



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL MISC. APPLICATION NO. 08 OF 2017

BETWEEN

ANN SIRENGO.....APPLICANT

AND

REPUBLIC.....RESPONDENT

R U L I N G

The Application

1. By the Notice of Motion dated 31.01.2017, the applicant seeks transfer of Butali SRM Cr. Case No. 716 of 2016 to Kakamega Law Courts or any other court of similar jurisdiction for trial and determination. The application is premised on grounds:-

- a) That the complainant has verbally indicated he is relate[d] to the trial Magistrate and [as] such is able to compromise the trial.
- b) That the applicant's several applications to the trial court to disqualify itself from the trial even after airing her concerns have fallen on deaf ears.

2. The application is also supported by the applicant's affidavit sworn on 31.01.2017 and on her further affidavit sworn on 01.03.2017. The application is not opposed

The facts of the Application

3. The applicant has deponed in her affidavit dated 31.01.2017 that the complainant in the lower court case, one Daniel Mwachi, has threatened her with allegations that he can influence the trial Magistrate because of his blood relationship with the said Magistrate. She also deponed that though she had applied to the trial court to disqualify itself, the trial court has refused to do so. The applicant is apprehensive that she will not get justice from the court at Butali if the case proceeds the said court.

4. In the further affidavit, the applicant avers that since taking plea on 10.06.2016, her case, in which she is charged with obtaining Kshs.78,000/= from Daniel Mwachi on 12.02.2016 by false pretences contrary to Section 313 of the Penal Code, has been mentioned 19 times without the case ever taking off. The further affidavit also addresses the issue of bond, which is not a subject matter of the instant application. The state did not make any substantive submissions on the application.

The Law

5. The locus classicus on the issue of transfer of cases in the case of **Shilenje – vs – Republic [1980] KLR 132**, in which **Trevelyan J** quoted respectively from commentaries by **Sir H.T. Prinsep and Sir John Woodroffe** in “Commentary and notes (14th Edition) [1906] and Criminal Procedure in British India (1926) for the proposition that:

“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.”

6. In **Ken Muriuki – vs – Republic [2015] eKLR, Wendoh J** persuasively, citing the English case of **R- vs – Sussex Justices Exp. Mc Carshy [1924] LLB 256** stated that in dealing with applications for transfer of cases, the court ought to ensure that “Justice should not only be done, but should manifestly and undoubtedly be seen to be done,” and that where the circumstances “suggest bias, prejudice or favouritism on the part of any judicial officer,” then the court so accused should not be allowed to conduct the said case. Judge Wendoh also referred to the case of **Tumani – vs – Republic [1972] EA 441**, where the Court in the said case held and I wholly subscribe to the said holding that, “In considering the possibility of bias, it is not the mind of the judge which is considered, but the impression given to reasonable persons” I am also fully persuaded by what **Ochieng J said in the case of Kamande and 3 others – vs – Republic [2014] eKLR Nairobi Criminal Application No. 83 of 2012 relied upon by Wendoh J. in the Ken Muriuki** case (Supra) in the following words:-

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them.

If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”

7. The issue that this court should give weight to in deciding whether or not to grant the order sought is “whether the applicant herein 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.” See **Kinyatti – vs – Republic, Criminal Appeal No. 6 of 1983 [1983] KLR 562**.

Analysis and Determination

8. Taking into account the facts of this case and the principles set out in the above cited authorities and the provisions of Section 81(1) of the Criminal Procedure Code, I am fully satisfied that the applicant has made out a case for the order sought. The record clearly shows that since the plea was taken on 27.06.2016, and though the case was fixed for hearing on various occasions, the hearing of the case has never taken off. But the more critical issue is the applicant’s apprehension that she will not receive a fair hearing if the case to hearing at the Butali Law Courts. The allegations of the complainant bragging that he can influence the outcome of the case because of his blood relationship with the trial court have not been refuted, and this goes a long way to support the applicant’s apprehension. The state concedes the applicant’s prayer for transfer. In the premises, and for the reasons given above, I order as follows:

- 1) That Butali SRM’s Criminal Case No. 716 of 2016 be and is hereby transferred to Kakamega Chief Magistrate’s Court for hearing and final determination.
- 2) To expedite the process of the matter proceeding before the Chief Magistrate’s Court at

Kakamega, the applicant shall appear before the said court on Wednesday, 08.03.2017 for directions as to hearing dates.

3) The applicant is at liberty to make her application before the Chief Magistrate's court for review of her bond terms.

4) The applicant shall remain in custody pending her appearance before the Chief Magistrate's court.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 7th day of March, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Osango (present).....for Applicant

.....Mr. Ng'etich (present).....for Respondent

.....Mr. Polycap.....Court Assistant.