



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANOUS CRIMINAL APPLICATION NO. 49 OF 2015

LIVINGSTONE MUHANDA ATILA ALIAS MWANA.....1ST APPLICANT

DAVID MAULA MAKAYAO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants filed an application by way of a Chamber Summons in this Court on 31st March 2015, seeking the following orders:

1. THAT, the court be pleased to issue orders for the case-to be accorded a fair trial as envisaged in the constitution.
2. THAT, the Court issues orders maintaining the status quo as ordered by the SRM court in Kangundo.
3. THAT, the Court issue orders staying the proceedings till this matter is determined by this court.
4. THAT, the cost of this application be provided for.

The Applicants aver in the said application and a supporting affidavit filed on the same date that no application was made for the transfer of their file from Kangundo law court at Machakos law court, and that their rights under Article 50(2)(j) of the constitution are being violated.

The Applicants are the two accused persons in **Machakos Chief Magistrates Court Criminal Case No. 1232 of 2014 – Rep vs Livingstone Muhanda & Another**. According to the Applicants, the said criminal case was transferred from Kangundo Senior Principal Magistrate's Court to Machakos Chief Magistrate's Court, and that the trial magistrate made an order touching on Article 50 (2) (j) of the constitution on 21st July 2014 concerning the evidence to be used in court.

However, that the trial magistrate at Machakos made a ruling on 20th November 2014 dismissing the earlier order of 17th July 2014 which is in contradiction of Article 50(2) (j) of the Constitution. The Applicants therefore want this Court to dismiss the Chief Magistrate's ruling of 20th November 2014 and to maintain the "status quo" of the earlier ruling. The also seek orders that their case be transferred to another court which will accord them a fair trial as envisaged in the constitution.

The 1st Applicant in oral submissions made in Court during the hearing of their application on 28th March 2017 submitted that he would like the case to be transferred to Kangundo Law Courts to proceed from where it had stopped. The 2nd Applicant submitted that he would like to be set free, as his rights had been violated.

The Respondent filed a replying affidavit sworn on 23rd March 2017 by Jackline Abuga, a Prosecution Counsel in the Office of the Director of Public Prosecutions, and one of the Counsel prosecuting **Machakos Chief Magistrates Court Criminal Case No. 1232 of 2014**. The Respondent averred that the criminal case initially originated from Kangundo law courts vide Kangundo Criminal Case no. 297 of 2014, which was later transferred to Machakos law court vide Criminal case no. 1232 of 2014 after the then trial Magistrate disqualified himself on the 21st July, 2014. Further, that prior to the disqualification of the said trial Magistrate at Kangundo Law Courts, the said Magistrate had on the 17th July, 2014 ordered that the Applicants herein be supplied with all the witness statements the prosecution wished to call by latest 18th July, 2014.

The Respondent stated that when the matter was transferred to Machakos law courts, the Applicants on the 20th November, 2014 revisited the application on the issue of the witness statements that had not been supplied, and that the said witnessed should not to be used as evidence. However, that Hon. Nyaga CM (as he then was) reviewed the earlier orders and ordered that the prosecution to supply with copies of statements of the witnesses, and the witnesses thereby allowed to testify. The Respondent annexed copies of the said proceedings and rulings.

The Respondents contend that following the orders issued on 20th November, 2014 by Hon. Nyaga CM, the matter proceeded to hearing and so far a total of 4 witnesses have been heard, including some of the witnesses that the Applicants wished not to be heard, hence the instant application has been overtaken by events. Further, that the Applicants' right of fair trial has not been denied considering that the Applicants all through have been given enough time to cross examine the witnesses and to raise any questions they may have in regard to their testimony.

It was asserted that the Applicants have not demonstrated as to why some of the prosecution witnesses should be locked out from giving their testimony given that they have already have been supplied with the said statements, and that they will not be prejudiced in any way if the witnesses testify since they will have ample time for cross-examination . In addition, that it will be prejudicial to the complainant's case if the said witnesses are locked out and justice would not be seen to be done.

The prosecution prayed that the Applicants' application be dismissed for being frivolous, vexatious and otherwise an abuse of the court process meant to delay the course of justice.

The Court asked for the lower court record to be brought up for perusal. After reading the lower Court's trial record, I have noted that on 5th June 2014 the Applicants pleaded not guilty to a consolidated charge of the offence of attempted robbery with violence in Kangundo Senior Principal Magistrates Criminal Case No. 297 of 2014, and thereafter sought the prosecution witnesses' statements. On 17th July 2014 the trial magistrate (Hon. L.N. Mugambi SPM), after having previously directed that the Applicants be supplied with all the witnesses statements, ruled that if the witness statements were not supplied by the close of business the next day (18th July 2014), the prosecution would not be allowed to rely on evidence contained in statements it will not have provided to the accused persons by that date. This position was reiterated by the said magistrate in a ruling he delivered when the matter proceeded for hearing on 21st July 2014.

PW1 then proceeded to give her evidence on 21st July 2014, and after her cross-examination by the Applicants it came to light and was conceded by the Prosecution counsel, that the witness statements by PW1 the Applicants had been supplied with were different from those the prosecution had. The trial magistrate, after expressing his opinion that the Court was being slighted, disqualified himself from hearing the case and transferred it to Machakos Law Courts for trial.

The matter proceeded for hearing from where it had stopped before Hon. J.N. Nyagah CM (as he then was) in Machakos Law Courts on 30th October 2014 when the cross-examination of PW1 continued. After the said cross-examination, the Applicants applied that they proceed only with the witnesses whose statements had been availed to them. The Respondent thereupon replied that they now had the statements of the remaining witnesses on file, and asked to supply them to the Applicants. The trial magistrate (Hon. J.N. Nyagah CM) thereupon on 20th November 2014 gave a ruling that the Applicants be supplied with the remaining witness statements, and the said witnesses be allowed to testify.

The Applicants in their application therefore essentially want this Court to overrule the ruling of Hon. J.N. Nyagah CM delivered on 20th November 2014, and uphold the ruling of Hon. L. N Mugambi of 17th July 2014 which he also reiterated on 21st July 2014. I note that the Applicants have brought their application pursuant to Article 50 (2)(j) of the Constitution, and that Hon. J.N. Nyagah CM delivered a considered ruling in which he *inter alia* addressed the issue raised by the Applicant as to the violation of their constitutional rights in Article 50 of the Constitution. The Applicants can therefore only come to this Court by way of appeal on that issue.

In addition, even if the application by the Applicants was to be deemed to be one for a revision of the two decisions, this Court notes that the remaining witness statements were availed to the Applicants, and they have the liberty to recall any witnesses who had testified before being availed the said statements for further cross-examination.

The only issue raised by the Applicants that is therefore competently before this Court is that of transfer of **Machakos Chief Magistrates Court Criminal Case No. 1232 of 2014 – Rep vs Livingstone Muhanda & Another** to Kangundo Law Courts. I note in this respect that the Prosecution and Applicants did make an application in the trial Court on 1st August 2016 before Hon. L. Mbugua CM (as she then was) for a transfer of the case to Kangundo Law Courts, which was declined in the interests of expeditious hearing of the case.

However, I note that Hon. L Mbugua has since been elevated to judgeship, and new directions will need to be taken in the criminal case as to its further hearing before a new trial magistrate. In this respect it is also notable that Hon. L. Mugambi was also transferred from Kangundo Law Courts, and there is a new magistrate with jurisdiction in the said Court. It will therefore be more convenient for the matter to be heard in Kangundo Law Courts, particularly in terms of the time and financial costs that will be incurred in the procurement of remaining witnesses.

The Applicants' Chamber Summons filed on 31st March 2015 is therefore allowed only to the extent that it is hereby ordered that **Machakos Chief Magistrates Court Criminal Case No. 1232 of 2014 – Rep vs Livingstone Muhanda & Another** be and is hereby transferred to Kangundo Law Courts for further hearing and determination. The Applicants shall be produced before the Kangundo Senior Principal Magistrate on **10th May 2017** for when the said criminal case shall be mentioned for directions as to its further hearing.

Orders accordingly.

DATED AT MACHAKOS THIS 2ND DAY OF MAY 2017.

P. NYAMWEYA

JUDGE