

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Misc Crimi Appli 67 of 2005

JUMA MUCHELULE APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

JUMA MUCHELULE, the Applicant, alleges that he is the accused in the Senior Resident Magistrate's Court Criminal case No. 1155 of 2004. He seeks in his Chamber Summons application dated 19-9-2005 an order that the said case be transferred from Mumias S.R.M.'s court to any other court. His other prayer is for an order that this court do terminate the said case. He alleges that he is charged in the said case with the offence of maliciously administering poison with intent to harm contrary to section 236 of the Penal Code.

In his affidavit in support of the application, he alleges that the trial court has treated him with bias and that it has since September 2004 failed to fix the case for hearing. He also alleges that he was initially admitted to bail but the court file later went missing from the court registry and his bond was subsequently cancelled when the file was later found.

Mr. Karuri, learned State Counsel, who appeared for the Republic when the application came up for hearing on 26.10.05 opposed the application and submitted that the transfer sought of the case would greatly inconvenience the prosecution witnesses if the case were transferred elsewhere. In any case, he said, the applicant had not demonstrated how the trial magistrate was biased against him. He urged the court to dismiss the application.

The power of this court to change the venue of the hearing of a criminal case is conferred by section 81 of the Criminal Procedure Code, Cap 75, and, in the exercise of this power, the court may change venue of the hearing of a case so suo moto, or on application of a party interested or on the report of the lower court. In the instant case, the accused in the lower court has applied for the transfer of the case to another court. Section 81(3) of the Criminal Procedure Code requires the application to be made by Notice of Motion. As the application is by Chamber Summons, it is not in compliance with this mandatory provision and is therefore incompetent and is struck out. At any rate, the struck-out application contained scanty information and the allegations in it were not buttressed by evidence so that even if it had been regularly instituted by way of a Notice of Motion, it did not disclose any merit for the order sought and was bound to fail.

However, so as to satisfy itself as to the regularity of the proceedings in Mumias Cr. case No. 1155 of 2004 pending before the Senior Resident Magistrate, the Hon. P. Sultan (Mrs.), this court hereby calls for the record with a view to examine it.

Dated at Kakamega this 8th day of November, 2005.

G. B. M. KARIUKI

J U D G E