



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISC CRIMINAL APPLICATION NO. 23 OF 2019**

**ANTHONY OMONDI MUREMA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an application for transfer of Siaya PM Criminal case No 644 of 2014 from Siaya Principal Magistrate's Court-Hon. J. Ongondo to Kisumu Magistrates' Court for hearing and final determination)***

**R U L I N G**

1. The applicant **Anthony Omondi Murema** is the accused person in Siaya Principal Magistrate' Court Criminal Case No 644 of 2014. His case is one of the long standing criminal cases in the station, going by the records in that court. He is charged with the offence of assault causing actual bodily harm. He now by his Notice of Motion dated 4<sup>th</sup> October, 2019 seeks for orders transferring his case from Siaya PM's court to Kisumu Law Courts or to any other court of competent jurisdiction.
2. From the averments in the affidavit supporting the Notice of Motion dated 4<sup>th</sup> October, 2019 seeking transfer of the said case form Siaya principal Magistrate' Court to Kisumu Magistrate's Court, or to any other court for hearing and determination. The applicant claims that the case is substantially heard and that the prosecution have closed their case which is now pending defence hearing.
3. The reasons for seeking transfer of the said case which is being heard by Hon. Ongondo, Principal Magistrate is that the trial magistrate is very hostile and harsh to the applicant accused person, and that when the applicant misses to attend court due to work related circumstances that are beyond his control, that the said court has refused to accept the fact that the employer cannot release to the applicant any document of travel to and from Somalia as such documents are deemed to be secret.
4. The applicant therefore is apprehensive that he will not get justice before the trial court and that it is in the interest of justice that the case be transferred from his court to another court for hearing and determination.
5. In support of the said application, the applicant has sworn an affidavit reiterating the above facts and adds that he does not want any special treatment from the court but that being a KDF personnel, he can only attend court if his employer allows him and if the said employer is served with documents to attend court. The applicant claims that he has lost confidence in the trial court in view of the above situation and feels that he will not get justice from the said court.
6. The Respondent through the Senior Principal Prosecution Counsel Mr. Okachi opposed the application and argued that the applicant had not demonstrated the harsh situation necessitating transfer of the case that the case came up for directions on how the applicant was to be served and it is not clear whether his employer was served. That there are other courts within Siaya County hence there is no reason why the case should be transferred from Siaya to Kisumu Law Courts. Counsel urged the court to dismiss the application.
7. In a rejoinder, the applicant's counsel Mr. Wanyanga submitted that they had tried to explain the unique circumstances to the trial court but that the trial court does not seem to understand. That his client missed court twice and was asked for documentation to show that he was in Somalia which he cannot provide as he is not supplied with such documentation due to the nature of his special duties as a KDF Soldier serving in Somalia.

**DETERMINATION**

8. I have considered the application for transfer of a criminal case No Siaya PM Cr case No 644 of 2014 from Siaya PM's Court to Kisumu law Courts or to any other court of competent jurisdiction.

9. I have also considered the affidavit sworn by the applicant, the submissions by his counsel and the opposition thereto by the Prosecution. I have also perused the record of the trial court where PW1 the complainant testified on 19/1/2015 before Hon.J.N.Sani, Ag SRM then who left the station and the trial continued before Hon Hazel Wandere PM who also left the station and the matter was placed before Hon J. Ongondo PM for hearing.

10. The applicant was placed on his defence on 22/2/2017 but to date he has not been heard despite the fact that the defence hearing was slated for 25<sup>th</sup> April 2017 before Hon Hazel Wandere.

11. Hon J. Ongondo has handled the matter from 12/6/2017 but has only been confronted with application after application by the defence. The applicant has only been available to file and prosecute applications which have been dismissed but he has never appealed against the said dismissals. Instead, I observe that he did attend this Court in Constitutional Petition case No 3 of 2017 wherein the applicant herein was the Petitioner seeking the following orders:

- (a) ***A declaration that the petitioner's rights to a fair administrative action pursuant to article 4 (1) and 2 were infringed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents;***
- (b) ***A declaration that that the petitioner's right of being arrested and arraigned in court by his employer have been violated;***
- (c) ***A declaration that the right of the petitioner's employer's right to officially be informed of the petitioner's criminal liability has been violated;***
- (d) ***A declaration that the petitioner's rights under article 49 (1) a (i) were contravened;***
- (e) ***A declaration that the petitioner's right not to be subjected to psychological torture guaranteed under article 29 were contravened;***
- (f) ***An order for compensation of the Petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in all contraventions or by any other person found culpable;***
- (g) ***An order of certiorari quashing the criminal proceedings against the petitioner in Siaya Criminal Case No.644 of 2014;***
- (h) ***That the honourable court be pleased to make such other orders as it shall deem fit and just;***
- (i) ***Cost of the Petition.***

12. This court dismissed the above petition vide a judgment dated 22<sup>nd</sup> January 2019 but made an order as follows:

***“However, in the interest of justice, I exercise discretion and order that for convenience of the petitioner and to enable him procure permission from his employer to enable him attend court for the hearing of his criminal case in the lower court, the summons to him to attend court shall at all times be issued to him through his employer the Kenya Defence Forces.”***

13. Prior to the hearing and determination of the above petition, the applicant herein obtained stay of proceedings in the Cr Case No.644 of 2014 pending hearing and determination of the said petition. On 7<sup>th</sup> November, 2017, Hon J. Makau J issued orders of stay the trial court record shows that the applicant was given free bond on account of his employment and being a local person and the assurance that he would attend court whenever needed.

14. The applicant seems to have breached bond terms leading to his arrest and on 4<sup>th</sup> October 2019 he was remanded hence the application herein but the applicant has not disclosed this fact to this court. I also note from the trial court record that the applicant filed an application under certificate of urgency on 4<sup>th</sup> October 2019 before the trial court seeking to be released from remand and that his previous bond terms be reinstated which orders were granted after a warning by the trial court as the prosecution did not oppose the application thereof.

15. On the same day, the applicant approached this court with his application for transfer of his case to Kisumu Law Courts or to any other court fearing that he may not get justice from the PM's court Siaya because the trial magistrate is very hostile and harsh to him.

16. **Section 81(1) (a) and (e)(ii) of the Criminal Procedure Code, Cap 75 provides:-**

***“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***

***.....***

***.....***

***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. ....

**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. ....”

17. Therefore, under the above provisions, this court may order transfer of a criminal trial from one subordinate court to another court of equal or superior jurisdiction whenever it is made to appear that a fair and impartial trial cannot be had in the trial court, or that such an order is expedient for the ends of justice, or is required by any provision of the Criminal Procedure Code.

18. The Applicant has alleged that the trial court has been very hostile and harsh to him and that it seem not to understand his situation as his nature of employment requires him to be away but no documentation is available because of the confidential nature of his duties. He claims that he got an order from this court to be served upon the employer but that the trial court or state has not served the order to the employer; and that therefore he might not get justice before the trial court.

19. Having considered all the above, and read the affidavit by the applicant, I find that the applicant has been responsible for the delay of his case and is only using the trial court as a scapegoat. Hon Ongondo has not taken evidence of a single witness in the matter and for more than two years he has only heard applications after applications in the matter which was stayed pending determination of the Constitutional petition No 3 of 2017 and which petition was determined on 22<sup>nd</sup> January 2019.

20. In my humble view, the applicant is not willing to have his defence case taken. He has all the time to file application after application which applications are intended to delay the hearing and determination of the criminal case. That is not permissible.

21. Article 159 of the Constitution obliges courts to dispense justice expeditiously and unless circumstances are such that expedition would prejudice the parties, a simple assault case cannot lie in court for over five years as is the case herein.

22. It can be frustrating to a trial court where parties scuttle the hearing every time the court sits ready to hear a matter just as it would be offensive to the parties if the court were to delay any hearing for no apparent reason. In my view, the employer issue is a side issue since the applicant is available most of the time on his own accord and it is upon him to inform his counsel as to when he is available away from Somalia so that his defence can be taken.

23. I am unable to find any hostility and or harshness demonstrated by the trial court on record to persuade me to transfer to Kisumu or elsewhere, a simple assault case which has been pending before the trial court for over 5 years and creating unnecessary backlog, just to delay its conclusion. I find that the apprehension by the applicant is unfounded as it is the duty of the trial court to warn an accused person of the consequences of failing to attend court which would be in breach of the bond terms.

24. The applicant was duty bound to ensure that the High Court order requiring service of the summons upon his employer was executed as he is the one who sought those orders not the state or the court. He cannot claim that the state has refused to serve the orders. He must extract them and cause them to be served by usual court process including using a court process server.

25. There is no evidence that he caused to be served the order of this court made in Const.Pet No. 3 of 2017 on 22<sup>nd</sup> January 2019 upon his employer and that he requested the trial court to give him a suitable date for the defence hearing and the trial court declined to do so.

26. I am not satisfied that the Applicant has demonstrated that he will not have a fair and impartial trial in the court currently trying him. He has not even sought for recusal of the trial magistrate from hearing the case. I am also not satisfied that an order for transfer of his trial is expedient for the ends of justice. I find the application for transfer of the Siaya PM Cr Case No. 644 of 2014 to Kisumu or to any other court devoid of merit and the same is hereby dismissed.

27. I order that the applicant Anthony Omondi Murema being an employee of Kenya Defence Forces and the accused person in Siaya PM Criminal Case No. 644 of 2014 which is pending defence hearing on 11/11/2019 SHALL appear in court on that date before the Principal Magistrate Siaya to present his defence case.

28. Should the applicant find it necessary, this Ruling and Order shall forthwith be given to the applicant's counsel Mr. Wanyanga for service upon the Kenya Defence Forces headquarters through the Legal Officer, Ministry of Defence, Nairobi for information and necessary facilitation of the applicant to attend court for the hearing of his case.

29. This file is closed.

**Dated, signed and delivered at Siaya this 14<sup>th</sup> Day of October, 2019.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr. Ariho Advocate holding brief for MR Wanyanga Advocate for the applicant

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent

CA: Brenda and Modestar