



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 25 OF 2019**

**DAN ONYANGO OPIYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an application for Transfer of Bondo PM Cr Case No. 1098 of 2018 to any other court within this jurisdiction)*

**RULING**

1. The Applicant herein Dan Onyango Opiyo is an Accused person before Bondo P.M's Court. In a criminal case No. 1098 of 2018. He claims that he is facing a charge of **Robbery with Violence contrary to Section 296(2) of the Penal Code.**
2. By his application dated 26.6.2019, he seeks for transfer of his case from Bondo P.M's Court to any other Court within the jurisdiction of this Court for him to be accorded fair trial.
3. The application is supported by a statement of supporting affidavit which is not commissioned wherein the Applicant claims that the first witness in the case was allowed to coach the second witness and that when he raised the matter to the trial Court, he was not assisted and that the Magistrate appeared to be hell-bent to convict him in the case.
4. He also claims that he was denied a chance to cross-examine PW3 exhaustively, who is the investigating officer who has threatened him by saying that he would ensure that the Applicant is convicted and jailed.
5. The Applicant claims that he will not get justice before the said Court.
6. At the hearing of his application, he informed the Court that judgment in the said case is due for delivery on 4.10.2019 hence I had to give this ruling expeditiously.
7. I have considered the Applicants plea for transfer of his case from Bondo Law Courts to any other Court for trial. Although the applicant did not invoke the provisions of **section 81** of the **Criminal Procedure Code** which empowers the High Court to transfer a criminal case from one subordinate court to another or to itself. I will deem the application as properly filed in the interests of justice and in order to completely deal with the applicant's complaints. **Section 81** of the **Criminal Procedure Code** states 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.**

8. 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 of 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.”

9. Regrettably, the Applicant came to Court too late in the day as the case was heard and concluded and is pending judgment delivery on 4.10.2019. This Court cannot Order for transfer of a case that is concluded and neither can it recall a judgment which is due for delivery.

10. The Applicant will have an opportunity to exercise his rights of appeal should he be dissatisfied with the decisions of the trial court. More so, a conviction is not the only verdict that a Court of Law can render in a judgment. A conviction is dependent on proof of a case beyond reasonable doubt.

11. For the above reasons, I find that the application for transfer is not sustainable. The same is declined. The applicant to wait for judgment to be delivered on 4.10.2019 for him to decide the next cause of action.

12. File is closed. Orders accordingly.

**DATED AT SIAYA THIS 1<sup>ST</sup> DAY OF OCTOBER, 2019.**

**R. E. ABURILI**

**JUDGE**