



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL APPLICATION NO. 7 OF 2018

STANLOUS KITONGA MUSEMBI.....1ST APPELLANT

JOSEPH KAMAU SAMANDE.....2ND APPELLANT

JOSEPH MANYINGE KIARIE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 8/8/2016 in the chief magistrate's court at Narok in Criminal Case No. 3689 of 2012, R. v. Joseph Kamau Samante & 3 others).

RULING

Introduction

1. This is an application for transfer of the three appeals of the appellants from this court to another High Court.

Factual Basis

2. According to the appellant's affidavit, they were sentenced to death in respect of a capital robbery charge by the Principal Magistrate at Naivasha in Criminal Case No. 3689 of 2012. They then filed their appeals in the High Court being Criminal Appeal Nos. 36, 37 and 40 of 2016 at Naivasha registry.

3. They have further deponed that their appeal were to be heard in the High Court at Naivasha, but the deputy registrar of that court transferred their appeals without their consent to the High Court at Narok.

4. Additionally the appellants have averred that their case originated from Narok Chief Magistrate's court, but was transferred in the interests of justice to Naivasha Magistrate's court due to pressure from Narok Police Command and other outside pressure. They now feel unsafe for the appeals to be heard in the High Court at Narok, since the Narok police Command works hand in hand with the Narok High Court.

5. They fear that this might lead to influence which might prejudice their fair hearing of their appeals by this court.

6. The appellants have also averred that being aggrieved parties, they seek that it is in the interest of justice that another High Court hears and determines their appeals.

7. Finally, they have averred that their application is brought in good faith and in the interest of justice.

The applicable law

8. Section 81 of the Criminal Procedure Code [Cap. 75] Laws of Kenya authorizes the High Court to transfer a case for trial and determination from one magisterial court to another or to itself in terms of section 81(1) (e) (iii) of the Criminal Procedure Code. [Cap 75] Laws of Kenya. The provisions of section 81 aforesaid apply to trial cases pending in the magisterial courts. The aforesaid provisions are clearly inapplicable to appeals that are pending in the High Court for hearing and determination.

9. Furthermore, in *James Omutiala Ayuku v. R, Misc. Criminal Application No. 24 of 1989, High Court (Kisumu)*, the High Court refused to transfer a case from one magisterial court to another, following allegations by the accused that the complainant had bribed the police prosecutor and that his advocate had not been allowed to make a submission of no case to answer. The court ruled that the allegation of

bribery had nothing to do with the magistrate.

10. In *R. v. Samson Ochieng Nyambua and others in Misc Criminal Application No. 39 of 1991, High Court, (Kisumu)*, the court transferred a case from one magisterial court to another, since the trial magistrate had convicted and sentenced the accused to a monetary fine for causing disturbance in court in the course of a judicial proceedings. In addition to the foregoing case law, article 50 (1) of the 2010 constitution of Kenya guarantees to every person the right to have any dispute resolved in a fair and public hearing before a court. The instant appeals are not excluded from the operation of these constitutional provisions.

11. Finally in the capital robbery case of *Nkuyata v. R. in Criminal Appeal No. 15 of 2016*, in which I confirmed the appellant's appeal against conviction and sentence of death, I transferred his appeal to the High Court at Naivasha for hearing and determination.

12. In the light of the applicable law and the reasons advanced for transfer, I find that the allegations of the influence of the Narok command have nothing to do with this court. Furthermore, these allegations lack actual evidentiary basis. I find that the appellants are forum shopping for their appeals to be heard by another High Court.

13. Furthermore, I find that no reasonable tribunal properly directing itself on the law and the facts will believe that they will not get a fair hearing and determination of their appeals.

14. In the light of the foregoing, I find that the appellants have not made out a case warranting a transfer to another High Court.

15. Their application is hereby dismissed in its entirety.

Ruling delivered in open court this 4th day of April, 2018 in the presence of the appellants and Ms. Nyaroita for the respondent.

J. M. Bwonwonga

Judge

4/4/2018