



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. E026 OF 2021**

**REPUBLIC.....APPELLANT**

**Versus**

**MICHAEL OTIENO ONYANGO.....RESPONDENT**

**RULING**

This is a Notice of Motion

1) Spent;

2) Spent;

3) That this court be pleased to order for the reinstatement of the initial bond terms of Kshs. 350,000/= dated 29/12/2020 given to the applicant and set aside the bond terms of Kshs. 2,000,000/= enhanced by the trial court on 19/8/2021, pending inter partes hearing and determination of this application;

4) This court be pleased to order for the transfer of Criminal Case E294/2020 from the current court in Migori to any other court in Kisumu with similar jurisdiction;

5) This court be pleased to give any other order that in the circumstances it deems fit protection of the applicant's rights;

6) Costs of the application to the applicant.

The said application is premised on grounds found in the body of the application and two affidavits, one dated 6/9/2021 and further affidavit dated 19/10/2021.

The Applicant, **Michael Otieno Onyango** deponed that he was charged in CMCR E294 of 2020 before Migori Chief Magistrate's Court which came up for hearing on 15/10/2021; that without any justification, the court reviewed the bond terms upwards from Kshs. 350,000/= to Kshs. 1,000,000/= and later to Kshs. 2,000,000/= which led him to be locked up in custody for allegedly obtaining Kshs. 990,000/=; that he has never absconded yet the court enhanced the terms *suo moto*; that the alleged offence was committed in Kisumu and the court with jurisdiction to hear the matter is Kisumu not Migori. He is apprehensive that justice will not be served in the matter by the conduct of the trial court and that this amounts to violation of the applicants' rights to fair trial and denial of his rights.

In the further Affidavit, the applicant contends that on one occasion he was unwell and his surety attended court to explain to the court about his absence, and he produced medical reports as proof; that on a different date, he and the complainant went to the wrong court room only to learn later that the court rooms had been changed for that day. He later located the court room and it was settled; that on 19/8/2021, the firm of **Odinga Obo** came on record to act on his behalf because he could not understand the direction the court was taking; that he did not make an application for recusal of the magistrate because the evidence on record relates to repossession of a motor vehicle by the company after the applicant failed to pay the balance of the purchase price; that the car was sold to him for a period of more than six months; that he is apprehensive that if the file is not transferred from Migori to Kisumu, justice will not be served in the matter due to the conduct of the trial magistrate; that he sought assistance of counsel after his bond was enhanced without any legal basis.

The Application was opposed and **Mr. Kerongo Maatwa**, the prosecution counsel having conduct of Criminal Case E294 of 2020 swore the replying affidavit dated 6/10/2021 in which he deponed that after plea was taken, the case was fixed for hearing on 9/3/2021 but that it never proceeded for different reasons till 10/8/2021 when the complainant testified. It was adjourned to 19/8/2021 but due to the conduct of the applicant, who failed to attend court. On 8/7/2021, the court exercised its discretion to adjust the bond terms upwards; that on 19/8/2020, the

applicants applied for adjournment and the case was rescheduled to 14/10/2021 but instead, the applicant filed this application; that the complainant hails from Masara area of Migori County, works in Migori Town and had reported the matter to DCI Migori but that applicant was arrested in SyokiMau, Machakos Town. Counsel deponed that the court is given unfettered discretion under Section 81 of the Criminal Procedure Code to transfer cases; that although the applicant alleges impartiality and unfairness, he has not demonstrated the particulars of bias by the court or when it acted unfairly; that the court's exercise of discretion to adjust bond terms is not a ground for transfer; that the applicant does not meet the principles and threshold set in our **Joseph Korir alias David Choge vs Republic (2018) eKLR and Kamande & 3 others =vs Republic (2014) eKLR**; that the complainant has testified, the next three witnesses are from Migori and it will be too expensive to transfer the case to Kisumu; that the court should balance the interests of both parties and that if indeed the applicant was genuine, he should have asked for the recusal of the magistrate; that the application is not brought in good faith.

The court directed that this matter be canvassed by way of written submissions and both parties complied.

**Mr. Odinga** the applicant's counsel, submitted that where the record and evidence on record shows miscarriage of justice, bias and violation of an accused's right, then the court must intervene and ensure that justice is done; that the law provides for geographical jurisdiction of a trial magistrate which cannot be determined by the complainant; Office of the Prosecution or the litigation office; that from the evidence, the claim is clearly of a civil nature and that the conduct of the trial has made the applicant lose confidence in Migori Court Station and hence prays for transfer of the case but not recusal.

Counsel also relied on the Bail and Bond Policy and urged that under Article 50(2) of the Constitution, one is presumed innocent till proved guilty and should not be treated like a convict.

Relying on Section 72 of the Criminal Procedure Code, the counsel submitted that the said section provides for the place of trial to be in a court within the local geographical jurisdiction of the place where the crime also took place. He relied on the decision in **Machakos Misc Application No. 257 of 2020 David Kiagen Mbisi =vs= Republic** where the court held that a transfer to another can occur for exceptional circumstances.

In **Maina Kinyatti vs Republic (1984)eKLR** the court held that any apprehension in the accused's mind that he may not have a fair and impartial trial is of reasonable character that ought to be a ground for ordering a transfer and that under Section 81 Criminal Procedure Code, court acting *suo moto*, ordered the transfer of a case where it believes that the fairness of the trial will be undermined.

Counsel further listed the circumstances where a court may exercise its power to change, the venue of a case. Counsel relied on the decision in **DPP vs Perry Mansukhal Kansagra & others (2020) eKLR**.

**Mr. Kimanthi** submitted that under Section 81 Criminal Procedure Code, the factors to consider before a transfer of a criminal case are listed and relied on the case of **Kamande & 3 Others =vs= Republic (2014)eKLR** where the principles in Section 81 Criminal Procedure Code were applied. See also Kevin **Shitambasi Amwayi =vs= Republic (2017) eKLR**

Counsel also submitted that though the applicant had initially relied on the ground that variation of bond terms was a violation of the applicant's rights, the affidavit added two more grounds, that the applicant has no faith in all courts at Migori Court and that the matter is civil in nature. Counsel argued that the two latter grounds are evidence of the intention by the applicant to delay and frustrate the hearing of the criminal case. Counsel further argued that variation of bond terms per se cannot be evidence of unfairness or bias and there is no material before court to demonstrate bias.

I have duly considered the application, affidavits filed, the written submissions. Section 81 of the Criminal Procedure Code gives the High Court powers to change the venue of hearing where it is made to appear that:-

- 1) **That a fair and impartial trial cannot be achieved in the trial court;**
- 2) **That some question of law of unusual difficulty is likely to arise;**
- 3) **That a view of the place or a near which any offence has been committed may be required for the satisfactory trial of the offence;**
- 4) **That an order under the Section will tend to general convenience of the parties or witnesses;**
- 5) **That such an order is expedient for the ends of justice or is required by any provision of this code or that it is expedient to grant the order to meet the ends of justice.**

The principles set out in Section 81 are meant to ensure that an accused person gets a fair trial and to meet the ends of justice.

The leading case on transfer of a criminal case from one venue to another was well articulated in the case of **Shilenje =vs= Republic 1980 KLR 132** where the court said:-

**“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.”

In **Maina Kinyatti vs Republic (1984) ECLR** 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.”**

In the instant case, the issue that culminated in the filing of this application is the variation of bond terms by the trial court. After hearing PW1, an adjournment was sought by the prosecution and the court made the following orders:-

**“Order adjournment granted. Hearing on 19/08/2021. In view of the emerging evidence that the accused was on the run after getting the money from the complainant and his past conduct, the bond of the accused is enhanced to Kshs. 1,000,000/= with two sureties of similar amount. The accused is therefore remanded accused to provide these sureties.”**

The applicant’s counsel applied to have the bond terms reinstated because the security held in court was much more than the bond given. The court put the matter off and on 19/8/2020, the court after hearing counsel, reviewed the bond terms further to Kshs 2,000,000/= with one surety of the same amount.

Counsel then applied for adjournment of the case and it was adjourned to 14/10/2021 and the court approved the earlier surety to remain the same but on the new terms. On 6/9/2021 the applicant moved to this court with this application.

The Applicant’s complaint is therefore that by variation of the bond terms, he was treated unfairly and with bias. As clearly stated in the authorities considered above, the applicant’s allegation of bias must be reasonable and founded on sufficient material and there should be some strong grounds. As observed by J. Sitati in **Simon Chege Waweru =vs= Republic Criminal Appeal No. 831 of 2002**, the allegations directed at judicial officers alleging bias and lack of fairness must not be accepted without there being substantive evidence to back them. If the court were to accept such allegations without substantiation, it would erode the integrity and independence of the judiciary.

In **Director of Public Prosecution =vs= Perry Kansagara & 8 Others [2020] eCLR** the court said:

- a) Where there are special or exceptional circumstances that cannot be addressed through the Statutory revisional powers of the court without undue expense or delay;**
- b) Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;**
- c) Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.**
- d) In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring ‘the fair administration of justice.**

In the case of **Tumaini =vs= Republic 1972 EA 441**, in considering the possibility of bias which is the opposite of impartiality, the court said that it is not the mind of the judge which is considered but the impression given to reasonable persons. In **Porter =vs= Magili (2002) ALL ER 465** the court said:-

**“The question is whether the ‘fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was (or would be) biased.”**

First of all, the applicant was never denied bond. The terms were merely varied after the court heard PW1’s evidence whereby PW1 testified that the applicant had disappeared for long after the alleged transaction meaning he is a flight risk. The court also mentioned the applicants conduct in the case as one of the reasons for variation of bond terms. It is on record that the applicant had once been absent and claimed to have been sick. At the next mention, he produced medical documents and the court seemed to have been satisfied with the explanation given. The trial court generally referred to the applicant’s conduct which is not recorded.

Even after giving bond terms which did not seem to go well with the applicant, the applicants counsel applied for further variation of the terms and the court did indulge the counsel and released the accused on same security document though on enhanced bond terms. I find no evidence of bias or unfairness on the part of the court. If the court had been biased, it may never have revised the bond terms it had given. Besides, variation of bond terms after a court hears part of, the evidence is not uncommon. It is an exercise of the court’s discretion. Bond is granted to ensure that an accused person attends the trial of his case, while bearing in mind the presumption of innocence until proven guilty.

The applicant argued that in fact the issue between the complainant and the applicant is one of a civil nature. It is not uncommon for a case to attract both civil and criminal sanctions. Being charged does not preclude the complainant from suing for damages in a civil court. Besides, the trial court has heard only one witness and needs to hear all Prosecution witnesses for it to determine whether or not the case is a civil

matter. It is premature for the applicant to presume that the court should have noted that the matter is a civil one.

It is the applicant's submission that this case should be transferred to Kisumu because that is where the cause of action arose and that is in term of Section 72 of the Criminal Procedure Code which provides that a person should be tried in a court within the local geographical jurisdiction where the offence was committed. Although the offence is alleged to have been committed in Kisumu (see the charge sheet), the Respondent deponed that the complainant hails from Masara area in Migori, he reported the incident to DCI Migori; that the applicant was arrested in SyokiMau, Machakos and that all the remaining witnesses hail from Migori; that the appellant had indicated that he works in Kisumu and Nairobi, and I have seen that he swears in his affidavit that he resides in Nairobi. Whereas the proper place to charge the applicant is Kisumu, yet the matter having been reported in Migori and all the prosecution witnesses hail from there, there is nothing to stop the prosecution from filing it at this court. It would not be improper to have the case heard in Migori in light of paragraph 81 which provides that the convenience of the witnesses be considered as well as to ensure that the ends of justice are met. It would not be in the interests of justice to send all the witnesses to Kisumu for hearing. It is more convenient to have the case heard in Migori. Besides, if the applicant is indeed serious about the transfer of the case to Kisumu, he should have applied to do so before the evidence of the first witness was taken. It is only after the issue of bond came up that the applicant came up with the application. The application is not made in good faith.

The applicant contends that he has no faith in all the courts in Migori. However, only one magistrate was seized of this matter. There are other competent courts that can deal with the case. There is no evidence that a trial in any other court in Migori would be inconvenient or prejudicial to the applicant. That is why I am convinced that there is mischief in the application.

From the foregoing, I am satisfied that the applicant has not met the threshold for the grant of the order for the transfer of this case. The matter do proceed before the same magistrate. Allowing this application would be allowing the applicant to go shopping for a court which will sent him and that would be eroding the integrity and independence of the court.

The application lacks merit and is hereby dismissed. The lower court file be remitted back to the trial court to proceed with the hearing.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

**Ochieng holding brief Mr. Odinga for Appellant**

**Appellant present (virtually)**

**Mr. Kimanthi for the Respondent.**

**Nyauke Court Assistant**