REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICATION E103 OF 2021

ALEX OPONDO OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant ***ALEX OPONDO OTIENO***, has filed this application dated 31.3.2021 under certificate of urgency. The application is brought under Articles 2(5), 25(c), 50(1)(7), (9) and 165 of the constitution. The application seeks upto 7 orders. From the submissions of the parties, however, only prayers 4 and 6 remain live. The said prayers are:-

*i) **THAT** this Honourable court be pleased to examine and revise the orders issued by **Hon. L. O. Onyina, Chief Magistrate, JKIA** court on 15.2.2021.*

*ii) **THAT** this Honourable court be pleased to transfer Nairobi JKIA Chief Magistrate's court case No. 144 of 2019, Republic Versus Alex Opondo Otieno from the Chief Magistrate's court, JKIA to any other suitable Magistrate's court of competent Jurisdiction for hearing and determination of the Criminal case.*

The prosecution side has opposed this application and urged that it be dismissed. This application has been canvassed by way written submissions.

The applicant has given a long chronology of the events leading to this application in the submissions filed. amongst these are as follows:-

i) THAT on 15.11.2019, on a date when counsel for accused did not turn up for hearing on grounds of sickness, the court declined to grant the plea for a mention date, and instead fixed a hearing date, thereby denying the defence the opportunity to address the issue of bail.

ii) THAT on 29.11.2019, the case proceeded to hearing despite the court being informed that the defence counsel was indisposed.

iii) THAT on 10.2.2019, the court, ruling on application by the prosecution, allowed the prosecution to supply additional documents.

iv) THAT on 16.7.2020, the court dismissed an application for an adjournment and the case proceeded in the absence of the defence counsel.

v) THAT on 2.9.2020, the court dismissed the application of the defence that witnesses who had testified be recalled to testify afresh.

vi) THAT on 11.11.2020, upon an amendment of the charge sheet, the court dismissed the application of the defence that the trial starts *de vono* and instead ordered that the witnesses could be recalled for further cross examination.

vii) THAT on 27.10.2020, all through to 15.2.2021, the present defence counsel had not had typed proceedings to enable him take up the defence of the accused fully.

viii) THAT on 2.2.2021 and 15.2.2021, the trial magistrate made certain disparaging remarks against the defence and counsel for the defence.

The counsel for the defence submitted that all there factors put together point to bias against the defence and thus the prayer to have this case transferred to another court of competent jurisdiction.

Much of the submissions were on the issue of recusal, an issue which this application does not raise. To that extent, I shall refrain from considering the same. However, the court was referred to the case of ***Kinyatti Versus Republic (1984)eKLR,*** in which the Court of Appeal, quoting from the Tanzanian case of ***Republic Versus Hashimu (1961)EA 656*** held amongst others;

> ***"…. The applicant must make out a clear case before a transfer of any trial is granted on his application and the apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred must be reasonable."***

The respondent, on the other hand, submitted that the applicant has failed to show that the trial court lacked impartiality, Justice or fairness. Counsel relied on the local case of Charles Koigi Wamwere and 2 others Versus Republic (1992)KLR, in which the court held the test to be'

> ***"….. so the test to me appears to be this. An applicant who alleges bias must either prove bias or grounds which suggests bias or grounds which suggests bias or a is not what the accused thinks. It is what a reasonable man observing the conduct of the proceedings is likely to conclude."***

It was also submitted that it is in fact the defence who have caused the delay of the trial and that the court was right in ruling against the plea to start the trial *de novo*.

I have considered the submissions of both sides and the authorities relied on. This application first seeks an order of revision of the orders of the lower court of 15.2.2021. these are the orders that dismissed the defence application for recusal of the Honourable trial magistrate and for transfer of the case of another court f competent jurisdiction.

Section 362 of the Criminal Procedure Code gives this court the revision powers over subordinate court. It states;-

> ***"This 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 findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

It is clear from the above provision that for an order of revision to issue, it must be shown the incorrectness, illegality or impropriety in the aggrieved order of the subordinate court. In our case the applicant has not made any attempt at all towards proving the incorrectness, illegality or impropriety in the said aggrieved orders of the trial court.

From the submissions of the applicant, it is clear to me that the applicant's claim of bias on the part of the Honourable trial magistrate is based only on the fact that the trial court has made several adverse ruling on the applications made by the defence. The said orders are on the submissions filed. same have also been reproduced herein above. I have perused the proceedings of the trial court and it is apparent that the Honourable trial magistrate has on each particular incident given a considered ruling on the applications made by the defence sides. The issue therefore that crops up is whether it would be proper for this court to move in and consider the merits of those decisions as urged as to be persuaded that the same point to a bias on the part of the court against the defence side.

The honourable Justice Joel Ngugi, faced with a similar situation of interlocutory application for revision in ***Isaac Karanu Mbugua Versus Republic (2018)eKLR***, had this to say;

> ***"For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances ….. The court will generally hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below. Hence, the propriety of exercising revision power for interlocutory matter is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal."***

I fully associate myself with the above finding. In short, this court must reject any attempts at either micro-managing the process of the lower court which enjoy constitutional independence. It must also reject (as held by the Hon. Justice Ngugi) any invitation to hear appeals piecemeal.

For the above reasons, the prayer for revision of the order of the lower court of 15.2.2021 fails. I so find.

On the 2nd issue of transfer of the pending case to another court of competent, jurisdiction, this court is guided by section 81(1)(e)(ii) that bestows on this court the powers of transfer of cases in subordinate court.

Both the defence and the prosecution sides are agreed on the standards applicable. That the applicant must prove bias or reasonable apprehension of it. And that this must be considered from the view of a reasonable man observing the conduct of the proceedings, and not the accused. With respect, the apprehension on the part of the applicant seems only to be based on the fact that several of the rulings made by the court have not gone the way of the applicant. The question is whether this alone can be taken to be proof of bias or likeliness of bias. I think not. As I have already stated above, the record clearly show that on each of the said applications, the Honorable trial magistrate gave considered findings. On the merit, this ground fails. Suffice it to say that apprehension that a party would lose in litigation is normal practice in adversarial systems such as ours. This, for the sole fact that in a winner takes it all situation, the outcome must be one unhappy party on the one hand and a delighted party on the other.

Justice must however, not only be done, but must also be seen to be done. In ***Kaplan & Stratton Versus 2 Engineering Construction limited and 2 others (2000)KLR,*** the Court of Appeal, faced with an application for disqualification of a Judge, held;

"Although it is important that Justice must be seen to be done, it is equally important that Judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide their case in their favour."

I have considered the history and circumstances of this case us depitched on the record and I am convinced that for Justice to be done and be seen to be done, I find this to be a case fit for trial and disposal by a different magistrate of competent jurisdiction. I accordingly therefore exercise my discretion and order that this case, JKIA Criminal Case No. 144/2019 be transferred for hearing and determination by a magistrate (other than the Hon. L. O. Onyina, Chief Magistrate) with jurisdiction at the JKIA Law Courts. I further order that this file be placed before the Hon. Chief Magistrate, JKIA Law Courts, for allocation to a different magistrate. Orders accordingly

D. O. OGEMBO

JUDGE

15.2.2022.

Court:

Ruling read out in court (on-line) in presence of Ms. Opondo for the applicant and Ms. Kibathi for the state.

D. O. OGEMBO

JUDGE

15.2.2022.

Court:

Matter to be mentioned before the Hon. Chief magistrate on 21.2.2022 for allocation as ordered above.

D. O. OGEMBO

JUDGE

15.2.2022