REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 220 OF 2018

(Coram: Odunga, J)

BETWEEN

FMN.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(From the Original Criminal Case SO No. 40 of 2017 (CR 1116/2017) at SPM's Court Kangundo)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

FMN.....ACCUSED

RULING

1. In this application, the applicant herein substantially seeks an order that Kangundo Criminal (SO) Case No. 1115 of 2017 be transferred to another court which will accord him a fair trial as enshrined by the Constitution.

2. The application was based on the grounds that the trial court has been seen to discriminate the applicant based on the applicant's HIV status. The applicant lamented that he was not supplied with the statements of PW3, **Elizabeth Kaluku Muisyo**, in order for him to prepare but that the said witness was simply presented in court as a witness. Upon doing so, the trial court compelled the applicant to proceed and cross-examine the said witness despite having not been supplied with her statement in violation of his right as an accused person.

3. In opposing the application, the Respondent relied on a replying affidavit sworn by **Mogoi Lilian**, the Prosecution Counsel in the office of the Director of Public Prosecutions, Machakos.

4. According to the respondent, on 6th December, 2017 when the matter came up for hearing, the prosecution had witneses in court and was ready to proceed with the hearing. However, the applicant informed the court that he had not been supplied with witness statement and based on that the hearing was adjourned and the prosecution directed to supply the statements the same day. On 20th December, 2017, the hearing proceeded with two witnesses before the same was adjourned to enable the prosecution call other witnesses. On 25th January, 2018, though the prosecution was ready to proceed with one witness, the matter was adjourned after the applicant informed the court that he was not feeling well. Similarly, on 5th March, 2018 the applicant informed the court that he was unable to proceed. On 5th March, 2018 after PW3 testified that applicant applied for special diet and applied for the recall of PW1. However, no issue was raised with respect to PW3's witness statement, an implication that he had been supplied with the same. On 19th March, 2018 an order was made that the applicant be given the same diet as others in similar condition. On 9th May, 2018 when PW1 was availed for further cross-examination, the hearing did not proceed as the applicant was reportedly unwell. Similarly, on 25th June, 2018 the applicant was absent without any reason and warrants of arrest were issued against him and despite several mentions thereafter, the applicant was still absent till 23rd July, 2018 when he was brought to court under warrant of arrest and after failing to give any satisfactory reason for his absence, his bond terms were cancelled. It was deposed that on 23rd August, 2018 when PW1 availed herself for further cross-examination, the applicant indicated that he had no further questions hence the matter was adjourned. On 22nd November, 2018 after the conclusion of PW5's testimony, the applicant once again applied for recall of PW1 for further cross—examination but based on the objection by the prosecution, the application was denied.

5. It was therefore contended that the hearing was fairly conducted and the applicant's rights were upheld and that there was no bias on the part of the trial court. It was contended that the matter is almost two years in court and it is in the interest of justice that the trial comes to an end as there is no valid reason why the same should be transferred.

6. The court was therefore urged to dismiss the application.

7. There was a rebuttal affidavit sworn by the applicant herein in which the applicant introduced fresh matters not the subject of this application.

8. I have considered the issues raised in this matter. With respect to the circumstances under which this Court transfers a case from one magistrate to another, **Trevelyan, J** in **Shilenje vs. The Republic [1980] KLR 132**, held that:

> **"On the authority of such cases as *Re M S Patel's Application (1913) 5 KLR 66* and *The Republic vs. Hashimu [1968] EA 656* (a Tanganyika case), I am asked to say that the application should be granted if I am satisfied that a clear case has been made out that the applicant has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate; and save, that I would rather use my expression "a real apprehension, honestly held and reasonably based" for "reasonable apprehension", I would not quarrel with that. But I am asked, also, on the authority of later English decisions such as *Metro-politan Properties Co (F G C) Ltd vs. Lannon [1969] 1 QB 577* and *Hannam vs. Bradford City Council [1970] 2 All ER 690* to hold (if I understood counsel correctly) that the question falls (in the end) to be resolved on the basis that, if right-minded people would have a suspicion that a fair trial was not to be had, that is enough to require the application to be granted. I would like to go into the question a little more closely than that; and I derive much help from the commentaries upon section 526 of the *Indian Code of Criminal Procedure 1908* made by two eminent writers, both former judges, Sir H T Prinsep and Sir John Woodroffe, i.e the former's *Commentary and Notes* (14th Edn) and the latter's *Criminal Procedure in British India* (1926). On page 646 of Prinsep we find:**
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> **'*The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer.*'**

and I endorse entirely. It would be thoroughly unfair to such officers were it otherwise. At page 647 we have:

> **'*What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of a reasonable character, and not withstanding that there was to be no real bias on the matter, the fact that incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer.*'**

Again I agree; it is, as it were, the objective approach to the problem supplementing the subjective approach which I have just previously set out. Then we have:

> **'*Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused. The court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil.*'**

which also must be so, or so I think. Then it is said:

> **'*But although each of the several grounds imputing bias may not be sufficient in itself for ordering the transfer of a case to another court, they may, taken together form reasonable grounds for the accused apprehending that he may not have a fair trial.*'**

which again, as I think, must be so. And finally, on page 648 we have:

> **'*It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.*'**

Which I am prepared to accept; but this does not relieve the court from resolving the question on the evidence before it in the light of what the section under discussion provides, which is what, as I understood it, counsel for the respondent urged upon me.

On pages 612 and 613 of Woodroffe, we have:

> **"…*This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere…A more ordinary class of***

case is that in which, the High Court is not of itself of opinion that affair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have affair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security…The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer…The question in such cases is not whether there is actual bias…but whether there is reasonable…ground for suspecting bias…and whether incidents may have happened which, though they might be susceptible to explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial…The necessary condition, however, for the transfer in such a case is that the apprehension to justify a transfer must be reasonable, that is, the court ought not to be guided by the impressions produced in his own mind as to the impartiality of the magistrate, but must look to the effect likely to be produced in the mind of the parties to the action of the magistrate…Abstract reasonableness, however, ought not to be the standard…'

Which, if not precisely the same as Prinsep, is in line with it."

9. It is recognized that "*It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety*." **(People vs. Rhodes (1974) 12 Cal. 3d 180, 185 [115 Cal. Rptr. 235, 524 P.2d 363])**.

10. The principles that emanate from the foregoing are that in order to justify transfer of a case from one judicial officer to another, there ought to be a real apprehension, honestly held and reasonably based that the accused may not have a fair and impartial trial. Accordingly, some very strong grounds are required for transferring a case from one judicial officer to another. However, though incidents have not happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, they may, nevertheless be such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused since the court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants are unreasonably foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts yet it is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held. It is equally, its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences. With regard to transfer of cases on grounds that a fair and impartial inquiry cannot in fact be had, cases which are very rare to come by, on grounds personal to the judicial officer, is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere.

11. In this case as I have stated hereinabove, the applicant's application is based on the fact that he was never supplied with witness statements before PW3 testified hence he had no opportunity to prepare his defence.

12. Article 50 of the Constitution provides as hereunder:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

(r) information shall be given in language that the person understands.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

> ***(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and***
>
> ***(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.***

(6)A person who is convicted of a criminal offence may petition the High Court for a new trial if—

> ***(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and***
>
> ***(b) new and compelling evidence has become available.***

(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

13. It is therefore clear that the appellant was entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court had this to say on the same: -

> **"The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be update when additional information was received."**

14. In **R vs. Ward [1993] 2 All ER 557**, **Glidewell, Nolan and Steyn, LJJ** held that:-

> ***"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."***

15. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in **Simon Githaka Malombe vs. Republic [2015] eKLR,** where the said Court expressed itself as follows:

> **"We do not quite fathom how the appellant can possibly be to blame for the prosecution's failure to supply the witnesses' statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal…It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real."**

16. In this case**,** on 5th March, 2018, the day PW3 testified, the applicant informed the court that he was ready to proceed. After PW3 testified, the applicant only applied to be given special diet an application which the court acceded to on 19th March, 2018. He never at any time complained that he was never furnished with the statement of PW3. The fact that on 6th December, 2017 the applicant applied, and unnecessarily so, in my view, that he be supplied with the witness statements is a clear manifestation that he was well aware of his constitutional rights. Nothing prevented him from objecting to the testimony of PW3 before the said witness testified if he had not been furnished by her statement. Instead he said that he was ready to proceed an indication that he was prepared to do so.

17. Having considered the facts raised in this application, I am not satisfied that the applicant has proved that there is a real apprehension, honestly held and reasonably based, that he has or will not receive a fair and impartial trial from the Learned Magistrate.

18. In the premises, the application fails and is dismissed. Let the Lower Court file be returned to Kangundo Law Courts to be dealt with in the usual manner.

19. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Applicant in person

Miss Mogoi for the Respondent

CA Geoffrey