



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC. CRIMINAL APPLICATION NO. 21 OF 2020**

**JUSTUS MURIITHI GICHOVI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant, has brought the application under no specific provisions of the law and prays for the following orders;

- (i) An order be issued for the withdrawal of the trial magistrate in Criminal Case No.117 of 2018 at Embu Law Court No.4;
- (ii) An order for the restarting of the applicant's criminal case;
- (iii) Any other order that the court deems fit to grant in the circumstances.

2. At the hearing hereof the parties made oral presentations; the applicant was unrepresented and relied on the grounds on the face of the application; which was opposed by prosecuting counsel for the State Ms. Chemenjo; hereunder are the rival submissions;

**APPLICANT'S SUBMISSIONS**

3. The applicant submitted that the trial magistrate failed to conduct his trial fairly; that he had requested to recall a prosecution witness for further cross-examination but his request was not granted and hence he was greatly prejudiced; that the failure by the trial court to grant him this order amounted to a travesty of justice; and that there was no guarantee of a fair hearing as provided for under Article 50(2) of the Constitution;

4. In the current conditions justice cannot be served and the applicant prayed that this court exercises its discretion by allowing the application to ensure that justice was done.

**RESPONDENT'S SUBMISSIONS**

5. The application was opposed by the respondent who submitted that after perusal of the court record it was noted that the applicant had thoroughly cross-examined **PW1**;the applicant gave no reasons for this request but stated that he was not ready to take the evidence of Investigating Officer (**PW3**);

6. **PW1** was an eleven (11) year old minor and the recalling him with no substantive reason being given would be traumatic for the child who would relive the incident; this was also an infringement of the rights of the child;

7. Prosecuting Counsel for the State stated that there were no sufficient grounds for withdrawal and that the court was competent to proceed with the case and that the withdrawal which would lead to further delay; the applicant was the one causing the delay and was infringing on his own right to a fair trial as provided by Article 50 which provides that the trial must proceed without undue delay;

8. Counsel concluded that the trial court's decision to deny the applicants request was fair and its finding was based on the available facts; and prayed that the application be dismissed as it had no merit.

**ISSUES FOR DETERMINATION**

9. Taking into consideration the above submissions this court has framed only one issue for determination; which is;

(i) Whether the application for transfer is merited;

### **ANALYSIS**

10. From the submissions it is noted that the applicant had thoroughly cross-examined **PW1** and when it came to the time for the Investigating Officer (**PW3**) to testify the applicant stated that he was not ready to take the evidence of this witness and made his request to recall **PW1** and gave no reasons to support this request;

11. The request was dismissed by the trial court as submitted by the respondent that the minor (**PW1**) had already been subjected to intense cross-examination by the applicant; and the recalling **PW1** meant revisiting the incident which the trial court correctly found would not be in the best interests of the minor (**PW1**); the application was also found to be a means of prolonging and delaying the proceedings;

12. The instant application is a challenge to the trial courts order; whereas it is true that the right to recall a witness for cross-examination is part of ensuring a fair trial to the accused; but the legal position is that the right to recall a witness for cross-examination is at the discretion of the trial court and it must be satisfied that it is essential to recall the witness for cross-examination so as to arrive at a just decision;

13. In this instance the minor (**PW1**) was indeed aged 11 years; the record reflects that the applicant had subjected the minor to considerable cross-examination; and upon reaching **PW3** made a whimsical application to recall **PW1**; the trial court found the reasons given by the applicant to be unsatisfactory and found that there was no necessity in recalling **PW1** for further cross examination and found that it was a calculated means of protracting the litigation; it also perceived the request was not being in the minors best interest;

14. After perusal of the record and for the reasons stated above this court is satisfied that the trial court correctly found that the applicants request was based on ulterior motives in that it was a means to derail, prolong and to delay the proceedings; and finds no good reason to interfere with the trial courts finding in denying the applicants request to recall **PW1**.

15. As for the transfer of the case the applicable law is found at Section 81 of the Criminal Procedure Code; this court notes that the applicant did not invoke the provisions of this section which reads as follows;

***“81. (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.***

***(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.***

***(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.***

***(4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.***

***(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.”***

16. In the case of **Maina Kinyatti .v. Republic [1984] eKLR** the Court of Appeal held that the test to be applied in an application under Section 81 of the CPC is whether an applicant has made a clear case by discharging on a balance of probabilities the burden of showing that the apprehension in his mind that there will be no fair trial is reasonable;

17. This court must be satisfied that the trial court is implicated in unfair conduct of the trial; the applicant confirmed to this court that **PW1's** statement was availed to him at the first instance and well before the commencement of the hearing of the case; and the record reflects that the applicant extensively cross-examined **PW1**;

18. The applicant merely stated that the denial of his request to restart the case and to recall **PW1** made him apprehensive that he would not receive a fair trial; otherwise no substantial material was placed before this court touching on the trial courts conduct;

19. This court is satisfied with the trial court's decision which was fair and sound; this court has also taken into consideration that the matter before the trial court has proceeded substantially and finds that the applicant's request for transfer to another to be a calculated to delay the expeditious disposal of the case; and to have the matter transferred to another court of concurrent jurisdiction would not be in the best interest of justice;

20. This court is satisfied that the applicant's application does not meet the criteria set down in the provisions of Section 81 of the Criminal Procedure Code;

#### **FINDINGS AND DETERMINATION**

21. For the forgoing reasons this court finds that there is no basis for the transfer of Criminal Case No 117 of 2018 to another court for hearing and determination;

22. The application for the transfer of the Criminal Case No. 117 of 2018 is found to be lacking in merit and it is hereby disallowed.

23. This court directs that Criminal Case No.117 of 2018 shall continue to be heard and determined by to Court No.4 Embu.

Orders accordingly.

**Dated Signed and Delivered Electronically at Voi this 8<sup>th</sup> day of October, 2020.**

**HON.LADY JUSTICE A.MSHILA**

**JUDGE**