REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELANNEOUS CRIMINAL APPLICATION NO. 37 OF 2014

1. ROSE NJOKI KARANGUI

2. DAVID MUKOMA GICHOHI

3. FLORENCE NJOKI WAHOME

4. BENSON GICHOHI MUKOMA

5. JOSEPHINE MUTHEE'

6. JOHN KINUTHIA MUKOMA

7. EPHANTUS MUTHEE

8. JAMES WAMBUGU MUKOMA.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a motion dated 19th November, 2014 the applicants sought for an order to transfer the **Criminal Case No. 150 of 2014** from Mukurweini magistrates' court to the Chief Magistrates' Court at Nyeri.

It is not stated under which law the application is made; it is however, stated to be supported by the affidavit of **David Mukoma Gichuhi** sworn on his own behalf and on behalf of the rest of the applicants.

According to Mr Gichuhi, the applicants were jointly charged in **Mukurweini Senior Principal Magistrates' Court Criminal Case No. 150 of 2014** with the offence of incitement to violence contrary to **section 96** of the **Penal Code**, Cap 63; they all entered a plea of not guilty to the charges and the trial began in earnest.

At the hearing, so the applicant has sworn, the learned magistrate 'properly' recorded the evidence of the complainant, one James Oludhe who is said to be a police officer; however, when the applicants' counsel cross-examined the complainant, the learned magistrate is alleged to have failed to record the questions put to the complainant and his answers. It is for this reason that the applicants fear that they will not get a fair hearing from the trial court.

The state opposed the application and filed grounds of objection to that effect.

At the hearing of the application counsel for the applicants submitted that she relied on the supporting affidavit of the applicant. In the course of her submissions the learned counsel asked for more time to supply more documents, though she had initially indicated that she was ready to proceed.

Counsel for the state opposed the application and cited section **197(1)**

(b) of the Criminal Procedure Code, Cap 75 according to which evidence should be taken in a narrative form. In any event, there was no evidence before the court to prove the allegations by the applicants. It was the learned counsel's view that the application is misconceived and only intended to delay the hearing and the determination of the trial against the applicants in the magistrates' court.

The form of taking evidence in a criminal trial is stated in **section 197** of the **Criminal Procedure Code**; that provision of the law states as follows:-

> ***197. Manner of recording evidence before magistrate***
>
> ***(1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—***
>
> *a.* ***the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;***
>
> *b.* ***such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative: Provided that the magistrate may take down or cause to be taken down any particular question and answer.***
>
> ***(2) Notwithstanding the provisions of subsection (1), a record of any proceedings at a trial by or before a magistrate may be taken in shorthand if the magistrate so directs; and a transcript of the shorthand shall be made if the magistrate so orders, and the transcript shall form part of the record.***
>
> ***(3) If a witness asks that his evidence be read over to him the magistrate shall cause that evidence to be read over to him in a language which he understands.***

Of particular interest to this application is **section 197(1) (b**) which is clear that the evidence need not be taken in the form of question and answer but that it shall be in the form of a narrative. If the applicants' case is that the learned magistrate ought to have recorded the evidence in question and answer form, then they are mistaken as to the law on taking of evidence and to that extent the application is misconceived.

If, on the other hand, the applicants' case is that the learned magistrate was not taking the evidence at all, then there is no material from which this court can confirm the applicants' allegations. It is noted that the applicants are duly represented by a learned counsel; there is no evidence that their counsel ever made any efforts to have a copy of the record of the proceedings produced in this court for the court to satisfy itself of the integrity or regularity of those proceedings. As it is now, the court cannot act on mere allegations without any proof which, with the exercise of a bit of diligence, would have been obtained. For this reason I agree with the learned counsel for the state that the applicants' application is misconceived and is hereby dismissed.

Dated, signed and delivered in open court this 3rd June, 2016

Ngaah Jairus

JUDGE