



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL APPLICATION NO 248 OF 2002

JOYCE MUKUHI NJENGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is an application by way of Notice of Motion under Section 81(1) (a) and (e) and 81(1) (ii) of the Criminal procedure Code and 65(2) of the Constitution of Kenya seeking the transfer of Criminal Case No. 3489 of 2000 from the Senior Principal Magistrate's Court at Kibera to the Senior Principal Magistrate's Court, Makadara or to any other Criminal Court of equal jurisdiction for trial.

The grounds set out in the body of the application and upon which the said order is sought are that:

- (a) the trial magistrate has made some remarks and comments in open court which are prejudicial to a fair and impartial trial and,
- (b) in view of such comments, the applicant is apprehensive that she will not get a fair and impartial trial.

The applicant has sworn two affidavits, and one in reply to the one sworn by the Senior Principal Magistrate at Kibera, to justify the order sought.

I have also heard the submissions advanced by both counsel appearing in this matter.

The applicant is facing seven counts of stealing by agent C/S 283 of the Penal Code in Criminal Case No.3489 of 2000. She first appeared in Court on 20th April, 2000. To date the hearing of the case has not started.

I called for and examined the original court file. On not less than three occasions, warrants of Arrests were issued against the applicant because she was not present in court when the case was called out.

Be that as it may, 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 or her mind that there will not be a fair and impartial trial before the magistrate from whom the trial is sought to be transferred. (See Republic –v Hashimu (1968) E.A. 656)

It is the applicant's case that there is apparent animosity between her and the entire Judicial fraternity at the Kibera Law Courts. It is the duty of an applicant to present to the court, distinct incidents that display in unambiguous terms, the overt inclination on the part of the trial court that, a fair and impartial trial will not take place. I say so because, a fair and impartial trial is a constitutional right. At the same

time, it has to be appreciated that every judicial officer has taken the oath of office to administer justice, without fear or favour, affection or ill will. That oath is the conerstone of the independence of the judiciary. That is why, any allegation of unfairness, impartiality or bias must be taken very seriously and he or she who alleges must be prepared to prove the same.

Regretably, most of the allegations of that nature do not appear on record and they end up to be the word of the applicant against the court.

However, with the material before me I am able to say the following.

The trial having not started, whatever has transpired so far is clearly administrative. Part of the court's daily duties is case management where accused persons appear for mentions or hearing, and dates or time for the hearing are allocated. It is not uncommon for accused to be late or absent but, it is the duty of the presiding judicial officer to remind all the parties of their obligations as to court attendances and time keeping. That is the context within which I view the alleged comments made by the court in this instance.

With respect, I see nothing to suggest that the learned trial magistrate alluded to the nature of the charges against the applicant or the ultimate outcome thereof. The court is never in control of the evidence to be adduced by the prosecution until the same is presented; and even then, only the evidential value is relevant to the final decision.

I see no animosity, real or apparent that has been shown to suggest that a fair and impartial trial shall not be accorded the applicant herein.

In a further affidavit, the applicant has annexed some documents to show that the several complainants have received the money complained of .

I have elected to say nothing thereon as to do so may prejudice the impending proceedings.

In the end I find that, there is no merit in this application. The same is accordingly dismissed.

The original file shall be returned to the learned Senior Principal Magistrate latest by 20th June, 2002 when the applicant shall also appear for mention to take hearing dates.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of June, 2002.

A. MBOGHOLI MSAGHA

JUDGE