



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO.19 OF 2020

SUSAN OMBUNYA BUKOSHE.....APPLICANT

VERSUS

THE STATE COUNSEL.....RESPONDENT

RULING

1. What is for determination is the Motion, dated 10th March 2020, wherein the applicant, Susan Ombunya Bukoshe, is seeking transfer of Mumias Senior Principal Magistrate's Court Criminal Case No. 500 of 2019 (Mumias SPMCCRC No. 500 of 2019) to the High Court for directions and determination on grounds, inter alia, that:

a) the applicant has lost faith in the presiding magistrate;

b) on 8th January 2020 she sought adjournment on grounds that she was unwell, but her application was rejected, and the court proceeded to hear three witnesses;

c) since she was unwell, she was unable to cross examine the witnesses presented that day; and

d) She wrote a letter to the presiding magistrate, on 24th February 2020, to disqualify himself as the applicant was not satisfied with the way she was being treated, but the court declined.

2. In her affidavit in support of the application, she avers that the trial court violated her constitutional rights by not according her an adjournment, and ordered her to proceed with a matter, when she was unwell, to her detriment. She avers that litigation ought to be decided on merits, but not on technicalities, and no party should be condemned unheard. She also complains that she was compelled to meet the expenses of prosecution witnesses, and that the trial court had refused to recuse itself. She cites another case, being Mumias Senior Principal Magistrates Court Criminal Case No. 1256 of 2017 (Mumias SPMCCRC No. 1256 of 2017), where she was allegedly subjected to an unfair hearing, and the High Court had to order its transfer from one court to another.

3. The application was argued orally on 2nd July 2020. The applicant argued that the trial court was biased against her, as it declined to allow her application for adjournment, and proceeded to hear three witnesses, who she was unable to cross-examine. She submitted that she wrote to the court asking the trial magistrate to recuse herself, but the trial court declined, and proceeded to hear one witness, despite her saying that she was unable to cross-examine. She also points at the order that she pays Kshs. 6, 000.00 for witness expenses. She submitted that the trial court was discriminating against her, while favouring the complainant, who was a government official. She cited another case, Mumias SPMCCRC No. 1256 of 2017, where she accused the presiding magistrate of not intervening in the proceedings being conducted in that matter, and she had to seek the intervention of the High Court, which acceded to her request for transfer of the matter. She complained that the trial court was punishing her. She stated that she feared that she could not get justice at the Mumias law courts.

4. The respondent, through Mr. Mutua, prosecution counsel, indicated that they would not file a response to the application, and said that he was relying on the trial record.

5. At the end of the submissions, I called for the records in Mumias SPMCCRC No. 500 of 2019 and Mumias SPMCCRC No. 1256 of 2017. Both files have been made available. I have perused both and acquainted myself with the goings on in both.

6. The applicant had been charged, in Mumias SPMCCRC No. 500 of 2019, with an offence of obtaining goods by false pretences. She took plea on 22nd May 2019, where she pleaded not guilty. The matter was set down for hearing on 3rd July 2019. On that 3rd July 2019, the applicant was absent, and the matter was put off to 5th September 2019 for hearing. On 5th September 2019, it is not clear from the record whether the applicant was in attendance, but the matter did not proceed as the trial magistrate was on transfer, and the matter was put off to

14th November 2019. Come 14th November 2019, the applicant is recorded to have been absent, and the matter was put off to 8th January 2020 for hearing. On 8th January 2020, the applicant requested for adjournment on grounds that she was unwell and could not proceed. The application was rejected on grounds that the applicant had not provided proof that she was unwell, and that witnesses had travelled from far; Machakos, Kajiado and Nairobi. The court then proceeded to hear three witnesses, but the applicant did not cross-examine them, on grounds that she was sick. After that the matter was put off to 26th February 2020. Two witnesses were in court, but the applicant asked the court to disqualify itself, on grounds that the court had forced her to proceed with the matter when she was unwell. Her application was rejected, in a ruling, delivered the same day. The matter proceeded, with one witness testifying. The applicant did not cross-examine the witness, stating that she was unwell, and that she needed time to engage an advocate. The trial court thereafter directed that the applicant pays the witness expenses of Kshs. 6, 000.00, before the next hearing. After that the applicant moved the High Court on the instant application.

7. In Mumias SPMCCRC No. 1256 of 2017, she was charged with obtaining money by false pretences. She took plea on 22nd November 2016, and the matter was fixed for hearing on 19th January 2017. The hearing was being handled by Hon. Nyakundi, Resident Magistrate (RM). Come 19th January 2017, the prosecution was ready with three witnesses, but the accused was not present, and was said to before a court at Kakamega, on another case, whose details were not given. A warrant for her arrest was issued. Later that afternoon, an advocate appeared on her behalf, and pleaded her case, and the warrant of arrest was lifted. The matter was then fixed for hearing on 15th February 2017. Come 15th February 2017, the prosecutor turned up with five witnesses. The applicant was present, and pleaded that she was not ready as her advocate was not in court. It would appear that the file was placed aside to await her advocate. When it was called out later, she said she wanted to settle the matter, and asked to be given time. That plea was rejected and the court proceeded to hear the four witnesses. At the next hearing, on 21st February 2017, the prosecution had two witnesses, and the applicant was present. She indicated that she was ready, but waiting for her advocate. When the advocate arrived, he asked for prosecution witness statements and for recall of prosecution witnesses. The prosecution resisted the application, on grounds that the statements had been supplied to the applicant earlier on, and the advocate ought to have gotten the statements from the applicant or her previous advocate. The court allowed the adjournment to permit the advocate study the file and have the witnesses recalled. The matter was put off to 3rd March 2017. On that date, the prosecution availed three of the previous witnesses for cross-examination, and had two fresh witnesses. The applicant was present, and said that her advocate was not in court. In view of that, the court dismissed the previous witnesses, who had been recalled for cross-examination, and proceeded to hear the two fresh witnesses. In the end, the court found the applicant to have had a case to answer, and fixed the matter for defence hearing on 4th April 2017. The matter was mentioned, before Hon. TA Odera, Senior principal Magistrate (SPM), on a date prior to the defence hearing, ostensibly to address a complaint raised by the applicant, whose details are not given in the record. In the end, Hon. Odera directed that the matter had advanced substantially, to defence hearing, and did not see any good reason for it to be taken away from Hon. Nyakundi RM. It would appear that it was at that stage that the applicant moved the High Court in Kakamega Criminal Miscellaneous No. 46 of 2017, and obtained an order that the matter proceed *de novo*, before another magistrate. The court was subsequently allocated to Hon. CC Kipkorir, Senior Resident Magistrate (SRM), and was placed before her on 21st March 2019, who fixed it for hearing on 21st May 2019. Come 21st May 2019, Hon Kipkorir indicated that she was on transfer, and, therefore, she could not hear the matter. She fixed it for hearing on 22nd July 2019, before another magistrate. No step has been taken in the matter since, and it would appear that the matter has died a natural death.

8. I have noted that when the criminal matter, the subject of these proceedings came up for hearing on 3rd July 2019, as scheduled, the accused was absent, yet she was on bond. No explanation was given, and another date for hearing was fixed, for 5th September 2019. No warrant was issued for her arrest. At the next hearing dates, 5th September 2019 and 14th November 2019, she did not also attend court, even though the matter could not have proceeded, for on one date the trial magistrate was on transfer, and on the other the trial magistrate was said to be attending to certain urgent personal matters. When the matter came up on 8th January 2020, the prosecution had three witnesses, but the accused asked for adjournment as she said she was sick. She did not provide proof that she was sick, and the adjournment was denied. I have noted that when she moved this court for directions, she did not attach any document as proof that she was indeed sick on 8th January 2020, and, therefore, the trial magistrate had acted unfairly in denying her an adjournment. It is standard practice that where an accused person is unwell, and seeks adjournment on that ground, they ought to provide proof of that. Usually a sick sheet from a doctor or clinician. This is important as the witnesses will have travelled from various locations, and they should not be send home without doing what had brought them to court, without proper cause, hence the need for whoever seeks to have the matter adjourned to have a good reason for seeking adjournment, and should be ready to provide proof of what they claim. I am not persuaded that the trial magistrate acted improperly or exercised discretion capriciously in denying the adjournment and proceedings with the matter. There is nothing to suggest bias or favouritism on the part of the trial magistrate, to warrant the file being reassigned to another magistrate.

9. The applicant cited to me the proceedings in Mumias SPMCCRC No. 1256 of 2017 to demonstrate that the trial magistrate in the instant matter had failed to intervene administratively in that matter. I believe the proceedings in Mumias SPMCCRC No. 1256 of 2017 do not make the case for the applicant any better. If anything, it demonstrates a pattern of behavior on her part, to delay criminal proceedings, by obstruction, and maneuvers involving obtaining orders from the High Court so as to frustrate the prosecution at the magistrate's court, as happened in Mumias SPMCCRC No. 1256 of 2017. The High Court will not be party to such maneuvers.

10. I decline to grant the orders sought in the Motion dated 10th March 2020. Let the prosecution of the applicant in Mumias SPMCCRC No. 500 of 2019, proceed to its logical conclusion before Hon. Odera, Chief Magistrate. Should the applicant be unhappy with the eventual outcome, there is an automatic right of appeal to the High Court. Let the files in Mumias SPMCCRC No. 500 of 2019 and Mumias SPMCCRC No. 1256 of 2017 be returned to the criminal registry at the Mumias law courts for finalization.

11. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF June 2021

W. MUSYOKA

JUDGE