked, there had been several deaths of servants arising largely from a lack of medical attention, and he had in his capacity as an administrative officer, publicly advocated enhanced penalties to employers who had failed in their duty towards their sick servants, he would in such circumstances be highly biased against any employer charged with that offence. After reviewing the facts of that case, and examining the authorities relied on by counsel, WILSON J dismissed the application of the accused for a transfer of the case and held,

"**Further. That the test is whether a change of venue should be granted is the proved existence of distinct incidents giving rise to a reasonable apprehension in the mind of the accused. That he will not have a fair and impartial trial before the magistrate in question."**

Another important quotation appears at paragraph F page 658 of the ruling of the court in the HASHIMU case where it says:-

"In reaching the decision, WILSENT, also relied on the case of BAKTU SINGH V. KALI PRASAD where AMEER ALI J, said the following (1900) 28 Cal at page 301:-

"**We entirely endorse ……..but it will be noticed that they refer in explicit terms to the occurrence of incidents giving rise to a reasonable apprehension in the mind of the accused that he would not receive a fair or unprejudiced trial. The learned judges point out that it is not every apprehension which would be taken into consideration but that the apprehension must be of a reasonable character and must be founded upon distinct incidents (to paraphrase their language) which would really give rise to a reasonable apprehension that there would not be a fair trial."**

Having examined the facts before him SAID J refused the application. He drew much strength from the decision by WILSON J in the case of **BHAG SINGH V R (1941) ITLR (R)** 133, quoting the following from the ruling of WILSON J in the above case:-

"**That the test of whether a change of venue should be granted is not whether the magistrate is actually prejudiced against the accused, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the magistrate in question, and that in deciding what is reasonable apprehension regard must be had not to abstract standards of reasonableness, but to the standard of honesty and impartiality of the accused himself and his degree of education and intelligence."**

In dismissing the applicant's application for an order of transfer, SAID J said in part:-

"……**There is nothing arising from the facts of the case or the attitude of the learned district magistrate that could be taken to indicate that the accused will not have a fair and impartial trial…….. I understand the accused properly, his complaint is that the third witness called by the prosecution at his trial should have been the first witness. Personally I can see nothing wrong with the order in which the witnesses were called……**

The learned judge thus found that there was nothing from the facts of the case that could give the accused a reasonable apprehension for thinking that he would not have a fair and impartial trial from the learned district magistrate who was hearing the case, and that if the accused felt "**aggrieved at the eventual decision of his case, he had his remedy by way of petition of appeal or revision to this court."**

In the SHILENJE case (above) the applicant, a state counsel was charged with corruption. He applied for bail on his own bond and although the Republic representative did not oppose the application, the magistrate required a surety. Though originally fixed for hearing before another magistrate, it was re-allocated and came before the magistrate who had heard the bail application. The applicant applied for the transfer of the case to another magistrate under section 81(1) (a) of the C.P.C. on the ground that he feared that he would not receive a fair trial before the magistrate who had refused bail on his bond, whom he had previously known socially when they were both working in the same province, that he had conducted prosecutions before the magistrate and they had from time to time "**agreed to disagree"** on points of law and practice and that an advocate whom the applicant wished to represent him had declined to do so on grounds of ill-health after speaking with the magistrate on the phone. At the hearing of the application the applicant added that after the alleged phone call, he had pleaded with the advocate to ask the court to accommodate him on such days as his ill-health prevented him from conducting the case. The advocate however denied making such a call.

The court (TREVELYAN J) considered the authority of such cases as Republic V Hashim (above) Re MS. Patel's application (1913) 5KLR 66 in deciding whether a clear case had been made out by the applicant that the applicant had a reasonable apprehension in his mind that he would not have a fair and impartial trial before the magistrate. The learned judge quoted from **Sir H.T. Prinsep CRIMINAL PROCEDURE IN BRITISH INDIA (1926**) at page 646 – commentary and notes 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 personal censure on such officer."**

After considering the facts before him, the learned judge dismissed the applicant's application, arguing as he did that the refusal of bail on the applicant's bond alone could not be construed as a suggestion of bias, that their earlier social contact did not preclude the magistrate from trying the applicant fairly and impartially and that infact taken collectively the applicants complaints would not have created a reasonable apprehension in any right thinking person's mind that a fair and impartial trial might not be had before the magistrate.

Referring again to page 647 of Sir H.T. Prinseps COMMENTARY AND NOTES, (14th Edition) upon section 526 of the Indian Code of Criminal Procedure 1908, there was this to say:-

"**What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of reasonable character, and notwithstanding that there was to be no real bias on the matter, the fact that the incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer."**

In the application before me, the applicants are fearful that because the complainant in the matters is an influential businessman in Marsabit town, and that because the said complainant has been seen in the company of the court prosecutor on two occasions, then the applicants are unlikely to have a fair and impartial trial before the Marsabit court. This court must determine whether such apprehension is reasonable with reference to the mind of the court rather than to the mind of the accused. For an order of transfer to be made therefore, the apprehension to justify a transfer must be reasonable.

From the facts before me, I do not think or do I find that the applicants' apprehension is reasonable. Furthermore, the apprehension by the applicants does not impugne the impartiality of the magistrate. After considering the authorities cited to me by counsel for the state, I find no justification for the applicants' apprehension that they will not have a fair and impartial trial before the Marsabit trial magistrate. The fact that the prosecutor may also be the investigating officer, and how he will step down as prosecutor so as to give evidence as a investigating officer is a matter which I believe the Marsabit trial magistrate will be more than qualified to deal with, if it arises that is. If indeed the applicants' home is exactly half way between Isiolo and Marsabit, this court is unable to appreciate how a transfer of the case from Marsabit to Isiolo will assist the applicants, except perhaps of shortening the distance to be traveled by the applicants' advocate. That however, was not deponed to in the supporting affidavits. If the applicants had alleged that the complainant had been seen in the company of the learned Marsabit magistrate in a members club, this court would have taken another look at the applicants' application.

In conclusion therefore, I do not find that the applicants have made out a case for an order of transfer of their cases from Marsabit Court to Isiolo Court. As the learned judge concluded in the Shilenje Case, I would equally say that "**The incidents relied on cannot be said to be calculated to create any reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial, trial might not be had before the magistrate."** Infact the magistrate has not been shown to be in any way biased or unfair against the applicants or any of them. There is nothing in the brief facts that were given to me during the hearing of the application to make it seem to me that it would be in the interests of justice to allow the application for an order of transfer. In the result, the application is dismissed.

Dated and delivered at Meru this 14th day of February, 2005.

RUTH N. SITATI

Ag JUDGE

14.2.05