



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 144 OF 2018

CALITO EMELSON.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant is undergoing a criminal retrial at J.K.I.A Chief Magistrate's Court in Criminal Case No. 118 of 2016. He is facing a charge of trafficking in Narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. He was initially tried of the same offence, convicted and sentenced to life imprisonment in Kibera Criminal Case No. 3773 of 2010. His Appeal to the High Court against the said judgment succeeded to the extent that a retrial was ordered. The retrial commenced at Kibera law courts in Criminal Case No. 1264 of 2016. The same was later transferred to J.K.I.A Law Courts on his application to the High Court where it was assigned Criminal Case No. 118 of 2016 which has been proceeding before Hon. L. O. Onyina (SPM).
2. In a ruling delivered on 11th April, 2018, the learned magistrate dismissed an application filed by the Applicant in the said court on 14th February, 2018 seeking for yet again another transfer of the matter to another court of competent jurisdiction within Nairobi. The court declined to disqualify itself and found that the application was merely a delaying tactic employed by the Applicant and his advocates.
3. In the present application, the Applicant seeks for a revision of the orders issued by the learned trial magistrate regarding the transfer of Criminal Case No. 118 of 2016. The application is supported by an affidavit sworn by the Applicant in which he has raised two major grounds namely: that the trial magistrate has on several occasions failed to record any matter and/or issues raised by him thus prejudicing his right to a fair trial; and that the conduct of the trial magistrate is unbecoming, unprocedural, illegal and cannot be expected to deliver a fair and just determination.
4. The Applicant has highlighted the instances of impropriety as follows; that on 1st November, 2016, he informed the court that he would not be able to proceed with the hearing the following day as earlier scheduled but the court failed to record those sentiments and instead only recorded that he had prayed that the matter be extended to Friday; that on 2nd November, 2016, the said magistrate forced him to proceed with the hearing in the absence of his advocate and he was denied the right to cross examine the witness who testified on the said date (PW1) on the contents of a report produced in court; and that the prosecution and the magistrate ensured that PW1 did not read or respond to the questions he asked on the said report thus leaving a serious evidential gap.
5. Learned counsel for the Applicant, Mr. Wachira submitted that the failure by the trial court to record the Applicant's sentiments occasioned him grave injustice. Counsel further submitted that the instances highlighted denied the Applicant the right to a fair trial under Articles 22 and 50 of the Constitution hence there was a reasonable apprehension that the Applicant will not be accorded a fair trial by the Honourable magistrate. He therefore beseeched this court to use its powers under **Section 81** of the **Criminal Procedure Code** to grant the transfer order sought in order to protect the interests of justice.
6. The Application was opposed even though nothing was filed in that regard. In her oral submissions, learned State Counsel, Miss. Akunja for the Respondent submitted that the Application lacked merit as the Applicant's allegations did not impute any impropriety on the part of the honourable magistrate to warrant his disqualification. She noted that according to the trial court's proceedings of 2nd November, 2016, the Applicant did not indicate whether he had an advocate and/or was waiting for one. She also stated that on 3rd November, 2016, the prosecutor sought the opinion of Mr. Kang'ahi, learned counsel for the Applicant on whether he would wish to recall PW1 who had testified in his absence. Counsel responded that the Applicant had adequately cross examined the said witness but reserved his right to recall in future if need arose. She stated that it was evident that the Applicant was forum shopping which was an abuse of the court process. She urged that the application be dismissed.
7. It is trite law that an Applicant may seek an order of the High Court under **Section 81** of the **Criminal Procedure Code** to transfer a case from one subordinate court to another where there is a reasonable apprehension of bias or partiality. The said provision reads as follows:

(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 another 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 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 Productions 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 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.”* (emphasis added).

8. It is also well settled that before a transfer of trial on the basis of bias and/or partiality is granted, an Applicant must make out a clear case that he has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred. The alleged bias must be evident from the facts on the face of the record and not just perceived because the decision to transfer a case cannot be made whimsically. In the case of **President of the Republic of South Africa and Others vs South African Rugby Football Union and Others** the court stated as follows:-

“While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.”

9. I have examined the trial court’s record and I fail to see any bias or partiality on the actions taken by the honourable magistrate. The Applicant’s allegations of selective recording of proceedings are baseless and unfounded. I say so because when the hearing dates of 1st, 2nd and 3rd November, 2016 were fixed, the Applicant did not object and neither did he inform the court that he was in the process of instructing a new counsel to come on record. Be that as it may, the court considered his sentiments of 1st November, 2016 and exercised its judicial discretion in rescheduling the hearing to the next day. The honourable magistrate was not bound to accede to the Applicant’s application to disregard the entire three days fixed for hearing in his presence. I cannot therefore interfere with the exercise of the magistrate’s discretion because it is evident that the court did not act injudiciously.

10. Further, I note that the Applicant ably cross examined PW1 who testified on 2nd November, 2016. His allegation that he was denied an opportunity to cross examine the witness is therefore unfounded. In any event, it is on record that upon being given an opportunity to recall the witness for further cross examination, his own advocate Mr. Kang’ahi did not see the need to do so. Instead, he reserved the right of recall to a later date if at all there would be need to do so. Further, the trial in the lower court is still ongoing and neither the Applicant nor any of his advocates have applied for recall of PW1, which right is still available to him.

11. In the premises, I find that the Applicant has not adduced any cogent evidence of bias and/or reasonable apprehension of the same to warrant a transfer of the case to another court. The application lacks merit and is hereby dismissed. Honourable L.O Onyina (SPM) shall continue to hear the case until conclusion.

12. It is so ordered.

Date and Delivered this 7th day of May, 2019

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant in person.*
2. *M/s Akunja for the Respondent.*