



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. 1 OF 2014

JENEBY TAITA ARAP TOOAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant's Notice of Motion is dated 31st December 2013 and is brought under **Section 362 and 364** of the **Criminal Procedure Code Chapter 75** of the **laws of Kenya**. In the Notice of Motion the applicant, **Jeneby Taita Arap Too**, prays that the court do call for the record of **Nairobi CM Criminal Case No. 1391 of 2012** to satisfy itself on the correctness, legality or propriety of the orders of the Chief Magistrate (CM) Mr. K. W. Kiarie, of 10th and 30th October 2013 directing the Principal Magistrate, Mr. J. Karanja to continue hearing the criminal case.
2. The applicant prays also that this court do alter or reverse the said orders and direct that the case be heard by any other magistrate of sufficient jurisdiction at Kibera or Makadara courts. He further prays that the court do give such other or further directions pertaining to the trial of Criminal Case No. 1391 of 2012.
3. To put the application before me in perspective, I have set out the chronology of the events that occurred in the case in the lower court. In paragraph No. 3 of the supporting affidavit the applicant depones that on 23rd January 2013, the initial prosecutor sought to withdraw from the case because of some adverse comments made by one of the parties. The trial magistrate also recused herself. The matter was referred to the chief magistrate who allocated it to Mrs. L. Mbugua, Senior Principal Magistrate for hearing. Counsel for the applicant raised objection when the matter came up before Mrs. L. Mbugua on 19th February 2013, insisting that it should proceed before Mrs. Okundi since it was a part heard.
4. It will be noted that from paragraph No. 2 of the applicant's affidavit the proceedings were not at an advanced stage. In fact, the matter had barely commenced when the complainant was stood down before she completed her testimony. The Chief Magistrate ordered the matter to be returned before Mrs. Okundi for hearing but for a second time she declined to hear it when it came before her. She sent it back to the Chief Magistrate for allocation to any other court of competent jurisdiction. On the orders of the Chief Magistrate the hearing commenced *De novo* before Mr. J. Karanja Principal Magistrate and a new prosecutor on 3rd June 2013.
5. The applicant depones that on 9th October 2013 a hostile exchange erupted between the prosecutor

and the defence counsel in court, causing the case to be once again referred to the Chief Magistrate for reallocation to another court. On 10th October 2013 the chief magistrate ordered the prosecutor and counsel on record to resolve their differences, apologise to the court in writing and present themselves before the same court for the trial to continue. He also intimated that he had received a written complaint from the complainant, about the conduct of the defence counsel.

6. In paragraph 10 and 11 of the applicant's affidavit, he depones that the defence counsel did apologise to the trial court but also sought leave to withdraw from acting for the applicant. That the applicant also wrote a letter to the Chief Magistrate requesting that the trial be allocated to any other court other than court No.3 (J. Karanja PM), because ***"he learnt that there were people interfering with his case in order to deny him an adequate and effective representation which is a basic right of an accused under the Constitution."*** When the matter came up before the trial court on 25th October 2013, learned counsel Miss Chesyna who had come on record for the applicant applied for it to be removed before court No.3 and taken to any other court.
7. On 30th October 2013 and for the fourth time, this matter came up before the Chief Magistrate for purposes of allocating it to a court other than the court which was currently seized of it. The Chief Magistrate ordered that the case should be heard and determined by court No. 3. It is this order and the order of 10th October 2013, which directed the case to be heard before court No. 3 which is now impugned before me.
8. Learned counsel Miss Chesyna appearing for the applicant, contended that it was the applicant's feeling that the prosecutor intimidated the defence counsel with the intention of driving him away so that a conviction could be secured. Further that if the case proceeds in court No.3 the applicant would not receive representation of his choice. She urged this court to exercise its powers of revision and reverse the orders of the Chief Magistrate.
9. The application was opposed through Miss Ndombi learned counsel for the state. She argued that the misunderstanding in the trial court was between the defence counsel and the prosecutor and could be resolved without involving the trial magistrate. Miss Ndombi submitted that both the defence counsel and the prosecutor had tainted hands since it was they who engaged in an exchange before court. Miss Ndombi maintained that there was no illegality in the orders of the chief magistrate to warrant their reversal.
10. Having elected to come by way of Review the applicant has placed himself in the straight jacket defined by **Section 362** of the **Criminal Procedure Code** which provides that:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court." (*emphasis mine*)

The applicant must therefore satisfy the court of the incorrectness, illegality, or impropriety of the orders which this court is being called upon to review, or as to the irregularity of the proceedings leading thereto.

11. I have called for and reviewed the proceedings and the events which led to the application that birthed the orders complained of and I am unable to find anything which could justify the invocation of **Section 362** of the **Criminal Procedure Code** in this case.
12. By the applicants own averments the difference with his counsel was with the prosecutor in both the first and third courts. The second court was never even given a chance by the defence to commence the trial. In the subordinate court the trial magistrate is in charge of the proceedings and it is erroneous to suggest that a fall out between the defence counsel and the prosecutor would translate into a conviction against the applicant. To believe this leaves no room for the evidence adduced and for the discretion of the trial magistrate.

13. All in all no material has been placed before me from which I could draw an inference of the absence of impartiality on the part of the trial magistrate or the chief magistrate. The withdrawal of the defence counsel from the case was by his choice and not an order of the court. Both the prosecutor and the defence counsel are officers of the court who have a duty to preserve the dignity of the court. In this case they have exhibited conduct unbecoming of such officers, by throwing temper tantrums and holding the courts hostage and stalling the proceedings. The applicant on his part seems to be bent on picking and choosing the court that should hear him, in what appears to be a classic case of forum shopping.

14. For the foregoing reasons I find that the application is lacking in merit and decline to orders of the Chief Magistrate issued on 10th and 30th 2013 directing that the trial should proceed before court No.3. I dismiss the application accordingly.

SIGNED DATED and DELIVERED in open court this *17th* day of *July* 2014.

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L. A. ACHODE

JUDGE