



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL APPLICATION NO. 440 OF 2003**  
**(In the matter of an intended appeal)**

**BETWEEN**

**PATRICK NDEGWA WARUNGU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**REASONS FOR THE RULING**

On 21st August 2003 I dismissed the appellant's application. I reserved my reasons which I now give.

By a Notice of Motion, under section 81 of the Criminal Procedure Code, the applicant seeks orders that:

- 1) This application be heard urgently and on priority basis.
- 2) This Honourable Court be pleased to transfer the hearing of the criminal case number 1384 of 2002 at Kikuyu Law Courts from the presiding Magistrate Mrs Wakahora to any other court of competent jurisdiction. 3) Such other orders be made as this honourable Court may deem fit and just.

The application is based on the grounds that:

- (i) The learned trial magistrate is openly biased against the Applicant and she is not impartial while presiding over the hearing of the case.***
- (ii) The learned trial magistrate had for no any justifiable reason withdrawn the Applicant's bond and remanded him in custody for about 23 days.***
- (iii) The learned trial magistrate had heard two cases involving the Applicant previously and it is clear that she is not impartial.***
- (iv) The Applicant will not get a fair trial before the said Magistrate.***

The application is predicated upon the annexed affidavit of *Patrick Ndegwa Warungu* sworn on 6th May 2003.

For the applicant it was argued that the presiding magistrate (whom henceforth I shall refer to simply as the magistrate) is biased in that on 10th March 2002 the said magistrate suspended the accused's bond and remanded him in custody after one of the complainants made unfounded allegations that the applicant had threatened him.

That in respect of the said allegations the magistrate did not give the applicant a chance to deny or admit the allegations. He was then remanded in custody pending the matter being investigated by the police.

It was further argued for the applicant that after 23 days he was released in custody and since then he has never been charged with any criminal offence.

It was also argued for the applicant that the presiding magistrate had also rejected an application by one of the complainants to withdraw her complaint against the applicant. Moreover on 30th May 2003 when the matter came up for mention, the applicant made an application before the said magistrate to disqualify herself but she declined to do so. It was the applicant's case that in the foregoing circumstances he was justifiably apprehensive that the said magistrate will not give him a fair trial which eventually would lead to a miscarriage of justice, hence this application.

For the respondent it was argued that bond/bail of the applicant was cancelled because he was disrespectful. That P.W.3 (Stephen Kibue Njoroge) on taking the witness stand testified that he was threatened by the applicant. After Njoroge's sworn evidence the trial magistrate ordered an investigation and in the meantime withdrew the applicant's bond temporarily. Later when investigation was over she reinstated the applicant's bond. That cannot amount to bias, counsel submitted.

As regards the allegation that the complainant wanted to withdraw the case but the court declined it was argued for the respondent that any withdrawal under section 87 (a) requires the permission of the court. By refusing the same in the light of the record that discretion was properly exercised.

As to disqualification, it was argued that refusal of the trial magistrate to disqualify herself on the basis of the applicant's application cannot constitute bias at all. That the record reflects that the learned trial magistrate has fairly conducted the criminal case. The mere fact that certain orders sought by the applicant were not granted does not in itself constitute bias, counsel contended.

I have on my part carefully analysed the two rivaling arguments.

The principles upon which transfer may be granted has been crystallized in several authorities the leading one being *SHILENJE v THE REPUBLIC* [1980] KLR 132 which lays down the law that for the High Court to order a transfer there must be 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 whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

I derive much help from Sir H.T. Trinsep and Sir John Wrodroffes i.e. the former's commentary and Notes (14th Edition) (1906) and the later's *Criminal Procedure in British India* (1926).

The principles which come out clearly are that the High Court will always require some strong grounds for transferring a case from one judicial officer to another.

The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial.

Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than the mind of the accused.

On the evidence before me, in light of the provision of section 87 of the Criminal Procedure Code, I take the view that the withdrawal of the applicant's bond on allegations of the complainant does not constitute enough reason to transfer the case bearing in mind the fact that the magistrate after the result of the investigation reinstated the applicant's bond. That speaks well of the magistrate. It is a clear evidence of impartiality and proper administration of justice.

Equally on the evidence before me, I am not prepared to hold that the magistrate rejection of the complainant's application does constitute bias when seen against the background that previously (in the same court) the complainant had withdrawn the case involving the complainant and in less than a month the same parties were back in court seeking reinstatement of the charge and continuation of the case to its logical conclusion.

Whether one takes the two incidences individually or collectively there is no evidence to show that the magistrate is in any way partial or unfair.

Finally there is nothing before me to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

Those are the reasons why I dismissed the application.

DATED and DELIVERED at NAIROBI this 26th day of September 2003.

**N.R.O. OMBIJA**

**JUDGE**