



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAJIADO**

**CIVIL MISC. APPLICATION NO. 39 OF 2016**

**FAITH MUTHONI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant **Faith Muthoni** through M/s Khaminwa Advocate filed a notice of motion dated 9/11/2016 brought under section 80 of the Criminal Procedure Code and all other enabling provisions of the law seeking the following order:

- That the honourable court do issue an order transferring Criminal Case No. 111 of 2016 involving the applicant and the state filed at Ngong Chief Magistrate's Court to Milimani Law Courts at Nairobi

The application is premised on the following grounds:

1. That the applicant was charged with the offence of threatening to kill contrary to section 223(1) of the Penal Code and failing to comply with the condition subject to which a firearm is held contrary to section 4 (3) (d) of the Firearm Act of 2012.
2. That the applicant took plea on the 29<sup>th</sup> September, 2016 and was released on a personal bond of Kenya Shillings One Million (1,000,000.00) and surety of a similar amount, bond term which were quite oppressive.
3. That the learned magistrate exhibited bias against the applicant while conducting the proceedings by being dismissed and rude to the counsels for the applicant as well as refusing to grant a hearing date which suits the applicant counsel to enable him attend.
4. That furthermore the learned judge was dismissive of a letter dated 5<sup>th</sup> October, 2016 from the Office of the Director of Public Prosecutions which is fundamental to the said proceedings as a complaint had been lodged in regard to the manner in which investigations which is fundamental to the said proceedings as a complaint had been lodged in regard to the manner in which investigations were and are being conducted with regards to the said Criminal Case No. 111 of 2016, Republic v Faith Muthoni.
5. That the said conduct of the learned magistrate risk violating the applicant's constitutional right

to a fair hearing hence the application.

6. That furthermore the applicant upon release has received death threats with regards to the said case from a mobile phone number 0722891291, which read as follows:-

***“Uko mjanja but hesabu kuanzia leo siku tatu hazitaisha kama hujawekwa futi sita chini.”***

7. That hence the applicant is apprehensive that her security cannot be guaranteed if the said proceedings are conducted within the jurisdiction of Ngong Law Courts.

8. That it is in the interest of justice that the application be allowed.

The certificate is further supported by the affidavit sworn by the Senior Counsel Mr. Khaminwa. The gist of the affidavit being that the trial magistrate at Ngong Law Courts displayed bias which pauses a violation to the constitutional right to a fair hearing of the applicant case. The respondent in a rejoinder filed a replying affidavit sworn by Mr. Akula the senior prosecution counsel dated 11/1/2017. In his affidavit the senior prosecution counsel stated that the applicant has not availed evidence on bias against an unidentified judicial officer. The respondent counsel opposed the application for transfer of the case to Milimani Court Nairobi as lacking merit and sufficient grounds to invite jurisdiction of the court to grant the orders.

I have considered the application, affidavit in support and the replying affidavit by the respondent. The issue before this court therefore is, whether the proposed transfer sought by the applicant to have criminal case No. 111 of 2016 filed at Ngong Law Courts be transferred to the Chief Magistrate Court Milimani Nairobi.

#### **THE LAW:**

I law applicable to the powers of the High Court to change venue of a case. The general power of the court to transfer cases to another court is found in section 81 of the Criminal Procedure Code which provides as follows:

**“(1) Whenever it is meant 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 professional of this Code It may order –**
1. **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;**
  2. **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;**
  3. **That an accused person be committed for trial itself.”**

## Case Law and Commentaries:

The question of transfer of cases and recusal of judicial officers has been considered widely in a number of cases. In the case of *Jasbir Singh Rai & Others v Tarlochan Singh & 4 Others [2013] eKLR* the court held inter alia:

**“Recusal as a general principle has been much practiced in the history of the East African Judiciaries even though its ethical dimensions have not always been taken into account. The term is thus defined in Black’s Law Dictionary, 8<sup>th</sup> Edition [2004] pg 1303:**

**“Removal of oneself as a judge or policy maker in a particular matter (especially) because of conflict of interest.**

**From this definition, it is evident that the circumstances calling for recusal for a judge are by no means case in store. Perception of fairness, of conviction, of moral authority to hear the matter is the proper test of whether or not the non-participation of the judicial officer is called for.**

**The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized and he seen to have had its role, that the profile of the rule of the law in the matter in question be seen to have remained uncompromised. It is an insightful perception in the common law tradition that the justice of a case does not always rest on the straight lines but by statutory prescriptions and the judicial discretion in its delicate profile is critical to equitable outcomes.**

**This is what Sir David Maxwell Fyfe meant when he attributed to Lord Atkin a constructive intuition which operates after learning and analysis are exhausted. In *G. Lewis Lord Atkin (London Butter Worth [1983] pg 166)* it is precisely such delicate elements of judicial fairness that will also feature in the judgement as to whether it is not recusal of a judge, particularly in the case of a collegiate bench is of any materiality in a given case.....”**

**Different jurisdictions make provisions through statute or practice directions for certain grounds for recusal or disqualification of judges hearing matters in court. The most common examples, in this regard are: whether the judicial officer is a party: it related to a party or is a material worthiness or has a financial interest in the outcome of the case or had previously acted as counsel for a party.”**

In deciding a similar issue in the case of *Republic v David Makali & 3 Others Cr. Appeal No. 4 and 5 of [1994] UR* the court held as follows on the test of disqualification of a judge Tuno J stated:

**“That being the position as I see it when the courts in this country are faced with such proceedings as these (ie. proceedings for the disqualification of a judge” it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice.**

**The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quash judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge/magistrate or tribunal.”**

In the case of *Patrick Ndegwa Warungu v Republic High Court Misc. Application No. 440 of 2003 Ombija J* as he then was stated as follows:

**“The principles upon which transfer may be granted has been crystallized in several authorities. The leading one being Shelenje v Republic [1980] KLR 132 which lays down the law that for the high court to order a transfer there must be reasonable apprehension in the applicant’s or any right thinking person’s mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.”**

These are the principles of law to be applied in determining this notice of motion by the applicant under section 81 of Criminal Procedure Code. The question I ask myself is whether looking at the rival affidavit evidence it is fair and just to come to a conclusion that the non-identified judicial officer is likely to be biased against the applicant. Has the applicant demonstrated by way of evidence what are the acts or conduct deduced to warrant this court to disqualify the magistrate including change of venue of the trial to another court? The allegations of bias have not been presented before the trial magistrate nor is there evidence that the judicial officer at Ngong has mis-conducted himself in the proceedings or acted unfairly to the detriment of the applicant. The trial court has jurisdiction to try the criminal case facing the applicant. In addition the applicant has not shown that her rights to a fair hearing under Article 50 of the Constitution have been violated by the alleged judicial officer. From the record the prosecution is yet to open its case and present its evidence against the applicant. The applicant will have an opportunity to be heard and cross examine the witnesses on the allegations in respect of the indictment.

I have considered the issues with care and the discretion vested in this court to transfer cases under section 81 of the Criminal Procedure Code and the principles elucidated by the authorities referred herein. On my part I see no grounds to allow the application. The notice of motion by the applicant dated 9/11/2016 is hereby dismissed. The Chief Magistrate Criminal Case No. 111 of 2016 registered at Ngong Law Courts do proceed forthwith for hearing and determination.

**Dated, delivered and signed in open court at Kajiado this 10<sup>th</sup> day of February, 2017.**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

The Applicant present

Mr. Mateli Court Assistant

Mr. Mugambi holding brief for Mr. Khaminwa for the applicant present