

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO.332 OF 2016

MICHAEL KAMAU SAMWEL.....1ST APPLICANT

ZAKARY GITONGA NDERITU....2ND APPLICANT

KEVIN NJUGUNA WAINAINA....3RD APPLICANT

DAVID KINUTHIA MBATHA.....4TH APPLICANT

HOSEA KASIM.....5TH APPLICANT

LAWRENCE KURIA NJERU.....6TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicants have applied to this court to have some witnesses recalled in the criminal trial facing them before the Chief Magistrate's Court at Makadara. The Applicants complain that the prosecution has delayed the trial by failing to avail witnesses on the dates that the case had previously been scheduled for hearing. The Applicants state that since the trial commenced, several magistrates have heard the case. Their rights under **Section 200(3)** of the **Criminal Procedure Code** were not taken into account. They specifically requested the court to order that the trial commences afresh. During the hearing of the application, the Applicants (who are acting in person) reiterated the contents of the application and the supporting affidavit. They told the court that they had suffered in the entire period that the trial has been pending before the magistrate's court. This was because the trial court denied them bond and was unreasonably indulging various applications made by the prosecution to unnecessarily adjourn the hearing of the case. They complained that they were not accorded the right facilities to be able to cross-examine the complainant when she testified before court. That is the reason why they were seeking the complainant to be recalled and testify before court. They also urged the court to consider releasing them on bond pending their trial by the magistrate's court.

Ms. Sigei for the State opposed the application. She submitted that the Applicants had been charged with a serious offence which may result, if convicted, in the Applicants being sentenced to death. She explained that as much as the Applicants are entitled to bail, there were exceptional circumstances which negated this right. The Applicants had interfered with witnesses and even threatened to kill some of them. The Applicants had made it difficult for the trial court to expeditiously dispose of the case because of their behaviour in the magistrate's court. She urged the court to dismiss the application.

This court has carefully considered the complaints raised by the Applicants in this application. It has also had the benefit of perusing the proceedings of the trial court. The Applicants allege that their right to fair trial as provided **under Article 50** of the **Constitution** had been infringed in the manner in which the trial has been conducted. The Applicants have particularly been irked by the fact that they were denied bond pending trial and the fact that the trial court had indulged the prosecution in the various applications that they had made to adjourn the hearing.

Are these allegations made out in the proceedings? It is apparent from the proceedings that the

Applicants have made it difficult for the trial to be expeditiously concluded by the trial court. Evidence was placed before the trial court which supported the assertion by the prosecution that the Applicants had intimidated witnesses. Indeed, some of the witnesses have been placed under Witness Protection. Further, it is apparent that the Applicants do not want particular magistrates to hear their case. In fact, they walked out of the court during some sessions. They have also unreasonably demanded the recusal of one magistrate from hearing their case. The said magistrate, in the interest of justice, acceded to their request. The Applicants are now using that fact of recusal to demand the recall of the witnesses who had already testified. That is clearly an abuse of the due process of the court. This court cannot allow the Applicants to frustrate their trial before the trial magistrate's court under the guise that they are enforcing their constitutional right to fair trial. It is evident that the Applicants have a game plan: that game plan is to, by hook or crook, frustrate the trial so that they can, somehow, be acquitted for lack of production of evidence by the prosecution. It is clear that the Applicants are acting in absolute bad faith. This court cannot countenance the Applicants behaviour by exercising its discretion in their favour.

The upshot of the above reasons is that the Applicants application has been made in bad faith and is hereby dismissed. The trial shall continue from where it had reached before the magistrate who recused himself. The magistrate court's file shall be returned to Makadara Chief Magistrate's Court for hearing and final disposal. For the avoidance of doubt, the Applicants shall appear before the Chief Magistrate Makadara on 20th March 2017 for the mention of their case for the purpose of fixing appropriate hearing dates. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MARCH 2017

L. KIMARU

JUDGE