



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CRIMINAL APPLICATION NO 17 OF 2016

IN THE MATTER OF THE MARIMANTI RM. CR NO.569 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

TITUS KITHANGARARI CHABARI1ST RESPONDENT

DAVID MURITHI.....2ND RESPONDENT

JOHN NJAGI.....3RD RESPONDENT

DANIEL MWENDA.....4TH RESPONDENT

RULING

1. On diverse dates, Titus Kithangari Chabari, David Murithi, John Njagi and Daniel Mwenda (“the Respondents”) were charged before the Marimanti Senior Resident Magistrate’s Court with the offence of preparation to commit a felony contrary to Section 308 (1) of the Penal Code. Their respective cases were consolidated as Criminal Case No.569 of 2016 and the hearing thereof fixed for 12th October, 2016.

2. By a notice of motion dated 11th October, 2016, the office of the Director of Public Prosecution, Chuka applied for the stay of the said case and the same be consequently transferred from the said court to any other lower court in a neighbouring county. The grounds for the application were contained in the body of the Motion and in the Supporting Affidavit of No.218770 Chief Inspector Moses Waliula, the District Criminal Investigations Officer, Tharaka South. These were that; there is a likelihood that the case will not get a fair hearing because of political interference and witness intimidation; that the complainant in that case, a Dr Eliud Muriithi Mati, had specifically lodged a complaint to that effect with the office of the Director of Public Prosecutions (“DPP”); that some prosecution witnesses have received threats from the Respondents as a result whereof reports have been made in both Nkubu and Meru Police Stations. The deponent therefore swore that, it was necessary to grant the orders sought in order to avert a security crisis due to political interference and on the basis of intelligence information received.

3. The Motion was opposed by the Respondents vide the Replying Affidavit of David Muriithi sworn on 19th October, 2016. The Respondents contended that the application was frivolous, vexatious and an abuse of the process of the court as the allegations were being made on the verge of the trial date; that although the alleged intimidation occurred way back on 13th September, 2016, the same were not raised before the trial court on 27th September, 2016 when the Respondents attended court. The Respondents further questioned why the alleged intimidation were being reported in Meru and Nkubu Police Stations

and not the police stations within Tharaka Nithi County. They also took issue with the failure to disclose the names of the witnesses who had allegedly been intimidated. The Respondents denied the allegation of intimidating witnesses and the deponent averred that, it is his political ambition that had rattled the complainant to give the case a political angle. The Respondents alleged that because C.I.P. Moses Waliula was a prosecutor in Meru Law Courts, the Respondents are unlikely to get a fair hearing in that court. They urged the court to dismiss the application.

4. This is an application for transfer of a Criminal Case from Marimanti Senior Resident Magistrate's Court to any other Magistrates Court. The jurisdiction to grant such an application is donated by section 81 of the Criminal Procedure Code ("CPC"). The said section provides:-

"81. (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.

d.

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).....

(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)....."

5. In the case of **Maina Kinyatti .v. Republic [1984] eKLR** the Court of Appeal held that the true test to be applied in an application under section 81 of the CPC is whether an applicant has made a clear case by discharging on a balance of probabilities the burden of showing that the apprehension in his mind that there will be no fair trial is reasonable. The court stated:-

"Two High Court of Kenya Judges adopted what was said in Hashimu (Sachdeva) in Francis Henry Karanja .v. Republic HC CR Application No.107 of 1976 (unreported) and Traveyan J in John Brown Shilenje .v. Republic HC Cr Application No.180 of 1980 (unreported). All these cases have not departed from what Hamilton CJ said in the matter of an application by Ms Patel [1913/1914] 5KLR 66.....Hamilton CJ quoting the Calcutta High Court decision in Dupeyron .v. Driver I LR XXIII Cal 495 said at pg 68;

I am not here concerned with an issue as to whether a magistrate was in fact likely to be partial or impartial I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian Courts and I will refer particularly to the judgment of the Calcutta High Court in Dupeyron .v. Driver... where the judges say:-

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 incident having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.** The Patel case has withstood the test of time and in our view is still the law on the question of the transfer of a criminal case on application by the

accused person. **It is not the strength of** the ground as stated in the Indian Code of Criminal Procedure 1908 by Sir HT Prinsep and Sir John Woodroffe that weighs with a court **but the reasonableness of the accused person's apprehension. If the accused shows that his apprehension is reasonable then he has set out a clear case"**. (Emphasis supplied)

6. In the above case, the Court of Appeal seem to have laid down the test as regards an application by an accused because it was dealing with an application by an accused in that case. However, reading section 81 of the CPC, an application under that section can be made by any party to a criminal proceeding, either an accused or the prosecution. Indeed with the passage of the new constitution, the right to fair hearing under Article 50 now extends to even victims of offences commonly referred to as the complainants. Although the DPP ordinarily represents the state against the accused, the victims of offences (read complainants) in most cases, get to be heard through the DPP. It may be said that the DPP by extension represents the complainant in a criminal trial. In this regard, my view is and I so hold that the right under section 81 of the CPC and the test laid by the **Court of Appeal in the Maina Kinyatti case** extends to the DPP and the complainant in a criminal trial. Further, under Article 27 of the Constitution of Kenya no one is to be discriminated upon an account of who he is in society.

7. In this case, one Dr Eliud Mate Muriithi wrote a letter to the DPP which was received on 04th October, 2016. In that letter, he indicated that he is the complainant in Marimanti Criminal Case NO.569 of 2016. He raised four complaints to the DPP as regards his case that is political interference, that some politician and the Deputy County Commissioner of the area are interested on the case and that the latter who is a close friend of the Magistrate had been heard boasting that the Respondents are innocent and will be set free; that the court was lenient to the Respondents by virtue of the bond terms ordered and witness intimidation as well as witness tampering. He urged the DPP to have the prosecution of the Respondents in Marimanti stopped and the matter transferred to any other court outside Tharaka Nithi County preferably Meru Law Courts and that the bonds of the Respondents be cancelled. The DPP opted to have the case transferred on the grounds of political interference, witness intimidation and security reasons.

8. As regards interference with the course of justice, the only complaint against the Marimanti Senior Resident Magistrate is that the Deputy County Commissioner is a close friend of the presiding officer and that he had been heard to freely state that the Respondents are innocent and will be soon set free. In the case of **Muriuki .v. Republic [2015] eKLR**, Wendoh J faced with a similar application stated;-

"In a more recent case namely KAMANDE & OTHERS .V. REPUBLIC eKLR [2014] NAIROBI CRIMINAL APPLICATION NO. 831 OF 2012 Ochieng J when faced with a similar application for transfer stated thus:-

When giving consideration to an application for the transfer of a 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, the allegations that may be directed at Judicial Officers, alleging bias and lack of fairness must therefore not be accepted without there being substantive evidence to back them.

If the 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 balance this consideration with the need to ensure that justice is not only done, but also seen to be done."

This court subscribes to that view.

9. In the present case, save for the allegation that the area Deputy County Commissioner is a close friend of the trial magistrate and had been heard making certain remarks, there is no evidence to show that either the said Deputy County Commissioner ("DCC") has discussed or was heard discussing, the case with the trial magistrate. Indeed, it was never suggested that the said DCC had allegedly spoken to the trial magistrate or had been seen with the trial magistrate or had indicated that he will speak to the trial

magistrate and influence him on the matter. To this extent, I reject the allegation that the trial magistrate will not be dispassionate in the matter on account of the relationship between the area DCC and himself.

10. The other ground advanced was that there was likelihood of interference and witness intimidation. That two reports had been booked at the Nkubu and Meru Police Stations. This court is alive to the fact that the names of the alleged witnesses who have allegedly been threatened or interfered with were not disclosed. Indeed, the Respondent's denied that fact but the Applicant was courageous enough to disclose the OB numbers in question. Anyone who would wish to know the identity of such witnesses can peruse or request the perusal of the aforesaid OB entries.

11. The pertinent issue is that the witnesses are being intimidated. It was averred and was admitted that the criminal proceeding was taking the angle of a political duel between the complainant and the 2nd Respondent. It was averred, and not denied, that the Respondents' intended to stage demonstrations at the hearing of the case. That there was a likelihood of a security crisis and it was therefore imperative that the case be moved to a different County other than Tharaka Nithi. It was not suggested that the trial court is biased, or was likely to be biased.

12. The test for transfer of a case from one lower court to another under the **Maina Kinyatti .vs. Republic case (Supra)** is the reasonable apprehension by the applicant that he/she may not receive a fair trial. Whilst this court fully absorbs the trial court of any wrongdoing or likelihood of bias, that may not be the view of a reasonable bystander having knowledge of the allegations made in this application. The complainant has alleged witness interference as well as intimidation. No less than the man in charge of criminal investigations in the local area has averred that intelligence information did not only disclose that the Respondents intended to plan demonstrations at the hearing, which they never denied, but that holding the trial at the present court or anywhere within the county may lead to a miscarriage of justice. That there was a threat to security. These allegations were neither denied nor was the deponent of the Affidavit in support, C.I.P. Moses Waliula called to be cross-examined on his averments and be challenged on the veracity thereof.

13. Minded that it is not that which is in the mind of a judicial officer concerned, but the mind of a reasonable bystander and indeed an applicant under section 81 of the C.P.C, I am convinced that the apprehension of the Applicant is well founded. It is real that if the trial proceeded before the present court, there could be no fair trial. The Applicant preferred this trial to be proceeded with within Meru Law Courts. The Respondents expressed their apprehension if the same was transferred to those courts for reasons on record. In the premises, this court is minded to allow the application and transfer the subject criminal matter to be tried and determined before the Senior Resident Magistrate's Court Embu.

14. Accordingly, Marimanti RM Cr Case No. 569 of 2016 is transferred to the Senior Resident Magistrate's Court Embu. That the same is to be mentioned before that court on 24th November, 2016 for directions.

It is so ordered.

Dated and determined at Chuka this 3rd day of **November**, 2016.

A.MABEYA,

JUDGE.