



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CRIMINAL APPLICATION NO. 36 OF 2019

KAURA JOSEPH M'BURIA (CHAIRMAN)

MUNENE MUGUNA (SECRETARY)

JULIUS GITONGA (TREASURER).....APPLICANT

(Suing as officials of KATHERI MUTUJENE WAZEE CBO and on behalf of 28 others)

VERSUS

REPUBLIC.....RESPONDENT

VERSUS

PATRICK MUTHURI MURITHI.....ACCUSED/RESPONDENT

RULING

1. Kaura Joseph M'Buria one of the complainants in Githongo SRM Court Criminal Case No. 500 of 2019 filed a Notice of Motion dated 8th July 2019 brought pursuant to **Section 81 of the Criminal Procedure Code**. The applicant seeks among other orders for the transfer of GITHONGO SENIOR RESIDENT MAGISTRATES CRIMINAL CASE NO. 500 of 2019 to the Meru Chief Magistrates Court for trial and final determination.
2. The grounds of the application upon which the application is grounded upon are in its body and the supporting and supplementary affidavit of Kaura Joseph M'Buria sworn on 8th and 31st July 2019 respectively. It is contended that the complainants are members of Katheri Mutujene wazee CBO and owners of Plot No. 61 situated within Katheri Market and measures approximately 1/8 acres. On 30th March 2019 they were fencing the said land when their area MCA, the accused, came and started taking photographs and threatening to uproot the poles and barbed wire they were fencing. He was then charged with the offence of malicious damage to property at Githongo Law Courts.
3. The police in their investigation confiscated an IPAD belonging to the accused which contained evidence the police and complainant will rely upon during the trial. However, the accused made an application to have it returned to him and the court allowed the application and ordered that the documents stored in the IPAD should not be used in prosecuting the Respondent herein. It was the applicant's contention that they were not given an opportunity to voice their concerns regarding the order. Thus, they have lost confidence in the court.
4. The application was opposed vide the replying affidavit of Patrick Muthuri Murithi sworn on 20th July 2019. He deponed that the application is filled with falsehoods and denied all the allegations made by the applicant. That in spite of the order being made the prosecution has blatantly refused to honor the same as they are still holding his IPAD. That the applicant cannot substantiate their allegation of having lost their confidence in the court since the accused has no powers to influence any decision or functioning of the said court or any other judicial institution. The application is against the provisions of **Section 81 (1) (d) and (e) of the Criminal Procedure Code**. Mr Chelule for the state submitted that that the DCIO and IO had been ordered to release the IPAD to the accused person in the Lower court but had defied the court order and failed on two occasions to appear before the Trial Magistrate. He said further that instead of obeying the Court Order the DCIO and IO had opted to file an application for transfer through the complainants.
5. This matter was canvassed by way of written submissions. The applicant submitted by reiterating what they had stated earlier. At the moment of writing this the respondent's had not filed their submissions.
6. The issue of determination before this court is **whether to transfer the Criminal Case No. 500 of 2019 from Githongo Law Courts to**

Meru Chief Magistrate Court?

7. **Section 81 of the Criminal Code Procedure** provides the High Court with power to change venue. It states that:

“(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. According to the applicant is that the case ought to be transferred for the court is not impartial as it allowed the accused’s IPAD to be released and not to use the evidence in it. The applicant affirmed that there is evidence that shows the accused committed the alleged offence he is being charged with. Even though, the police through the D. C. I. O writing a letter explaining to the court that they intend to rely on the contents of the IPAD as their evidence in court the court went ahead and issued the release order. When the trial court issued the order it stated as follows:

“I have considered the sentiment of both the defence counsel and the prosecution counsel. I note that this is a case of malicious damage to property. I find no reason why the prosecution should process photographs evidence using the accused person’s Ipad. That goes against the right not to give incriminating evidence. In the circumstances I order the prosecution to release the accused person’s Ipad forthwith.”

9. **Article 50 (2) (l) of the Constitution** states that:

“Every accused person has the right to a fair trial which involves the right –

...

(l) to refuse to give self-incriminating evidence.”

In the case of **Richard Dickson Ogendo & 2 others v Attorney General & 5 others [2014] eKLR** Majanja J stated:

“To my mind the, the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purposes of extorting unwilling confessions or declarations implicating the accused in the commission of the crime. The purpose of protection against self-incrimination was summed up by the US Supreme Court in *Miranda v Arizona* 384 US 436 (1996) where it observed as follows; “All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect of a government, state or federal, must accord to the dignity and integrity of its citizens. To maintain a ‘fair state-individual balance, to require the government to shoulder the entire load’ to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth”.

Further in the case of **Republic v Mark Lloyd Steveson [2016] eKLR** Joel Ngugi J stated:

“I believe that this statement captures the position under the Kenyan Constitution: The right against self-incrimination covers both testimonial as well as documentary evidence. As long as the evidence sought to be adduced is or was compelled either in court or outside court by an Investigating Officer or some other person in authority, such evidence is given due to testimonial obligation and will be excluded from the criminal trial of the Accused Person who is so compelled.”

10. It is alleged that the accused used his own IPAD which he used to take photographs that would evidence his commission of the offence he is charged with. The IPAD is not in line with the offence he is charged with. Also, the property belongs to the accused who was in use of it. Thus, it is quite apparent trying to retrieve information from it amounts to self-incrimination which is a violation of an accused's right to fair hearing. Photographic evidence that is admissible in court against an accused person is that which has been obtained by a Scenes of Crime Officer duly authorized by a gazette notice using duly authorized machines /Camera and such evidence has to be certified. Photographs taken by an accused person using their own gadgets do not fall under the law of production of photographs under the Evidence Act. If the complainants were aggrieved by the order of the Trial Court they ought to have appealed against the order and should not have used this application to avoid executing the lawful order of the court.

11. The application to transfer Criminal Case No. 500 of 2019 from Githongo Law Courts to Meru CM Court has no merit and it is dismissed.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 09TH DAY OF OCTOBER 2019.

In the presence of :

C/A: Mwenda

Ms Mbithe for state/Respondent.

Mr Abubakar Advocate holding brief for Kaimenyi for Applicant. Copy of Ruling to be supplied to applicant at their cost.

HON A. ONG'INJO

JUDGE