



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CRIMINAL APPLICATION NO. 13 OF 2020

MIRRIAM N. NCHEREBE.....1<sup>ST</sup> APPLICANT

AARON MUTHOMI.....2<sup>ND</sup> APPLICANT

SAMUEL MUTHAURA.....3<sup>RD</sup> APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicants filed application dated 4<sup>th</sup> February 2020 seeking a stay of the proceedings in **Tigania Criminal case No. 1706 of 2018** and transfer of the same to Meru to be heard afresh.

2. The application was supported by the sworn affidavits of Miriam Ncherebe dated 4<sup>th</sup> February 2020 and 24<sup>th</sup> February 2020. She averred that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have been charged twice for the same offence in **Tigania criminal Case No. 1706 of 2018 and Tigania Criminal Case No. 1134 of 2018**. That despite the court consolidating the two files the same have been were being heard concurrently between court one and two. It was also her contention that the 2<sup>nd</sup> applicant had instituted a complaint before the Judicial Service Commission against the trial magistrate hence they are apprehensive that they shall not receive a fair and impartial trial.

3. This court on 26<sup>th</sup> February 2020 stayed the proceedings of Tigania Cr. Case No. 1708 of 2018 & 1134 of 2018 pending the hearing and determination of the application. It also directed the parties to canvass the application through written submissions.

4. The Applicant submitted that in the eyes of a right thinking man the trial magistrate ought not to have taken up the matter. That similarly the actions of the trial court withdrawing the matter and starting it afresh also raises eyebrows. The Applicants relied on the provisions of Section 81 of the Criminal Procedure Code and the following authorities i.e. **Maina Kinyatii v Republic (1984) & John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980**.

5. The Respondent submitted that the ingredients to be met for the transfer of a suit as set out in **Francis Otieno vs Republic H.C. Misc Appl. No. 19 of 2015 Homabay** had not been met. That the letter attached by the Applicants does not show what the complaint is about. Test of a reasonable apprehension from any right thinking member of the society must be real and not mere allegations. There must be reasonable grounds.

6. I have considered the evidence produced by the parties and the submissions of the parties. The provisions of section 81 of the Criminal Procedure Code invoked by the Applicant empowers the High Court to transfer a criminal case from one subordinate court to another or to itself state as follows;

**81(1) Whenever it is made to appear to the High Court-**

**(i) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or**

**(ii) that some question of law of unusual difficulty is likely to arise; or**

**(iii) 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**

(iv) that an order under this section will tend to the general convenience of the parties or witnesses; or

(v) that such an order is expedient for the ends of justice or is required by any provision of this Code,

i. it may order—

(vi) 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;

(vii) 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;

(viii) that an accused person be committed for trial to itself.

7. The 1<sup>st</sup> Applicant was initially charged in **Cr. Case No. 1134 of 2018** for the following offence; **Assault causing actual bodily harm contrary to Section 251 of the Penal Code.**

8. The particulars of the offence are that **1. Harun Muthomi**; On 9<sup>th</sup> day of July 2018 at Ithamari Village Kiando Location in tigania West Sub-County within Meru County, Wilfully and unlawfully assaulted **Kenneth Githinji** by Stabbing him using fork jembe injuring him on the left hand palm, thereby occasioning him actual bodily harm.

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants were charged in **Cr. Case No. 1706 of 2018** for the following offences; **Assualt causing actual bodily harm contrary to section 251 of the Penal Code.**

10. The particulars of the offence were. **1. Aaron Muthomi 2. Mariam Nkatha** On 9th day of July 2018 at Ithamari Village Kiando Location in tigania West Sub County within Meru County, wilfully and unlawfully assaulted **Kenneth Githinji** by stabbing him using fork jembe injuring him on the left hand palm, thereby occasioning him actual bodily harm.

11. In Count II Aaron Muthomi, Miriam Nkatha, Samuel Muthaura was charged with offence of **Creating disturbance in a manner likely to cause a breach of peace contrary to section 95 (1) (b) of the Penal Code.**

12. The particulars of count II were that **1. Aaron Muthomi 2. Miriam Nkatha 3. Samuel Muthaura**: On the 9<sup>th</sup> day of July 2018 at Ithamari Village Kiando Location in Tigania West Sub County within Meru County, jointly created disturbance in a manner likely to cause a breach of the peace by chasing **Christine Muchungi** from her home.

13. The matter in Cr. Case No. 1134 of 2018 proceeded before Hon. Wechuli but the same was withdrawn on 21<sup>st</sup> January 2019 under section 87 A of the CPC. The Court directed that the 1<sup>st</sup> applicants cash bail to be refunded.

14. The matter in Cr. Case No. 1706 of 2018 commenced on 30<sup>th</sup> November 2018. Bail/bond terms were issued to the applicants. The matter has proceeded for hearing, four witnesses have since testified for the prosecution.

15. From the simple and brief facts of the case you will notice that as the matter in Cr. Case No. 1706 of 2018 commenced Cr. Case in 1134 was still ongoing. The charges and particulars of the offence are the same. I agree with the applicant that at this stage the two matters ought to have been consolidated. I do note that the matter in Cr. Case No. 1134 of 2018 was withdrawn under Section 87 (a) of the Criminal Procedure Code. What is the effect of such withdrawal vis a vis Cr. Case No. 1706 of 2018.

16. **Section 87 of the criminal procedure code (cap 75 Laws of Kenya)** provides:

**“87. In any trial before a subordinate court any public prosecutor may, with the consent of the court, or on the instructions of the Attorney General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal –**

**(a) if it is made before the accused person is called upon to make his defence, he shall be discharged but such discharge of an accused shall not operate as a bar to subsequent proceedings against him on account of the same facts:**

**(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted”.**

17. In **Republic v HasmukhMeghji Shah [1984] eKLR** the Court distinguished the provisions of **Section 87 (a) and Section 87 (b) of the CPC** as follows;

**Under section 87 (b) of the Criminal Procedure Code the respondent could only be acquitted if he had been called to make his defence. In the present case no single witness had opened his mouth let alone the respondent being called upon to make his defence. Hence, section 87 (b) of the Criminal Procedure Code had no application in this case.**

18. The matter in Cr. Case No. 1134 of 2018 only proceeded for plea taking and issuance of bail/bond terms. No witnesses had testified in the case by the time the same was withdrawn on 21<sup>st</sup> January 2019. Haruon Muthomi who was accused in 1134 of 2018 was freshly charged

on 30<sup>th</sup> of November jointly with Miriam Nkatha and Samuel Muthaura with similar offences of assault as in 1134/2018 which had been withdrawn. It is true that while criminal case no. 1134 of 2018 was still pending, Criminal case no. 1706 of 2018 was instituted against the accused persons in criminal case no. 1134 of 2018 together with ne Miriam Nkatha for a similar charge as that in Criminal case no. 1134 of 2018. That was a fault on the part of the prosecuting counsel and probably on realization of this fault the Trial magistrate in Criminal case no. 1134 of 2018 was prompted to withdraw the same under section 87 (a) of the CPC. This was meant to ensure that the accused persons are not prejudiced and harassed by being charged in 2 different files with similar offences allegedly committed against the same complainants. The issue complained of by the Applicants was a mere procedural technicality which was corrected by the court in withdrawing one of the files to avoid duplicity. I would not find the applicability of the Principle in the case of **Nicholas Kipsigei Ngetich & 6 others v Republic [2016]eKLR** as the Applicants case had not been determined.

19. The case in Cr. Case No. 1134 of 2018 had not commenced the prosecution had not called its witnesses, the 1<sup>st</sup> applicant had not laid out his defence I therefore do not foresee any “double jeopardy” arising in the proceedings in Cr. Case No. 1706 of 2018. This is buttressed by the fact that the Applicants were discharged under Section 87 (a) which allows the prosecution to bring up subsequent proceedings upon any person. The plea for *autrefois acquit* and *autrefois convict* cannot be sustained in this case. The provision of Article 50(2)(o) of the constitution has not been violated

20. The next issue which the Applicant seeks to rely on is the provisions of **Section 81 (i) of the Criminal Procedure code** which provides that the High Court transfer a matter where it appears that a fair and impartial trial cannot be had in any criminal court subordinate thereto.

21. The 1<sup>st</sup> Applicant has stated that he has a complaint against the trial magistrate at the Judicial Service Commission. He attached a letter addressed to him from the Judicial Service Commission. The same does not bear the particulars of the complaint he has against the trial magistrate. The same is referenced; **Complaint against Senior Resident Magistrate at Tigania Law Court**. The letter does not mention whether the complaint is against the trial magistrate. I have looked at the proceedings the Applicants did not make an application during the course of the trial citing the proceedings in the Judicial Service Commission or any unfair and inconsistent ruling that has been made by the Trial magistrate. They have not made any application before the trial magistrate to recuse himself. The Application for recusal of a trial magistrate must first be made before the said Magistrate and subsequently to the High Court if the said Trial magistrates declines to recuse themselves and the grounds upon which recusal is sought is satisfactory.

22. In **Maina Kinyatti v Republic [1984]eKLR**, the Court of Appeal considered the test to be applied in such a case and stated that, “*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.*” The Court of Appeal further observed that it is the reasonableness of the accused person’s apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case. The same test was applied in **John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980 by Trevelyan J.**, who stated that the test is that of, “*Reasonable apprehension in the applicants or any right thinking person’s mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations.*” (this paragraph is also cited in **Francis Otieno Joseph v Republic [2015] eKLR**).

23. I do note that the matter In Criminal case No, 1076 of 2018 has proceeded substantially. However, the 3<sup>rd</sup> Applicant having been arrested under warrant of arrest after only 2 witnesses had testified I do find that it will be prejudicial to him for the proceedings to continue without him having an opportunity to cross examine those witnesses. I also find that the order by the Trial court that the 3<sup>rd</sup> Applicant would remain in custody until the determination of the trial and that the witnesses who had testified would not be recalled was too vindictive as the prosecution did not say that it would be difficult to obtain their attendance in court. It would appear that at some point the applicants were represented by Mr Gikonyo and Mr Kaume Advocate but at the time of these proceedings there is nothing to show that the advocates were given a notice to attend the hearings. This in my view, is a violation of the Applicants right to fair trial under Article 50(2) (c),(f) and (g). The Trial court is therefore ordered to ensure that the accused persons still have the intention of being represented by an advocate and to be given an opportunity to hire such an advocate and that the said Advocate should be given an opportunity to cross examine all the witnesses who have testified for the prosecution.

24. It is this court’s considered view that it ought not invoke its powers under section 81 CPC and change the venue of this trial being that the Applicants and the witnesses all come from within the jurisdiction of Tigania Principals Magistrates court and that the distance from the homes of both the Applicants and the witnesses may occasion hardship in terms of finances. This matter shall therefore be mentioned before the Trial Magistrate on 21<sup>st</sup> October 2020 with a view to giving directions as per this courts orders.

**HON ANNE ADWERA ONG’INJO**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED AT MERU THIS 8<sup>th</sup> DAY OF OCTOBER 2020.**

**HON ANNE ADWERA ONG’INJO**

**JUDGE**

**In the presence of:-**

**CA: Kinoti**

**1<sup>st</sup> Applicant: MS Vivian for 1<sup>st</sup> Applicant – Mr Kirimi holding brief. 2<sup>nd</sup> Applicant: Mr Kirimi Ngentu for 2<sup>nd</sup> and 3<sup>rd</sup> Applicants**

**3<sup>rd</sup> Applicant**

**Ms Mbithe for state - Present**

**Order: Notice of Ruling to be served on counsel for parties by DR through email.**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**