



DWM v Republic (Miscellaneous Criminal Application E075 of 2022) [2024] KEHC 1133 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION E075 OF 2022**

MW MUIGAI, J

FEBRUARY 5, 2024

**IN A MATTER OF SEXUAL OFFENCES CASE NO. S.O 17
OF 2018 AT CHIEF MAGISTRATES COURT AT MAVOKO**

AND

**IN A MATTER OF ARTICLE 165, 49 (1), (H), 50 (1) & (2), 25 (C)
AND ARTICLE 47 (1) OF THE CONSTITUTION OF KENYA**

AND

**PURSUANT TO THE PROVISIONS OF SECTION
200 AND 81 OF THE CRIMINAL PROCEDURE**

BETWEEN

DWM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The accused person/Applicant was charged with two counts. First count was incest; second count was committing indecent act with adult.
2. The information that led to the arraignment of the accused person before the Trial Court was as follows:

Count I: incest contrary to Section 20 (1) as read with Section 22 (1) of the *Sexual Offences Act* No 3 of 2006.

Particulars of the offence were as follows:



DWM: On the diverse dates between 1st June 2018 and 25th July,2018 in Athi River Sub-County within Machakos County, intentionally and unlawfully caused your genital organ (Penis) to penetrate into the female genital organ (vagina) of ZC who was to your knowledge your daughter.

Count II: committing an indecent act with an adult contrary to Section 11 (1) of the Sexual Offences Act No 3 of 2006.

Particulars of the offence were as follows:

DWM: On the diverse dates between 1st June 2018 and 25th July,2018 in Athi River Sub-County within Machakos County, intentionally touched the breasts and vagina of ZC with your penis against her will.

3. The charge was read to the accused on 3/8/2018 and the same explained to him and he pleaded not guilty to the two counts and a plea of Not Guilty was entered for the accused person/Applicant.
4. The prosecution opened its case and anchored its evidence on four [4] witnesses who gave their sworn testimonies on what transpired.

Evidence

5. PW1 CML told the Court that on 29/07/2018 at about 3.45 p.m. one of her children by the name MM told her that their father usually slept with Z PW1's first born. PW1 produced the Birth Certificate for PW2 in Court. She proceeded to the bedroom and asked ZC about the allegations. ZC informed her that her father would call her to the bedroom and have sexual intercourse with her. PW1 together with her children proceeded to the Police Station and made a report and obtained P3 Form. They then went to Nairobi Women Hospital and the child was examined for HIV & pregnancy. In the month of August, Z was confirmed to be pregnant and was due to deliver in April, 2019. Z gave birth on 4th January in Voi at her grandmother's at a nearby Dispensary, but unfortunately the baby was a stillbirth. DNA samples were taken for analysis from both the Appellant and the born child who was and Z. Z is a step daughter to the accused person. The daughter told that defilement had occurred around 3 times.
6. PW2 ZC told the Court that between 1st June 2018 and 25th July 2018 she was not going to school due to lack of school fees. One day she was alone in the house when the father called her in the bedroom and started questioning her and touched her breast asking her if he could suck her breast, she refused. He begun to remove her clothes and he was naked and covered himself in a blanket. He then defiled by inserting his penis in her private parts. He took 30 minutes and then gave her kshs.50/- and warned her against telling anyone. A week later, she went to fetch water and she confided in her sister Mwanatum after the incident occurred repeatedly, and she reported the same to their mother. She was taken to Nairobi Women Hospital where she was examined and was found to be pregnant. She later gave birth to a stillbirth in Voi. She was scared of telling her mother PW1 she thought she would beat her.
7. PW3 MM aged 14 years old at the time; The Trial Court conducted voir dire examination and found the witness competent to adduce evidence vide Sworn statement.
8. Pw3 told the Court that on 28/07/2018 at about 3.45 p.m. her mother had sent her and her sister ZC to fetch water. On their way back Z told her that their dad had been doing bad manners to her meaning defiling her. She had forbidden her not to inform their mother. Z looked so sad which made her to start crying. When they reached home their mother asked her why she was crying and she informed the mother what had befallen her sister. They then proceeded to the police station and reported the matter.



9. On 29/8/2019, the Appellant sought to have PW1 recalled for further cross-examination, which application was granted and PW1 was recalled on 7/11/2019
10. PW4 John Njuguna the Clinician working at Nairobi Women Hospital told the Court that he was sent to produce medical documents the GVRC Form on behalf of his former colleague Patrick Musyimi also an out-patient Clinician whom he had worked with for more than 1½ years. He stated that according to medical records, the complainant (Pw2) was brought at the facility on 29/07/2018 with a history of forced sexual intercourse by the father.
He produced the Form as exhibit in Court.
11. From the proceedings of the Trial Court, the accused on 14th November, 2022 made an application for the case to start afresh and Section 200 (3) of the CPC explained to the accused in Kiswahili and he insisted the case to start a fresh.
12. The Prosecutor objected to the Application and stated that minor testified in 2019 and the witnesses changed residences. They could not trace PW1 and the Investigation Officer was also transferred. The matter was delayed due to the Accused person's absence

The Trial Court Ruling

13. The Trial Court vide its Ruling dated 3rd January,2023 at Paragraph 29 of the said Ruling observed that Article 50 of the Constitution of Kenya connotes that a trial should commence and be concluded without un-reasonable delay. Under Article 159 (2) (h) of the Constitution, the Court shall be guided by principles which include that justice shall not be delayed. Starting a trial de novo in the present case obviously constitutes a delay in finalizing this case. It's the duty of this Court to uphold the above provisions of the Constitution and therefore this Court was unable to accede the request by the accused.

Notice of Motion

14. The Applicant/Accused person vide a Notice of Motion filed under Certificate of Urgency dated 25th October,2022 and filed in court on 3rd November,2022, wherein he sought the following Orders that:
 1. This application be certified as urgent and the same be heard and determined on priority basis and in the interest of justice.
 2. The Court to issue an order of stay of proceedings in the matter at Chief Magistrates Court under Criminal Case No SO 17 of 2018 pending hearing and determination of this Miscellaneous Application.
 3. The Court to issue an order/relief by setting aside the decision of the learned Trial Magistrate to cancel the Applicant's bond and bail terms and reinstate the Applicant's bond and bail terms.
 4. The Court to order for change of jurisdiction pursuant to the provisions of Section 81 of the Criminal Procedure Code since the Applicant is apprehensive that he might not get Fair Trial within the current jurisdiction; that is Mavoko Law Courts.
 5. The court to guarantee and safeguard the Applicant's constitutional rights to bond and bail as enshrined in Article 49 (1), (h) of the Constitution and fair trial as envisioned in Article 25 (c) and 50 (2) of the Constitution of Kenya 2010.
 6. This court to issue any other appropriate order, declaration or relief as it may deem fit to uphold and safeguard the Applicant's basic fundamental rights and freedoms as stipulated in the Constitution of Kenya 2010.



Supporting Affidavit

15. The application was supported by an affidavit dated 19th October,2022 and filed in court on 3rd November,2022, sworn by DWM, the Applicant herein wherein he deposed that he was arrested and charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of Sexual Offences Act No 3 of 2006 in the year 2018 at the Chief Magistrates Court at Mavoko.
16. Deposing that he was granted a bond of Kshs 500,000 and he immediately secured his release from custody after placing a surety in form of land title deed (annexed and marked copy of the release order).
17. He lamented that he had never absconded or failed to attend court ever since he secured his release from remand prison in the year 2018 and he has dutifully and faithfully attended all the courts proceedings whenever required to attend and notified court in case of any development.
18. Lamenting further that his last court attendance was on 22nd February,2020 and he was given another date for April 2020 however the said date bounced due to Covid 19 lockdown. And further that on 13th March 2020 all courts country wide were closed due to the outbreak of Covid 19 pandemic.
19. Deposing that his health also started to deteriorate gradually and in the year 2022 it became worse as he has a pre-existing health condition including HIV AIDS, High blood Pressure and a respiratory condition and also developed ulcers which has affected his dietary standards.
20. He deponed that due to poor health, he has spent the better part of the year 2022 while in and out of hospital corridors attending to his health. (annexed and marked copies of medical report).
21. That on 13th September,2022 he went to Mavoko courts to follow up on his cases and was informed that there was a warrant of arrest issued against him and he was told to wait for his court file to be taken before the Trial Magistrate in order for the said warrant to be lifted, however he was locked up in police cells instead.
22. He opined that upon being presented before the Trial Magistrate, he explained to the Trial Magistrate his predicament and informed him that he has been following up on his case and even on the material day he had visited the Court's Registry purposely to make a follow up, however the Trial Magistrate cancelled his bond terms and ordered that he be remanded in custody.
23. Deposing that the decision by the Trial Magistrate to remand him has caused great anxiety and psychological torture and the same was not done in good faith as he explained himself on the personal efforts that he had continually made a follow up on his case including writing formal inquiry on his case status in the year 2021 but it all fell on deaf ear.
24. He deponed further that he has personally made every effort to reach out to the Trial Court so as to settle this issue and have the bond terms reinstated to no avail. (Annexed and marked copies of his written applications seeking the reinstatement of his bond terms and the previous applications inquiring on the case progress prior to his bond cancellation).
25. Further that he is married man with school going children some who are in high school and being the sole bread winner, his children stand to suffer irreparably due to his indefinite and sudden incarceration. Opining that he stands to be greatly prejudiced by the decision of the learned trial Magistrate and prayed that the said decision to be over turned/quashed or vacated in the interest of justice.
26. The matter was canvassed by written submissions.



Submissions

Applicant's submissions

27. The Applicant in his submissions dated 27th October,2023 and in court on 1st November,2023, wherein counsel for the Applicant raised the following issues for determination:
 1. Whether the Applicant's Bond terms deserves to be reinstated.
 2. Whether there is the existence of exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to reinstate the Applicant's Bond terms.
 3. Whether the Applicant's basic fundamental rights as an accused person and as enshrined in Article 25 (c) of the *Constitution* and as provided for in Section 200 (3) of the Criminal Procedure Code has been violated.
28. On the 1st and 2nd issue, counsel quoted Article 49 (1) (h) of the *Constitution* and submitted that every accused person has the right to be granted reasonable Bond terms and bail terms upon his arrest and subsequent arraignment before court of law. Averring that the right to bond and bail is one of the basic fundamental rights and freedom which the *Constitution* guarantees an arrested or accused person. Contending that an accused person's fundamental right to bond and bail should not be interfered with unless there are compelling reasons to do so. To buttress his position counsel placed reliance on the case of *Simon Ngige Njoroge v Republic* [2017] eKLR.
29. Submitting that the law on granting of bail or bond pending trial is not in doubt as it involves exercise of judicial discretion. Contending that the trial court has wide discretion to grant bail or bond pending the hearing of the case. The trial court also has the discretion to deny or suspend bond or bail depending on the prevailing circumstances. It was opined that that discretion must be exercised judiciously.
30. Counsel for the Applicant invited the court look into the pertinent issues raised by the Applicant in his own affidavit and as supported by annexed documents therein. Opining that since the release from remand prison on the 20th day of august 2018 the Applicant has dutifully attended the court proceedings until the outbreak of Covid 19 pandemic which disrupted the normal programs globally.
31. It was the case for the Applicant that after the said outbreak the open court proceedings were discontinued and the court operations were closed indefinitely. Later on, the courts adopted the virtual/online proceedings.
32. Counsel contended that the Applicant then relocated upcountry since life in the city became unbearable as he lost his source of income due to Covid 19 pandemic. Opining that the Applicant's health also deteriorated and he was left with only one option that of making follow ups through the contact that he got from Mavoko Court registry as he was now far away while at the same time he was ailing.
33. It was submitted that the failure by the Applicant to attend court as at the material time or date was due to unavoidable circumstances coupled with confusion and communication breakdown. Arguing that the Applicant did all that was humanly possible as at that particular time to follow up on the status of the case to no avail.
34. Counsel submitted on behalf of the Applicant that the said applicant has been battling depression, ulcers and chest/respiratory condition over the last 3 years and his health has gradually deteriorated. All these require regular management and high level of specialized medical attention as well as a balanced



- diet which may be lacking in our prisons/police facilities countrywide therefore, the Applicant stands to suffer irreparable damage being sent back to custody again.
35. On the 3rd issue, reliance was placed under Section 200 (3) of the [Criminal Procedure Code](#) and submitted that the matter before the Chief Magistrates Court at Mavoko is currently being handled by a different Trial Magistrate. Contending that the new Trial Magistrate took over the case in late 2021 and ruled that the matter shall proceed from where it stopped.
 36. Contending that the Applicant strongly feels that the matter before the Chief Magistrate Court at Mavoko should start denovo is because during the initial hearing of the case, the Applicant had requested to be given time to source for legal representation, however this request was turned down by the then Magistrate.
 37. Averring that the Applicant was then forced to proceed while completely unprepared. This resulted in the Applicant failing to exhaustively cross-examine the first three witnesses. It was the contention of the Applicant that in the three instances whereby the matter proceeded to full hearing before the trial court, the Applicants sentiments were never captured nor considered. That it is clear from the court records that the Applicant was never asked whether or not he was ready to proceed with the hearing of the case. Instead the Applicant was always on receiving end and being ambushed.
 38. Reliance was placed on Articles 50 (2) (c), 47 (1), 159 (2) (a) of the [Constitution](#) of Kenya 2010., and submitted that the decisions arrived in a court of law should be well guided as profoundly enunciated in the various provisions of the [Criminal Procedure Code](#), the [Constitution](#) and other statutes. Contending that the charges that the Applicant is facing are very grievous in nature upon conviction and it is not in vain for the matter before Chief Magistrates Court to re-start for fairness sake.
 39. It was submitted that the applications that the Applicant filed at the Chief Magistrate Court Mavoko were never heard and instead more emphasis has been put on having the Applicant to proceed with the trial to conclusion in total disregard of the fact that the said matter is yet to be dispensed with by the High Court.
 40. Arguing that where exist reasonable apprehension that the accused person might not get fair trial in a given jurisdiction, this would automatically necessitate a change of jurisdiction. To buttress the above point, reliance was placed on the case of *Mohammed Khamisi Mazrui & others v Republic* HCCR Misc Application No 81 of 1985, and submitted that the it's not just the question of proceeding with the trial at the current jurisdiction for the sake of a delayed justice but rather the said justice must be seen to have been done in both ways.
 41. It was prayed that the orders sought herein be granted in the interest of justice.

Respondent's submissions

42. The Respondent in its Submissions dated and filed in court on 19th September, 2023, wherein state counsel relied on Article 49 (1) of the [Constitution](#) and Sections 362 and 364 (1) (b) of the [Criminal Procedure Code](#) and submitted that on 1st May, 2021 the Government of Kenya lifted the travel restrictions into and out of five counties being Nairobi, Kajiado, Machakos, Kiambu and Nakuru. Contending that the Applicant had from 1st May, 2021 to go to Mavoko Law Courts and check the status of the case.
43. It was submitted by the State Counsel that the Applicant never bothered to check on his case, until 14th September, 2022 his bond was cancelled. The Applicant never gave credible reasons why he failed to attend court appropriately.



44. On change of venue, reliance was made to Section 81 of the *Criminal Procedure Code* and the case of *Joseph Korir Alias Chonjo v Republic* [2018] eKLR that Relied on *Kamande & 3 others v Republic* [2014] eKLR, submitting that the Applicant has not disclosed any justification for change of venue in his Application. Contending that mere allegations without substantiation, will not suffice in this case. To support this averment reliance was placed on the case of *John Brown Shilenje v Republic* Cr. Appeal No 180 of 1980.
45. On de novo application, state counsel relied on Section 200 (3) of the *Criminal Procedure Code* and submitted that the right to have a matter start de novo is not absolute but depends on the reasons advanced by the accused person. Arguing that the applicant is hell bent on delaying this matter. Further reliance was on Article 50 (2) of the *Constitution* and the case of *Ephrain Wanjohi Irungu & 7 others v Republic* Nrb. HCCR. Rev. No 6 of 2013, to buttress the point on starting a trial *de novo*.
46. Counsel prayed that this Honorable court dismisses this miscellaneous Application in its entirety as the trial court was right in cancelling the Applicant's bond.

Determination/Analysis

47. I have considered the Application, the Supporting Affidavit, the trial court proceedings and the submissions of parties.
48. The issues for determination are:
 - a. Whether the Applicant is entitled to reinstatement bond terms.
 - b. Whether matter is to be subjected to de novo proceedings.
 - c. Whether it is viable to change the jurisdiction and/or venue of the lower court.
49. The Court jurisdiction on revision is donated by Section 362 as read with Section 364 of the *Criminal Procedure Code*.
50. Section 362 of the *Criminal Procedure Code* provides as follows: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.
51. Section 364 empowers the court to exercise the following powers:
 - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.



- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned”.

On whether the Applicant is entitled to reinstatement bond terms

52. From the Trial Court File, I note the Applicant was granted bond/bail of Kshs 500,000 with one surety. He failed to attend court on several occasions and a Warrant of arrest was issued on 18/2/2020. On 14/9/2022 the accused was brought to court vide a warrant of arrest on the 18.2/2021 and his bond terms cancelled by the Trial Court having failed to attend court from 3/12/2020 to 14/9/2022 when he was arrested.
53. In his Application and Affidavit, the Applicant states that he was prevented by factors such as the lockdown due to Covid-19 pandemic and his health status deteriorated.
54. This Court takes judicial notice of the Covid 19 Pandemic nation- wide and necessitated the courts operations to cease 2019 – 2020 and Courts during that period resumed online proceedings only. It is also true that the said pandemic was punctuated by lockdowns and curfews.
55. However, after the Court perused the Trial Court file, the Court file disclosed the Accused person/ applicant had failed to attend Court twice and warrants were issued and later lifted by the Trial Court; on 14/09/2018 and 25/01/2019 before Covid 19 pandemic lockdown and curfews set in.
56. I have considered the circumstances that the Applicant states prevented him from attending court leading to his arrest and subsequent cancellation of his bail. I have also considered the response by the prosecutions’ counsel. Further, I have read the proceedings and Ruling by the learned Trial Magistrate. In considering the reasoning in cancelling the Applicant’s bond, I find no legal basis to interfere with the finding. The Trial Magistrate’s finding and order were well within the Trial Court’s discretion and cannot be said to have been incorrect, irregular, illegal and or tainted with impropriety.
57. I also note that for the entire period the Applicant was not in attendance the trial court sat and issued directions. In my view Covid 19 pandemic cannot be blamed for the Applicant’s failure to attend court for a period of almost two (2) years. The Trial Court record shows that the Applicant was arrested by police when he went to the police station and was brought to court under warrant of arrest on 14/09/2022 and that he came to court to check his matter as he pleaded in the pleadings filed in this Court. Thirdly, the Court record confirms that the surety died and was not replaced so if the Accused person did not go to the Police Station it would have been difficult to locate and/or pursue him.
58. However, I am also to take into consideration the Applicant’s health. He deposed in his Affidavit that his health started to deteriorate gradually in the year 2022 and became worse as he has a pre- existing health condition including HIV AIDS, high blood pressure and respiratory condition. He annexed his medical documents though not certified, on the medical condition and/or records, these issues were not raised before the Trial Court. Secondly, the documents did not disclose the ailments pleaded in the pleadings, but a different ailments chest pains, pneumonia and prostrate. It is not clear if the Applicant was sick and if so when and where was he suffering from as his evidence is contradictory on medical ailments.
59. Whether matter a subjected to *de novo* proceedings
60. Under Section 200 of the [Criminal Procedure Code](#) it is provided that:



- (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
 - (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
 - (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.
 - (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
61. In *Abdi Adan Mohamed v Republic* [2017] eKLR, the Court of Appeal opined that Section 200 entrenches the accused person’s rights to a fair trial as provided for today under Article 50(1) of the *Constitution*, and it applies to the High Court also in addition to Magistrates courts.
62. In the Indian Supreme Court case of *Ajay Kumar Ghoshal etc. v State of Bihar & ANR*. [Criminal Appeal Nos. 119-122 of 2017, it was held thus,
- “A ‘*de novo* trial’ or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice.”
63. Further, in in *Mohd. Hussain @ Julfikar Ali v State (Govt. of NCT of Delhi)* (2012) 9 SCC 408, it was held,
- “A *de novo* trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice.”
64. From the Trial Court proceedings, PW1 was recalled for further cross-examination by the Applicant which application was granted on 28/08/2019 and PW1 was further cross-examined on 11/09/2019.
65. The Applicant on 14/11/2022 made an oral application for the case to start afresh and Section 200 (3) *CPC* was explained to him in Kiswahili when the new Trial Magistrate took over the matter. The prosecutor’s counsel opposed the said Application stating that the minor testified in the year 2019 and they changed residence hence the Pw1’s mother could not be traced. The prosecutor stated that he did not know the whereabouts of witnesses who testified. The Investigating Officer was also transferred;



he has lost trace that the delay of this matter was/is because of the accused's absence from court. He absconded trial from the year 2020; according to the State Counsel and this application was a delaying tactic as the accused was aware of non-availability of witnesses.

66. The Trial Court vide its ruling dated 3rd January, 2023 observed that Article 50 of the Constitution of Kenya in granting fair trial also connotes that a trial should commence and be concluded without unreasonable delay. Under Article 159 (2) (h) of the Constitution the Court shall be guided by principles which include that justice shall not be delayed. Starting a trial de novo in the present case obviously constitutes a delay in finalizing this case. It's the duty of this court to uphold the above provisions of the Constitution and therefore court was unable to accede the request by the accused unless cogent and tangible grounds are made out.
67. I cannot say more than what the Trial Magistrate had ruled on. I note that during the hearing of the three witnesses, the accused/Applicant fully participated and even cross-examined the prosecution witnesses. Consequently, even if the matter is being heard by succeeding Magistrate, and the accused in exercise of his right as the one before this court granted under Section 200 (3) CPC, that right must be exercised with utmost caution. That right must not be exercised audaciously and/or flagrantly it must be within the precincts of law; it must not be a delaying tactic or craft to delay justice. The court has a very scarce time to entertain processes to impede the wheel of justice.
68. The upshot of the forgoing is that I find no reason why the matter should be subjected to de novo proceedings as critical part of the hearing had been conducted and the Applicant on the frolic of his did not attend court proceedings occasioning the delay. He has not approached this court with clean hands.

Whether it is viable to change the jurisdiction and/or venue of the Trial Court hearing the matter.

69. The law as regards the powers of the High Court to change venue of a matter is found in Section 81 of the Criminal Procedure which provides as follows:

“ 81

- (1) Whenever it is made to appear to the High Court—
 - a. that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
 - b. that some question of law of unusual difficulty is likely to arise; or
 - c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
 - d. that an order under this section will tend to the general convenience of the parties or witnesses; or
 - e. that such an order is expedient for the ends of justice or is required by any provision of this Code, 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.”

70. In Clarence Darrow (American Lawyer, Speaker and Writer, 1857 - 1938 as he then was) stated that:

“justice has nothing to do with what goes on in a courtroom, justice is what comes out of a courtroom.”

71. The principles upon which change of venue may be granted have been crystalized in the leading case of *Shelenje v Republic* (1980) KLR 132 which lays down the principle that the for the High Court to transfer a matter from one venue to another,

“there should be reasonable apprehension in the applicant’s or any right thinking person’s mind that a fair and impartial trial might not be concluded before the Magistrate whether one takes the incidences individually or collectively. At the same time, there ought to be something before court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.”

72. In *Maina Kinyatti v Republic* [1984] eKLR the Court of Appeal considered the test under Section 81 of the *CPC* to satisfy the following criteria.

“Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.”

73. In the instant case, the Applicant took the view the Trial Magistrate totally refused to listen to his humble pleadings and was/ is apprehensive that he might not get fair chance to defend himself if the status quo remains and that is why he requested that his case be transferred to a different Trial Magistrate or to a different jurisdiction.

74. A Court of Law is bound to apply law on facts presented in Court and rights of parties in the justice process protected. The Applicant in this case has not demonstrated that the Trial Court has infringed on any of his legal rights that would hinder fair trial. What needs to be asked here is what is the Applicant apprehensive of? Is his apprehension reasonable?, I have/had the liberty to go through the Trial Court proceedings and what I can find the Applicant apprehensive of the cancellation of his bond terms by the Trial Magistrate, but the Court record confirms the Applicant had warrants issued twice before and were lifted. The last warrant of arrest was effected and the Applicant brought to Court by Police and not as he pleaded that the Applicant voluntarily came to Court/Registry to check his matter.

75. In my view the reasons advanced herein by the Applicant for change of venue lacks merit and as such not reasonable and does not infer reasonableness in the mind of a reasonable man. Secondly, the Trial has been conducted by different Magistrates and there is no likelihood that all Magistrates had any grudge interest or conflict with the Applicant.



Disposition

1. Based on the foregoing, the Applicant request for reinstatement of bond is dismissed due to his conduct as shown in the Trial Record and the following orders shall abide.
2. The matter in the Trial Court to proceed from where it had reached and the application to start denovo is not practical as witnesses cannot be traced and will delay the hearing of the matter.
3. The Criminal File Number 17 of 2018 be and is hereby returned to Hon. R. Gitau SRM at Mavoko or in the same Court it was before this application was made to have the rest of witnesses lined up to testify in the matter
4. The accused is entitled to the fundamental rights entrenched in terms of Article 49 and 50 on fair pre-trial and trial rights.
5. The attendance of all parties before the Chief Magistrate is indispensable.
6. The instant application is dismissed.

It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of:

No Appearance -for the Applicant

Mr. Mwongera - for the Respondent

Patrick/geoffrey - Court Assistant(s)

