



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**MISCELLANOUS CRIMINAL APPLICATION NO. 174 OF 2015**

**FREDRICK NDEI MATHIAS.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant has filed an application by way of Chamber Summons filed in Court on 6<sup>th</sup> November 2015 requesting that his case number 452 of 204 be transferred from Kilungu Law Courts . He filed grounds of application dated 5<sup>th</sup> August 2015 and filed in Court on 6<sup>th</sup> November 2015 wherein he alleges that there has been misrecording of the proceedings in the said case during the trial process, that different cash bail/bond terms were issued to the accused persons in the same case,, different charge sheets were issued to co-accused persons, that witnesses testified in the presence of other witnesses who had not testified, that the accused persons were apprehended in Court after the expiry time and that exhibits that were relied upon in another case were produced in the said case.

The Applicant also availed to the Court detailed submissions explaining the said grounds during the hearing of the application. HE gave the instances of information he alleges was not recorded by the trial magistrate during his cross-examination of PW1, the arresting officer, and the investigating officer. He also submitted that the 1<sup>st</sup> Accused was granted cash bail of 20,000/- and subsequently absconded Court, while the 2<sup>nd</sup> accused and himself were granted cash bail of Kshs 70,000/=. Further that a different charge sheet was used during the hearing of the testimony by PW1 and PW2, was different from that used during the hearing of the testimony of PW3 and PW4.

The Applicant also alleged that PW2 and PW3 were present in Court when PW1 and PW2 respectively were giving evidence. The Applicant also referred to another Criminal Case 443 of 2014 which had been transferred by the same magistrate to another Court in the same station without his consent and that he had raised a complaint with the magistrate handling the case who had forced him to proceed with the trial process. The Applicant stated that there was no independence in the two courts

This Court thereupon called for the original court file Kilungu Criminal Case Number 452 of 2014 which I have studied in making this decision. The applicable law to the application before the court is **section 81** of the *Criminal Procedure Code* which empowers the High Court to transfer a criminal case from one subordinate court to another or to itself. It states as follows:

***(1) Whenever it is made 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 provision of this Code, it may order—*
- i. 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;*
  - ii. 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;*
  - iii. that an accused person be committed for trial to itself.*

The Court of Appeal considered the test to be applied in the application of these provisions in *Maina Kinyatti v Republic* [1984] eKLR and held as follows:

***“Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.”***

The Court of Appeal further observed that it is the reasonableness of the accused person’s apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case.

I have considered the applicant’s stated apprehension and also the actual record of the proceedings. I note that the Applicant made an application before the trial magistrate for transfer of his case to another Court after he was put on his defence on 21<sup>st</sup> July 2015. He claimed that there was a mis-recording of the proceedings and the trial magistrate declined to grant the application. This ground raised by the Applicant cannot be verified from the Court record as only those who were present during the hearing are able to do so, and this Court is therefore not in a position to find if the same is true or not.

I also note from the record that the plea was first taken by one accused person known as Immaculate Kamene Mwangangi on 13<sup>th</sup> October 2014. The Applicant was not charged and was not present in the trial Court on that date. The Applicant took his pleas on 17<sup>th</sup> November 2014 on a charge sheet that had two other accused persons, and upon application by the prosecution to consolidate their cases. No other charge sheet is on the court record, neither is it indicated that the said charge sheet was later amended. In addition on the issue of different bail/bond terms given to the accused persons there is no record of bond being given to the Applicant. The only bond and bail granted was to the accused person who took a plea on 13<sup>th</sup> October 2014 whose terms were bond of Kshs 70,000/= with one surety or cash bail of Kshs 20,000/=.

The hearing of the trial commenced on 5<sup>th</sup> May 2015 when PW1 and PW2 gave evidence and the trial magistrate also made a ruling declining a request by the prosecution to produce additional witness statements. On 23<sup>rd</sup> June 2015 PW3 and PW4 gave evidence and the prosecution closed its case. There is no record that the accused persons pointed out that witnesses were in Court, and in any event the trial Court is not in a position to know which witnesses are in Court as it is not the Court that presents the said

witnesses. The Accused persons then asked to put in submissions on whether there was a case to answer. It is at this point that the Applicant made his application for transfer of his case and refused to proceed with the hearing of his case. The trial magistrate proceeded to hear the remaining accused person's defence and gave judgment on that accused person.

Having considered the proceedings, I do not find any ground to allege bias on the part of the learned trial magistrate erred in the manner in which she dealt with the Applicant's case. I therefore do not find any reasonable basis for the apprehension of bias on the part of the learned magistrate. While I have no doubt that the learned magistrate handling the matter will be fair and just in dealing with it, I must also consider the perception of the public and the Applicant in light of the events that have transpired. A reasonable person may perceive that the Applicant may not obtain a fair trial as a result of what has transpired, and given that judgment with respect to one of the Applicants co-accused has already been delivered by the trial magistrate.

In considering the alternative Court that can hear the Applicant's trial, the Applicant made allegation of both courts in Kilungu Law Courts not being independent, however he did not bring any evidence with regard to his allegations about Court No 1. In addition, it will inconvenience parties to transfer this case outside Kilungu Law Courts and in light of the fact that this is the nearest Court to where the offence was committed, and it will not be in the interests of justice to do so. I must also state in this regard that accused persons must also be discouraged from forum shopping in the hope that they will get a court that is sympathetic to their case by making baseless allegations about trial Courts.

In conclusion, in order to avoid further delays in the hearing of the Applicant's case and ensure that justice is done to the parties, I accordingly order as follows:

1. Kilungu Criminal Case Number 452 of 2014 *shall be heard by a different magistrate, and is hereby transferred to Court 1 in the Senior Resident Magistrates Court at Kilungu Law Courts for further hearing and determination.*
2. *The case shall be mentioned in that court on 18<sup>th</sup> February 2016 for directions and fixing hearing dates.*

**DATED AT MACHAKOS THIS 10<sup>TH</sup> DAY OF FEBRUARY 2016.**

**P. NYAMWEYA**

**JUDGE**