



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL MISC. APPLICATION NO. 55 OF 2016
KEVIN SHITAMBASI AMAYI.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

R U L I N G

Introduction

1. This application relates to Mumias Principal Magistrate's Court Criminal Case Number 305 of 2016, formerly Kakamega CMC Cr. Case No. 1999 of 2014. The applicant is charged with four counts of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. On the 23.03.2016 the applicant made an application before the Chief Magistrate, Kakamega to have his case transferred to another station on the ground that he had other cases in all courts at the Cm court at Kakamega. The then Chief Magistrate Hon. R. N. Kimingi ordered the case transferred to Mumias Court. The applicant appeared before the Court at Mumias on 12.04.2016. So far, 5(five) witnesses have testified before the principal Magistrate at Mumias.

The Application

3. By the Notice of Motion dated 23.09.2016, the applicant seeks orders transferring this case from Mumias Court to any other court of similar jurisdiction. The applicant also seeks termination of the trial of the case pending determination of this application.
4. The application is premised on one ground, namely that the trial Magistrate presiding in the matter has demonstrated partiality, undue interest and unfairness in handling the trial. The applicant also swore an affidavit in support of the application in which he depones that his application to the learned trial Magistrate to disqualify herself from the case has been declined and further that witnesses had been allowed to testify in his absence.
5. The applicant also alleges that the complainant has some influence over the court at Mumias and that unless this case is transferred therefrom, he stands to suffer outright prejudice.

Response to the Application

6. Prosecution Counsel Mr. Juma opposed the application on grounds that the applicant’s application is intended to delay the finalization of the case against him, especially in view of the fact that only two witnesses are remaining to testify before the prosecution closes its case. That infact by filing the application, the applicant is placing roadblocks in the path of a fair and speedy trial.

7. Counsel also submitted that the applicant’s application is frivolous and a flagrant abuse of court process, as it appears that the applicant wants to dictate which court should hear his case. Counsel urged this court to dismiss the application for want of merit.

8. In reply, the applicant maintained that he was not the one who asked for transfer of the case to Mumias Court and secondly that his request for statements led to his being shut out from proceedings during which 3 witnesses testified. Thirdly, the applicant stated that his trial normally takes place in chambers instead of being conducted in open court. He prayed for the orders.

The Applicable Principles.

9. In the case of **Shilenje – vs – Republic [1980] KLR 132**, the court outlined the principles to be applied by courts when faced with an application for transfer of a case from one court station to another or from one Magistrate to another. In the earlier case of **Tumaini – vs – Republic [1972] EA 441**, the court held that in considering the possibility of bias which is one of the grounds to be considered by the court in deciding whether or not to order a transfer, “it is not the mind of the Judge which is considered but the impression given to reasonable persons.” These same principles have been applied in the case of **Kamande & 3 others – vs – Republic [2014] eKLR** being Nairobi HCCR Application Number 831 of 2012 and Ken Muriuki vs – Republic , Meru High Court Misc. Criminal application No. 7 of 2015 reported in [2015] eKLR.

10. Section 81(1) of the Criminal Procedure Code Cap 75 laws of Kenya, in which applications for transfer of cases is anchored provides as follows;-

“81(1) Whenever it is made to appear to the High Court----

- a. that a fair and impartial trial cannot be held in any criminal court subordinate thereto; it
- b.
- c.
- d.
- e. that such, order is expended for the ends of justice or is required by any provision of this Code;

it may order;-

(i).....

(ii) that a particular criminal case or class of cases transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction,

(iii).....

11. In the **Muriuki Case** (above) Justice Wendoh borrowed the words of the Court of Appeal in the case of Kinyatti – vs – Republic, Criminal Appeal No. 60 of 1983 reported in [1983] KLR 562 to the effect that in deciding whether or not to transfer a case from one court to another, the test was whether the appellant had 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.”

12. In the **Kamande case** above, the High Court (Ochieng J) expressed itself thus when considering an application for transfer;-

“When giving consideration to an application for transfer of 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 at 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 always balance this consideration with the need to ensure that justice is not only done, but also seen to be done”

13. I entirely agree with what the courts have stated above and only add that applicants seeking to have their cases transferred are oftentimes malingering, and that is why such applications must of necessity be exposed to serious and careful scrutiny.

14. In the instant case, the applicant alleges that the trial magistrate is biased against him, one of the reasons for such allegations being that the trial Magistrate conducts the case in chambers instead of open court. This court takes judicial notice of the fact that Mumias Law Courts has only one courtroom, and it is not peculiar to the applicant that his case or part thereof may have proceeded in chambers. Without more, this is not a reason to warrant transfer of the case from Mumias Court to another court or even from the trial Magistrate or another Magistrate. If such an order were to be made, many cases countrywide would grind to a halt because of lack of adequate court rooms in most court stations. This would result in backlog. This would not augur well for the Judiciary which is currently fighting to reduce backlog. Secondly if this were to happen, the ordinary members of the public would lose confidence in the judiciary due to increased backlog, and the perception that Judicial Officers are biased.

15. The applicant also alleged in his affidavit in support at paragraph 6 thereof “THAT I am duly informed and threatened by the complainant of his influence within the Mumias Law Court and therefore expects (sic) no justice.” This is a sweeping averment as the applicant does not disclose the source of his information nor does he say that the complainant’s influence is over and with the trial Magistrate. The applicant also alleges that his application to the trial court to disqualify itself from conducting the case has been declined. I have read through the record of the trial court and find no record of such an application or applications.

16. The applicant also alleged that three of the five witnesses testified in his absence. Under normal circumstances, this would be a serious indictment against the trial court, but in the circumstances of this case, the applicant chose to walk out of the court after he raised a complaint concerning his phone which was allegedly taken by the police.

17. Finally, though the applicant alleged during submissions that the case proceeded without him having been provided with statements, that assertion is not supported by any averment in his supporting affidavit. In my considered view, that allegation was an afterthought intended to fortify his case for transfer. In any event, when the case came up on 20.03.2017, the applicant who is represented by an advocate never brought up the issue of not having been provided with statements. The applicant said”I agree to proceed. May my advocate come first.” When the advocate came, into court at 11.12am he (advocate) said, “ I am for accused. Though the application (the instant application) is still in the High Court, we can proceed.” The advocate never made mention of statements not having been supplied, and the case proceeded with PW4 and PW5 testifying.

18. In the result, I find and hold that the applicant has not made out a case for the orders sought. He appears to be forum shopping with the aim of causing undue delay in having the case concluded. The court will not allow the applicant to forum shop or to abuse the due process of the court. The record also

shows, though the applicant submitted to the contrary, that he applied to have his case transferred from Kakamega to another court. The applicant is therefore not being candid in his quest to have this case transferred for a second time.

Conclusion.

I find that the applicant's application has no merit, is frivolous and an abuse of court process. It is accordingly dismissed. The case shall proceed to further hearing at Mumias Court.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 11th day of May 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Present in person.....for applicant

.....Mr. Juma (present).....for Respondent

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