



Republic v Akuma (Criminal Miscellaneous Application E035 of 2024) [2024] KEHC 9505 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL MISCELLANEOUS APPLICATION E035 OF 2024**

**TA ODERA, J
JULY 11, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

LABAN ATANDI AKUMA RESPONDENT

RULING

1. Vide a letter dated 26.2.24, Laban Atandi Akuma, hereinafter referred to as the complainant herein complaining of his frustrations at Ogembo Chief Magistrate’s Court.
2. He said he is the complainant in Ogembo criminal case no. E030 of 2023 which took off in early 2023 but has stagnated. He said that neither him nor his witnesses have testified in the case as they have not been called to testify.
3. Also that in November 2023 he noticed the court prosecutor Mr. Ketoo conducting prosecution of his case without the police file and without informing him of the court dates and he also noted disparity of dates in the court file and the police file and the Judiciary Information Kiosk. He thereafter sought recusal of Hon. Callistus Sindani (PM) who is the trial magistrate, his court assistant and the court prosecutor vide an application dated 14.12.23 but no ruling has been delivered on the same to date and it is only the prosecutor who withdrew from the matter.
4. That on 19.1.24 his advocate Mr. Mochiemo Gichana told the court that he had consulted with him to withdraw the application for recusal which was not true.
5. He said he reported his complaint to the head of station Ogembo court Hon. Biwott vide a letter dated 22.1.2024 expressing his intention of lodging complaints against the trial court and his counsel to the Judicial Service Commission and Law Society of Kenya respectively. He later received reply dated 26.1.2024 from the said head of station in which he advised ODPP to withdraw the matter from Ogembo court and file it afresh in Kisii Court.



6. He thereafter wrote to ODPP Ogembo seeking a mention date in the matter in vain, the matter had a hearing date on 1.5.24 which is a public holiday.
7. He accused the Trial magistrate of refusing to recuse himself from the matter despite several requests by him to do so as he seems to be having a vested interest in the matter.
8. Vide a letter dated 7.2.20 he wrote to ODPP Kisii Seeking their guidance in the matter but the same was not responded to.
9. Vide his letter dated 13.2.2024, he complained to the Judicial Service Commission against Hon. Sindani and he was advised to write to this court. seeking orders of transfer of the suit from Ogembo Court to Kisii Chief Magistrate's court for hearing and determination.
10. Prosecution filed grounds of opposition dated in which they raised the grounds that:
 - a. The application is frivolous vexatious and an abuse of the process of the court.
 - b. the application is fatally defective and bad in law.
 - c. The applicant is forum shopping for seeking a transfer to Kisii Law Courts.
 - d. The advanced grounds do not meet the threshold for transfer of the case.
 - e. the application is brought in bad faith and is not in the interest of justice.
11. Learned prosecutor submitted that the law on transfer of criminal cases is premised on Section 81 of the [Penal Code](#) which provides that:

Section 81.

Power of High Court to change venue

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.



12. in the cited case of *John Brown Shilenje v Republic* [1980] eKLR where it was held:

“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.”
13. It was further submitted that in the case of *Maina Kinyatti v Republic* (1984) eKLR the court 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.”
14. This court called for Ogembo Criminal case no. E030 of 2023 I have carefully perused the said file and I noted that plea was taken in that case on 5.1.23 and prosecution sought a date for consolidation of the matter with another. The matter was listed for mention for consolidation on 17.1.23.
15. Come 17.1.23, Mr. Begi advocate appeared for the accused and the matter was consolidated with Cr E006 of 2023. The matter was listed for hearing on 29.3.23 and mention on 1.2.23. On 1.2.23 accused appeared in court and a further mention was fixed for 15.2.23 and the hearing date was confirmed. Come 15.2.23, accused did not attend Court and warrant of arrest was issued against accused no. 1. A mention date of 1.3.23 was given. on 21.2.23 Elijah Makori stood surety for Accused 3 and Richard Onyanha stood surety for Accused 2.
16. On 29.3.23 the matter came up for hearing and prosecution had one witness. Mr. Begi for accused persons sought an adjournment as statements had not been supplied to him. The application was allowed and the case was adjourned to 15.6.23.
16. On 15.6.23 the matter was for hearing and prosecution were ready with 4 witnesses. Prosecution did not object to the application and the same was allowed and matter was adjourned to 19.9.23.
17. On 19.9.23 the matters came up for 3rd hearing and Mr. T. Okemwa informed the court that he was holding brief for Mr. Gichana for complainant and they had agreed to take out the matter as Mr. Begi was indisposed. The application was allowed and the matter was fixed for 4th hearing on 13.11.23. I have perused criminal case no. E116 of 2024 consolidated with E521 of 2024 Ogembo and I note that the offence is threatening to kill contrary to Section 223(1) of the penal code and that accused are Elijah Makori and alias Chaplin and Samson Makori Mbaka and complaint is Laban Atandi Akuma the complainant herein. One witness who is the complainant testified in that case on 16.5.24. there is co complaint by the applicant about the said case.
18. There was no hearing on 13.11.23 and there is no explanation given for the same but the case was mentioned on 14.11.23 before Hon. Moguche in the presence of 3rd accused while accused no. 1 and 2 were absent. Warrants of arrest were issued against the accused hearing was fixed for 18.12.23 and mention on 29.11.23. On 29.11.23 accused were absent again and the warrants of arrest were extended to 22.12.23. The case was mentioned again on 13.12.23. on 19.12.23 accused were brought to court under warrant of arrest and the prosecutor informed the court that matter had a date for 18.12.23. The warrants of arrest were lifted and the prosecutor informed the court that complainant had filed application dated 22.12.23 which he said he was not comfortable with. A further mention was fixed for 22.11.23. Come that day counsel for complainant was nowhere to be seen and the matter was fixed for mention on 19.1 .24.



19. On 19.1.24, the matter came up for mention and Mr. Michiemo Gichana for the complainant informed the court that they wished to withdraw the application dated 22.12.23 and sought an adjournment as his colleague lost a wife. The learned Trial Magistrate ruled on the application for adjournment but was silent on the application for recusal. The matter was fixed for hearing on 1.5.24. On 1.2.24 the Trial magistrate indicated that he had seen a letter written to court and noted that 1.5.24 was a holiday and proceeded to change the hearing dated to 3.5.24 and ordered that accuse and ODPP be informed.
20. I have carefully considered the application the response and the submissions and the only issue arising for determination is whether a fair and impartial trial of the case in the lower court can be held at Ogembo Chief Magistrate's Court and especially before Hon C. Sindani (Principal Magistrate) in the eye of a reasonable man.
21. There was indeed an application dated 14.12.23 for recusal of Hon. Sindani filed by the complainant herein and based on the grounds he has raised in his letter which I have mentioned hereinabove. The said application was not heard as it was intended to be withdrawn at the instance of counsel for the complainant. The trial magistrate did not rule on it but ruled on the adjournment only for the reason which I believe was oversight. The complaint has also raised a complaint against the advocate with the Law Society of Kenya. He also had an issue with the prosecutor who has since recused himself from the said matter.
22. This court has supervisory powers over Ogembo Law Courts and thus it has the jurisdiction to deal with the matter herein. The delay in the matter has been clearly caused by both parties as on the first hearing the accused had not been supplied with statements and could not proceed in the circumstances as rightly stated by their counsel. On the second and 3rd hearings defence counsel was said to be unwell. On the 4th hearing it appears that the Trial court was not sitting and the matter was mentioned on the following day and hence the many warrants of arrests emanating from the proceedings 14.11. 23. It is not clear from the record whether accused had notice of the mention for 14.11.23 since the last date was on 13.11.23. The issues raised about enforcement of the warrant of arrest and recording of dates in the police file are between police and prosecution and the trial court had no business getting into the same as I doubt whether he had access to the police records. This court cannot comment on the records in the police file as it does not have administrative jurisdiction over the Office of Director of Public Prosecutions (ODPP) which is independent as per Article 157 of the *Constitution*. Any complaint against any Counsel working in the office of DPP ought to be directed to the officer in charge of ODPP in the County, then Regional in charge ODPP and then it can be escalated to the DPP himself. No real bias has been established by the complainant herein against the conduct of Hon Sindani in this matter.
23. However, it has emerged that Hon. Sindani is in conduct of two cases involving the same accused, complainants and the surety for Accused 1 herein i.e. the instant case and CR E116 of 2024. The instant is still fresh as no witness has testified. I have perused Ogembo Criminal case no. E116 of 2024 has proceeded and Hon. Biwott Chief Magistrate indicated in his letter dated 26.1.24 that he is seized of a civil matter between the parties herein arising from the same cause of action as the said E030 of 2023. Even without looking at the complaint raised by the complainant herein, it would be fair and just to all the parties in Ogembo CR. E 030 of 2023 that another judicial officer hears Criminal case no. E030 of 2023 for justice to be seen to be done in view of the said CR 116 of 2024.
24. I proceed to order transfer of Ogembo file to the Chief Magistrate's Court at Kisii for hearing and determination. Mention on 24.7.24 before Hon. Stella Abuya Chief Magistrate for re-allocation.

T.A ODERA



JUDGE

11. 7.24

Delivered via team's platform in the presence of:

Koima for Respondent

Court Assistant: Oigo

Applicant: Absent

