



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENEOUS APPLICATON NO. 1179 OF 2005

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE, CAP. 75 LAWS OF KENYA

ABDIRIZAK HAMED IBRHAIM APPLICANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

This miscellaneous application was made by Notice of Motion dated 2nd August, 2005 and filed on 3rd August, 2005. It was brought under rule 3(2) of the High Court Vacation (Practice and Procedure) Rules, section 81(1)(a),(e) and 81(2), (3) of the Criminal Procedure Code (Cap. 75, Laws of Kenya), the Constitution of Kenya (Chapter 5), S.3 of the Judicature Act (Cap. 8), and the inherent jurisdiction of the High Court.

On the occasion of hearing this application, within the framework of the Court's vacation rules, on 11th August, 2005 I granted two prayers pending the delivery of judgment : firstly, that Criminal Case No. 531/41/05 involving the applicant be stayed pending the hearing and determination of this matter; and secondly, that the status quo be maintained until judgment.

The applicant's substantive prayers are as follows:

- (i) that, the Court do enter and/or direct that Criminal Case No. 531/41/05 involving the applicant be stayed pending the hearing and determination of the case;**
- (ii) that, the Court do order and direct that Criminal Case No. 531/41/05 at the Wajir Law Court be transferred to any Court in Nairobi, in the interests of justice;**
- (iii) that, upon the transfer of the venue of hearing, the applicant do keep the same bond terms as in Criminal Case No. 53/41/05;**
- (iv) that, any such order be made as is just and expedient.**

The application is premised on the following grounds:

(a) that, the applicant, as a citizen of Kenya employed by the Kenya Commercial Bank at Mtito Andei, is entitled to the protection of the law and of the Constitution;

(b) that, the complainant in Criminal Case No. 531/41/05 is the Resident Magistrate sitting at the Wajir Law Court, and the applicant is apprehensive that before that Magistrate, he will not get fair trial;

(c) that, the applicant has cited the involvement of senior civil servants including the District Prosecutor, District Criminal Investigation Officer, the Resident Magistrate, the District Commissioner, and other civil servants in Wajir District – as a factor which will deny him a fair trial at the Wajir Law Court;

(d) that, the applicant has been subjected to several unnecessary delays, and the charges against him have been substituted several times, and to-date no proper hearing has taken place;

(e) that, the applicant is ready to appear before any Magistrate for the hearing of his case at any venue in Nairobi.

The applicant's Notice of Motion is supported by an affidavit in which he depones that he is the accused in Criminal case No. 83/05 and No. 531/41/05 both at the Wajir Law Court. He avers that sometime in January, 2005 he was assaulted by one *Mr. Biry* in the office premises at the Kenya Commercial Bank, Wajir. He reported the assault to the police. *Mr. Biry* was arrested by the Wajir police who charged him with the offence of criminal assault; but he was released on a bond of Kshs.8,000/=, and the case was fixed for hearing on 8th February 2005 this being Criminal Case No. 7/2005. Then on 24th February, 2005 the prosecutor approached the applicant at the Law Courts, with the request that he should have the case withdrawn and solve the matter in-house. The applicant declined the request, as he had been severely injured in the assault. Thereupon, the accused on his part reported an assault which is claimed to have taken place on 8th January, 2005 on which occasion the applicant herein, at the Kenya Commercial Bank in Wajir, had hit him with a rubber stamp. *Mr. Biry* had not reported that alleged incident to the police and it was now coming up as an entirely new matter.

The applicant depones that he had, about the time of the new police initiatives, found *Mr. Biry* feasting with the District Criminal Investigation Officer, *Captain Kai*; the District Court Prosecutor, *Mr. Juma*; the District Commissioner; the District Magistrate, *Mr. Ndururu*; and the Kenya Commercial Bank Manager, *Mr. Chisagha*.

It is deponed that on 28th February, 2005 the Bank's Retail Manager wrote to the Senior Manager, Employee Relations at the head office, stating that he had sought the Magistrate's opinion on the criminal cases in question. The applicant avers that he had raised the issue of the close relations between *Mr. Biry* and the several persons mentioned, in Court on 1st March, 2005; the Magistrate responded by announcing that he would disqualify himself from presiding over the case, but he did not record this, and he has now changed his mind. The same DCIO said to have intimately associated with *Mr. Biry*, was ordered by the Court to conduct investigations on the activities of the applicant herein. The applicant depones that subsequently the process of hearing the criminal case against *Mr. Biry* has stalled; and the DCIO has repeatedly found an excuse for not making a report in Court. The applicant depones that he was prevailed upon to withdraw his case on 19th May, 2005. As soon as this case was withdrawn, the DCIO now made his report in Court, recommending that the applicant should be charged with giving false information in court. This charge was brought against the applicant on 18th May 2005 and he was released on a bond of Kshs.100,000/=. The applicant depones that the only information he did give was under oath, in court, and forming part of the court record. The criminal case against the applicant, namely Criminal Case No. 83/05 has been adjourned several times, and it appears that there was no evidence. But then, it is deponed, the prosecutor applied and was allowed to *substitute charges* and bring a different charge against the applicant; and this was done on 16th July, 2005; and Criminal Case No. 83/05 was formally substituted.

In the meantime the applicant was transferred to the Kenya Commercial Bank at Mtito Andei; and it has become difficult for him to shuttle between Wajir and Mtito Andei when he has been required in court at Wajir. He urges that the case be heard in Nairobi, since the prosecution and the Magistrate at Wajir are witnesses in the case.

This application was heard before me as a vacation matter on 11th August, 2005 when *Mr. Mohamed* represented the applicant, while *Mr. Ondari* represented the respondent.

Learned counsel, *Mr. Mohamed*, submitted that the applicant would not be able to get justice at the Wajir Law Court : because the Magistrate himself is a complainant.

In the High Court of Tanzania case, **Republic v. Hashimu** [1968] EA 656 the Court (*Saidi, J*) had held (p.656):

“... 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.....”.

Learned counsel submitted that a Magistrate should not be judge in his own cause; and the applicant had reasonable fear that he will not get fair trial before the Magistrate.

Mr. Ondari opposed the application, and submitted that there was no basis for concluding that the Magistrate was the complainant. It was contended that the applicant did not demonstrate why he fears any other court in Wajir, if it heard the criminal case, would subject him, the applicant, to prejudice.

From *Mr. Ondari's* submissions, and in the light of the facts in the affidavit evidence, I take it that it is conceded that the very same Magistrate will be an inappropriate person to hear the case against the applicant. *Mr. Ondari* further said: **“If the same Magistrate who is the complainant (as alleged) were to hear the case, this would be contrary to natural justice”**. But he urged that the case be not heard in Nairobi because witnesses are likely to be found only in Wajir. Counsel said: **“He has not shown that any of the Magistrates in Wajir is a complainant”**.

But *Mr. Mohamed* in his reply observed that there is only one Magistrate in Wajir District; and that same Magistrate had made a statement now being relied upon in the criminal case against the applicant.

Mr. Mohamed submitted that the transfer of the applicant to the Mtito Andei branch of the Kenya Commercial Bank has been most disruptive to the applicant and to his appearances in Court at Wajir. He submitted that this Court has the power to transfer a case, for the purpose of hearing, in the interests of justice.

Counsel made the intimation that there is only one Magistrate, and who has made a statement bearing on the criminal case, in Wajir District. It is quite clear to my mind that this is a case for hearing elsewhere. The Magistrate in Wajir is certainly not in a position to hear it and determine it impartially, and it is not in the interests of justice that this same Magistrate should hear and determine the matter. Either the recognized end of justice must give, or convenience of hearing, especially in relation to the transportation of state witnesses, has to give; I would rather the latter rather than the former, should give.

Therefore I will decree as follows:-

1. It is hereby ordered and directed that the criminal case against the applicant, Criminal Case No. 531/41/05 at the Wajir Law Court, shall forthwith be transferred to the Makadara Law Courts in Nairobi, where it will be tried and determined, unless it is otherwise terminated in accordance with the Constitution and the law.

2. The said Criminal case No. 531/41/05 shall be listed for mention before the Makadara Chief

Magistrate within 30 days of the date hereof, for the purpose of giving hearing directions.

& 3. As Criminal Case No. 531/41/05 is listed before the Makadara Court, the applicant shall be allowed the same bond terms as he has had at the Wajir Law Courts.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of September, 2005.

J.B OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the applicant : Mr. Mohamed, instructed by M/s Ibrahim, Issack & Co. Advocates

For the respondent : Mr. Ondari, instructed by the Hon. The Attorney General