



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL APPLICATION NO. 831 OF 2002**

**ORESTERS NJOROGI KAMANDE**

**THOMAS WACHIRA MUGA**

**SAMUEL NGANGA NJUGUNA**

**SIMON CHEGE WAWERU.....  
APPLICANTS**

**VERSUS**

**REPUBLIC.....  
RESPONDENT**

**RULING**

This is an application to set aside proceedings of the trial court, on the day when the applicant was absent from the court; and the appellant is also seeking the transfer of the criminal case from the learned trial Magistrate, to another court, for hearing.

The application is dated 20th September 2002, and was filed in court on the same date. When the application came up for hearing before the Hon. Mbogholi J., on 26th November 2002, the court granted an interim stay of the proceedings. The said order for interim stay of the proceedings, was to remain in force until the rest of the application was heard and determined.

From the records, it does appear that the application has been pending since 26th November 2002, when the court granted the orders for interim stay.

When canvassing the application before me, Mr. Chesang advocate submitted that prayers 2 and 3 of the application were very much alive. He said that the Court had not yet made any decision on the said prayers.

Having perused the record, I am satisfied that the only part of the application which had been dealt with by the Hon. Mbogholi J. was prayer 1.

It is the applicant's case that the trial commenced and proceeded in his absence. The applicant says that he was sick, when the trial commenced, on 8th July 2002. He says that he sent his wife to court, to produce documents that would verify the fact that he was unwell. Even though his wife did present the documents to court, the applicant says that the learned trial magistrate went on with the trial.

In the light of the fact that he was not present in court during the proceedings which were conducted on 8th July 2002, the applicant contends that the said proceedings were unprocedural, and should be set aside.

It is his submission that a trial court is enjoined, by law, to ensure that no adverse evidence is tendered in court, in the absence of an accused person, unless his presence is dispensed with by the court. The rationale for this requirement was to ensure that an accused person's right to natural justice was safeguarded.

By virtue of the provisions of section 77 of the Constitution of Kenya, an accused person is supposed to be present at his trial

**“and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.”**

To my mind, the circumstances in which a trial court can proceed with a case, in the absence of the accused persons, are clear. The accused should either have consented to the trial going on in his absence, or otherwise, he should have been ordered removed by the trial court, if his conduct made it impracticable for the proceedings to continue, in his presence. None of these scenarios is applicable to this case.

In response to the foregoing submissions, learned State Counsel, Miss Nyamosi, said that the application was incompetent. It was her contention that the applicant had previously made a similar application before the learned trial Magistrate on 19th July 2002, and that therefore, the only recourse available to the applicant was an appeal. As far as the respondent was concerned, once the learned trial Magistrate ruled that the proceedings of 8th July 2002 were valid, the applicant could only appeal against that finding, if he was dissatisfied with it. Indeed, it was the respondent's view that the applicant could still apply for the witness to be recalled. For those reasons, this court was asked to strike out the application.

I have perused the record of the proceedings. Clearly, Mr. Chesang did make the following application on 19th July 2002;

**“I am humbly praying that the Warrant of Arrest be lifted and the bond be reinstated. The proceedings of 8.7.02 be set aside as the 1st Accused was not in court, so that the case can start afresh.”**

In answer to the applications, the prosecutor did not say anything about the setting aside of the proceedings of 8.7.02.

In his ruling, the learned trial Magistrate held, inter alia, as follows;

**“On request of setting aside the proceedings of 8.7.02 this court will adduce (sic) the said application on the next hearing date. The proceedings shall remain valid and the defence is at liberty to make an application to recall any of the witnesses at a later stage.”**

It is not clear to me what it meant by the phrase;

**“on request of setting aside the proceedings of 8.7.02 this court will adduce the said application on the next hearing date.”**

However, if I were to accept the respondent's submission, to the effect that the learned trial Magistrate had made a decision on the application, I cannot understand what else the court could be doing on the same issue on the next hearing date. To my mind if the issue was still to be dealt with at the next hearing date, in whichever manner, that would imply that the court did not yet make a final decision thereon.

But on the other hand, in the second part of the ruling (cited above), the learned trial magistrate held that the proceedings remained valid. For that reason, she told the applicant herein that he could later make an application to recall any of the witnesses, at a later stage. That “later stage” cannot be reached because

in the meantime, the High Court has now ordered that the proceedings be stayed, until this application is heard and determined. I must therefore make a decision on the application, so as to let the parties take the next steps in the matter, as they may be advised.

Although the decision by the learned trial magistrate is not that clear to me (as I have already discussed above), it is nonetheless a decision on the issue which has now been placed before me. Whether or not I am in agreement with the said decision is not in issue, at this stage. The trial court has told the applicant that the proceedings remain valid, and that he may request that witnesses be recalled. That appears to imply only one thing, that the learned trial Magistrate declined to set aside the proceedings of 8th July 2002. In the circumstances, it would not be open to the applicant to make a similar application to the High court. If the applicant is dissatisfied with the decision of the trial court, he may contemplate an appeal.

The other issue raised by the applicant was the transfer of the case from the trial Magistrate, so that it can be heard by another Magistrate.

To my mind, that limb of the application was given no more than a lukewarm treatment. A mere allegation that the trial magistrate was rude and harsh cannot be reason enough to order the transfer of the case. In any event, when the applicant's counsel was making submissions in that regard, all the material he made reference to was in relation to the 4th Accused, whilst the applicant was the 1st accused. In effect, the person about whom the applicant was speaking had not complained about the manner in which he was being treated. I do not therefore think that it is in the appellant's place to speak for his co-accused.

**In Shilenje V The Republic [1980]KLR 132.** Trevelyan J. cited with approval from the commentaries by Sir H.T. Prinsep and Sir John Woodroffe in “**Commentary and Notes**” (14th Edition) (1906) and “**Criminal Procedure in British India**” (1926), respectively.

**“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 a personal censure on such officer.”**

In this case, the applicant is faulting the trial magistrate for being harsh. He says that he has no faith in the trial Magistrate due to the way she had conducted the proceedings to date, coupled with;

**“her utterances in court and also the way she gave her ruling on 19th July 2002.”**

The applicant also says that he lacks faith in the trial prosecutor. Although this latter comment is not one of the factors that is supposed to be taken into account when deciding whether or not a case should be transferred from one court to another, the applicant brought it up. I cannot help thinking that he is trying to pile on anything which might help portray his position as difficult.

But in any event, his contentions do have a direct bearing on the conduct of the Judicial officer. That fact brings the case squarely within the realm of the issue discussed by Sir John Woodroffe, above. For that reason therefore, I must look for very strong grounds, from the applicant, before I could make an order for the transfer of the case.

When giving consideration to an application for the transfer of a case, the court will assess whether the applicant's apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them.

If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.

Section 81(1)(a) of the Criminal Procedure Code stipulates as follows:-

**“Whenever it is made to appear to the High Court –**

**(a) That a fair and impartial trial cannot be heard in any Criminal Court subordinate thereto; or**

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**It may order –**

**(i) that an offence be tried by a court not empowered under the preceding sections 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.”**

The applicant has not discharged the obligation placed on by the foregoing statutory provisions.

For the foregoing reasons, I strike out the application dated 20th September 2002. Accordingly, the orders staying the trial before the magistrate’s Court, are now set aside, paving way to the resumption of the trial.

Dated at Nairobi this 29th day of November 2004

**FRED A. OCHIENG**

**AG. JUDGE**

In the presence of Miss Nyamosi for State State

Chesang for Applicants

Anne Wambui – court clerk