



**Otieno v Republic (Miscellaneous Criminal Application  
42 of 2023) [2024] KEHC 1475 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
MISCELLANEOUS CRIMINAL APPLICATION 42 OF 2023**

**DR KAVEDZA, J  
FEBRUARY 20, 2024**

**BETWEEN**

**GEORGE ERIC OTIENO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant is an accused person before the trial court, where he is facing the charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He has moved this court by a Notice of Motion dated November 4, 2021 under section 362 and section 364 of the *Criminal Procedure Code* seeking the transfer of the case from the trial court to another impartial magistrate for the matter to start de novo.
2. The applicant averred that the case has been rushed to defence stage without the cross-examination of three (3) prosecution witnesses including the complainant. Further, that the applicant prayed for an order recalling of the said witnesses to be cross examined but the court declined. The applicant has also urged that the trial court issued many warrants of arrest despite not absconding. He further avers that the outbursts of the trial magistrate are intimidating, harassing and contrary to his right to a fair trial. The applicant is apprehensive that there is hostility from the trial court and thus the instant application.
3. In response, the respondent filed grounds of opposition dated May 31, 2023. It was urged that the application is untenable, not factual and lacks merit. Further, that the prosecution and the trial court were very accommodating to the applicant by lifting warrants whenever he attended court and the applicant took the patience of the court for granted hence the warrants of arrest were issued. Additionally, that the conduct of the applicant and his counsel is to blame for the delayed prosecution of this matter which was filed in 2019.



4. I have considered the application, the response and the written submissions filed by the parties. The issue for determination is whether the applicant is entitled to the orders sought.

### **Analysis and determination**

5. Although the applicant did not invoke the provisions of section 81 of the *Criminal Procedure Code* which empowers the High Court to transfer a criminal case from one subordinate court to another or to itself. I will deem the application as properly filed in the interests of justice and in order to deal with the applicant's complaints. Section 81 of the *Criminal Procedure Code states* as follows;

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.
6. The Court of Appeal in *Maina Kinyatti v Republic* [1984] eKLR considered the test to be applied in such a case and held as follows-

“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.”

7. The Court of Appeal further observed that it is the reasonableness of the accused person's apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case. Mere allegations will not suffice and the accused person must demonstrate reasonable grounds for the allegations.
8. The applicant raised the issue that the trial magistrate is biased and partial with outbursts towards him and his counsel. A claim of bias or prejudice against a judicial officer is a grave juridical issue as it imputes a serious charge on the conduct of the officer. The applicant bears the duty of establishing the facts upon which the inference is to be drawn and it is not enough to just make bare allegations (See. *Kaplana H. Rawal v Judicial Service Commission & 2 others* [2016] eKLR).



9. I have perused the record of the trial court and I have not found anything which suggests bias on the part of the trial magistrate. The applicant has only alleged that the trial magistrate is biased with outbursts towards him and his counsel but has not proved the same. In the circumstance, I do find that there has been no proof of bias.
10. The other issue that concerns this court is whether the trial court rejected the accused person's counsel request to recall the said three (3) witnesses and as a result, prejudiced the applicant's right to a fair trial. I have gone through the record of the trial court and the evidence of the prosecution witnesses. The record reveals that on December 21, 2020, the accused's counsel informed the court that she wished to recall two witnesses who had testified in her absence. The court however informed counsel that only one witness, PW 2, the government chemist had testified in her absence and that she could be recalled for a virtual cross-examination. It is therefore not correct to argue that the trial court rejected and dismissed the applicant's request to recall witnesses. I therefore find that the aspersions by the applicant that he will not get a fair trial are unsubstantiated.
11. Having regard to the provisions I have set out and the facts I have outlined, no case has been made for transfer of the case from the trial court to another court of competent jurisdiction and thus the application dated 4/11/2021 fails. The deputy registrar is directed to send back the trial court file and a copy of this ruling to the honourable magistrate to complete the criminal trial.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Ms. Ntabo for the Respondent

Applicant absent

No appearance by Ms. Odembo for the Applicant

Nelson Court Assistant

