



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CRIMINAL APPL NO. 3 OF 2018**

**KENNEDY MWENDA THURANIRA.....APPLICANT**

**-VS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Kennedy Mwenda Thurania, the applicant has applied vide an application dated 14<sup>th</sup> December 2017, for the transfer of Isiolo **Criminal case No. 544 of 2016, Republic –vs- Kennedy Mwenda Thurania** from Isiolo to Meru.

2. The gist of the application is that the Advocate who was allocated that case came to Isiolo and was disappointed by that court's that further the case had stayed for so long without being heard as witnesses had not been coming. The applicant further contended that the pro bono lawyer who had been allocated to him had disappeared leaving the matter unsettled and that since he had another case in Meru, it would save tax payers money if the Isiolo case was transferred to Meru where he was currently being held at GK prison Meru.

3. Mr. Namiti for the State while urging the court to dismiss the application contended that with regard to the issue of re- presentation, the applicant had a right to choose an Advocate and that the State could not be burdened with such an expense. He further contended that this was an Isiolo case where the offence was alleged to have been committed and that the witnesses hailed from Isiolo. He therefore observed that it was easier for the applicant to be transported to Isiolo as opposed to the witnesses being transported to Meru during the hearing.

4. I have carefully considered the application and the rival contentions by the parties. **Section 81 of the Criminal Procedure Code CAP 75 of the Laws of Kenya** gives the High Court powers to transfer cases. That section inter alia, provides; that:-

***“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.***

5. In the case of *Kinyatti V Republic (1984)eklr*, the Court of Appeal held that in deciding whether or not to transfer a case from one Court to another, the test is, whether an applicant has made out a clear case by discharging on the balance of probabilities, the burden of showing that the apprehension in his mind that he may not have a fair and impartial trial is of a reasonable character.

6. In *JOHN NJERU KITHAKA & ANOTHER VS REPUBLIC [2009] eKLR*, the court of appeal cited with approval the case of *REPUBLIC V HASHIMU [1968] EA 656* wherein it was held that before a transfer of any trial is granted, a clear case must be made out that the accused has reasonable apprehension in his mind that he will not have a fair trial before the magistrate from whom he wants the transfer.

7. In the instant case, the applicant contended that the Advocate who was allocated to his case came to Isiolo and was disappointed and that the matter had delayed since witnesses were not forthcoming. The applicant did not disclose who the concerned Advocate was. The case is clearly of 2016 which is barely two years old.

8. Although the applicant contended that he was convinced that a fair and impartial trial could not be accorded to him was not backed by any evidence. He did not state what the trial magistrate had done or failed to do for this court to call for the original record and examine the same to satisfy itself of the alleged impartiality of the trial magistrate.

9. As regards representative the applicant can live hire his own and if he is unable, he is at liberty to raise the issue at the trial for its directions. It is also easier for Applicant to be transported to Isiolo than the witnesses being transported to Meru Court.

10. Accordingly applying the test of law, I am not satisfied that the applicant has shown to the satisfaction of this court that he has a reasonable apprehension that he will not have a fair and impartial trial at the Isiolo Court.

11. I therefore find the application to be without merit and dismiss the same.

**DATED and DELIVERED at Meru this 5<sup>th</sup> day of April 2018.**

**A.MABEYA**

**JUDGE**