



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**H.C.CR.MISC.APPL.NO.53 OF 2015**

**JAIRO AMUGALA OMUKUBUNGU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant, JAIRO AMUGALA OMUKUBUNGU, has come to this court seeking an order to transfer his *Criminal Case No.720 of 2015* pending before the Principal Magistrate's court at Mumias to any other court for hearing and final determination.

The applicant has come in an unconventional manner in that he has only filed a letter Headed: TRANSFER OF CASE FILE NO.720/2015 AT MUMIAS LAW COURTS, addressed to the High Court through the Officer-in-Charge Kakamega Main Prison.

For purposes of this ruling, I reproduce the said letter here below; it says:-

*"I am the above mentioned accused person in safe custody charged with an offence of robbery with violence c/sec 296(2) of the Penal Code. I humbly request the transfer of case file No.720/2015 from Mumias Law Courts to any other court within the republic of Kenya due to the following facts:-*

1. *That sitting magistrate had shown open biasness by not giving me an ear to my persistent voice before the Honourable court.*
2. *That the sitting magistrate is very harsh and threatening.*
3. *That I have totally lost confidence in the entire Mumias Law Court.*

*Thank in advance hoping that my request will be highly considered."*

When this matter was placed before me on 28<sup>th</sup> January 2015 for hearing the accused was unrepresented and was ready to urge his request. The learned State Prosecution counsel Mr Oroni, held the view that there was no application for hearing but I directed that the applicant be heard despite the shortcomings in his application, noting that he was unrepresented and may not be aware of the procedural defaults. I took the view that the applicant having approached the Court and his grievances being clear and articulate, it would be an injustice to deny him the opportunity to be heard due to procedural technical hitches. The application therefore proceeded.

The applicant asked the court to allow his application saying that the trial magistrate in court No.1 at

Mumias Law Courts is harsh and on occasions has not heard him whenever he raises his hand to speak. However what he said was his main ground for seeking a transfer of his case from that court is that the complainant hails from Mumias. He said that he would prefer his case heard at Butere Law Courts.

Mr Oroni, learned prosecution counsel, opposed the application saying that the applicant had not given sufficient reasons to warrant a transfer of that case to Butere or any other court for that matter. Learned counsel argued that the distance between Mumias Law Courts and Butere is about twenty (20) km and that this did not make any sufficient difference. He took issue with the request arguing that the applicant had not filed an affidavit or produced evidence to show that he had requested the magistrate concerned to recuse herself from the case. He further argued that the applicant had not supplied any evidence to show the gravity of his allegations against that court. Prosecution counsel concluded by saying that if the applicant was dissatisfied with one court, he could be heard by another court within Mumias Law Courts which has three magistrates. He asked that the request be declined.

The applicant has undoubtedly moved the court exercising his constitutional right to a fair trial. *Article 50* of the Constitution gives every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or independent and impartial tribunal. This is a constitutional right that an accused person, including the applicant cannot be denied.

The law allows an accused person to apply to have his case transferred from one court to another if there are sufficient grounds to do so. *Section 81* of the Criminal Procedure Code (Cap 75) laws of Kenya which is material in this respect, provides as follows:-

*“S.81.(1) Whenever it is made to appear to the High Court:*

- a) that 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;*

**It may order:**

**(I) ...**

**(II) *That a particular criminal cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction. (emphasis)***

Whereas *Article 50* of the Constitution guarantees a fair trial through impartial and independent court, tribunal or body, *section 81* of the Criminal procedure Code allows this court to order a criminal case to be transferred from one court to another when it is made to appear it that a fair and impartial trial cannot be had in that court.

The question that arises in this application is whether it has been made to appear to this court that the applicant will not get a fair and impartial trial at Mumias Law Courts. The applicant has stated in one of his grounds that the sitting magistrate has shown open bias by not giving the applicant a hearing before that court and that the magistrate is harsh which have made the applicant lose confidence in the trial court.

The applicant has not shown in what instance the trial court has refused to hear him. It has equally not been shown when and under what circumstances the trial court was harsh to him. These would have aided the court determine whether those allegations are true and if they are such that they would deny the applicant a fair and impartial trial before that court.

It is a serious matter when an applicant alleges that he/she may not get a fair trial before a particular court

and such an allegation should never be taken lightly because a fair and impartial trial has constitutional underpinnings. However the court will not act on mere allegations without subsistence. The applicant has not shown to the satisfaction of this court why he believes he will not get a fair and impartial trial before the trial court. Furthermore, there are more than one magistrate at Mumias Law Courts which means the applicant, if he feels he may not get a fair and impartial trial from one magistrate he could request, with good reason, that his case be heard in any other of the remaining courts with competent jurisdiction without necessarily choosing which particular court.

During the hearing of this application, the applicant alluded to the fact that the complainant comes from Mumias and that is one of the reasons why he wants his case transferred from that court. The fact that the complainant hails from Mumias is not in itself a ground for transferring this case from Mumias. The applicant has not shown why he thinks that fact will make him not get a fair and impartial trial. He has not accused the complainant of any wrong doing backed with evidence. He appears to harbour the wish that his case be tried away from Mumias without demonstrating why.

The fact that the complainant comes from Mumias may also mean that witnesses are from Mumias and transferring this matter from Mumias may lead to another problem in that it will inconvenience witnesses. By having the trial proceeding at Mumias will also ensure a fair and satisfactory trial as contemplated by *section 81(1)(c)* of the Criminal Procedure Code.

As it has not been shown that the applicant had sought the recusal of the trial magistrate from the case, I will not attempt to address an issue that is apparently not before me. Suffice it to say that the application falls short of the test laid down under section 81 of the Criminal Procedure Code.

Where the apprehension in the mind of the accused/applicant that he may not get a fair and impartial trial is of reasonable character demonstrated by facts and incidences which might raise such suspicion, even though there may be no basis in believing so, the court would take a deep look into the matter and decide whether the apprehension is such that the reasonable thing to do is to order a transfer of the case. In the absence of that, there is likely to be a danger for forum shopping.

The upshot is that the applicant's request is without merit and his application dated 9<sup>th</sup> January 2015 is declined and dismissed.

**Dated and delivered at Kakamega this 5<sup>th</sup> day of February, 2016.**

**E.C. MWITA**

**JUDGE**