



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. APPLICATION CASE NO. 3 OF 2013

KINYUA JULIUS THIRARI APPLICANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in criminal case No. 944 of 2011 Senior Resident Magistrates Court at Tigania B. Ochieng (S.P.M.)

JUDGEMENT

1. The applicant by Kinyua Julius Thirari was instituted an application by way of a letter to the Deputy Registrar of this Court dated 17th December, 2012. In that letter he seeks to have the case against him in Chuka CM's court Case No. 30 of 2012 'separated' from that of his co accused Jobu Muthigani and Silas Mwithali M'Mauta. He then sets out five grounds as follows:
 - a. **Your Lordship there are so many adjournments at the instance of the second accused's Advocates and the two o-accused person. Imagine from January 3rd 2012 to date no single hearing has ever taken place and I have never absent myself any day.**
 - b. **When I c complained about the same o 7/11/12 the hon. Magistrate threatened to withdraw my bail bond and was ready to do good his threat and throw me in prison remand so that I do my case from there until I pleaded for mercy from him.**
 - c. **Your Lordship, the trip from Maua to Chuka is very expensive for me considering the fact that I am a peasant farmer and I have three children in school and an aged and ailing mother under my care. It costs me kshs. 1,200 each time I attend the court and I have done this for the last 12 months on this case number 30/2012 and 15 months on case number 1064/2011. These two cases are in different courts i.e case number 1064/11 is in court one while Cr/30/2012 is in court two. Sometimes they are fixed for mention same day and time which makes it difficult for me to attend two different courts one day and same time. When different dates are fixed one may be today and the other five days later e.g case no. 30/12/112 was mentioned on 4/12/2012 while case no. 1064/11 was mentioned on 10/12/12, and this makes costs even higher.**
 - d. **Your Lordship this is also a time consuming or time wasting since I only visit the court and I don't do my case and no convincing reasons given by the hon. Court. Your Lordship, this case has around nine (9) prosecution witnesses and for the last one year I have never talked to a single one and I now believe it can take very long to conclude this case.**

e. **Your Lordship, I don't want to attend the same court and same day with my co-accused persons because they keep on threatening me of dire consequences if I dare tell the hon. court the truth touching this matter and it's my desire to tell the whole truth. Your Lordship, it is worth nothing that we are sworn enemies with my two co-accused persons because Mr. Silas Mwithali was the complainant against me in the withdrawn case of robbery with violence no.1038/2011 at Kirindine law courts while I am the complainants in the case no.1064/2011 of assault against one job Muthigani thereby putting my security at stake. So I conclude that I have no justice if I will do the case with Mr.Jobu Muthingani and Silas Mwithali whom I fear.**

2. The Application was supported by a co-accused in the case Silas Mwithali M'Mauta. In his replying affidavit filed in this case on 15th May 2013. I have considered the affidavit. The Application is opposed. Mr. Makori learned state counsel for the State and Mr. Muriithi for Job Muthigani one of the co-accused to application strongly opposed the application.

3. I have considered the applicant together with the replying affidavit and the submissions by the parties.

4. The question of who should be charged and with an offence is the preserve of the Director of Public Prosecutions under Article 57 of the Constitution. In exercise of that power, the law provides that the DPP shall not be under the direction or control of any person or authority. On that ground alone the applicant's prayer for the 'splitting' of the case against him from that against his co-accused is incompetent.

5. That is not the only reason why the separation of the cases against the co-accused is untenable. One of the charges against the Applicant and his co-accused is conspiracy contrary to section 394 of the Penal Code. It is trite law that this charge cannot be sustained against one person because no one person can successfully conspire alone of necessity therefore, all persons alleged to have been a part of the conspiracy should be charged together for the success of the case. For that reason also, the application to split the cases against the appellant and his co-accused cannot succeed.

6. There is a request to transfer the case against the Appellant and his co-accused from Chuka Law Courts to any other court preferably Maua or Nkubu. Section 81 of the CPC gives the grounds upon which the High Court can transfer a case from one court to another. It stipulates as follows:

"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) 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.

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney-General, be supported by affidavit.

(4) An accused person making any such application shall give to the Attorney-General notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.”

7. What one deciphers from these provisions is the mode in which the application should be brought. Under S.81(3) the application should be by Motion supported by an affidavit.
8. The instant application was by a letter and was not supported by any affidavit.
9. What is more important however, are the considerations that should guide the court in determining the application to transfer a case from one court to another. These include considerations of whether a fair and impartial trial will be had; whether there are some questions of law of unusual difficulty that the subordinate court may not be able to deal with; the convenience of all parties concerned and expediency for the ends of justice. The Applicant has not raised any of these grounds in his application. He urged about delay in having case heard and determined, his inconvenience due to travelling to and from court and his inconvenience as he tried to shuttle between courts for mention of the “more than one case” he faces in the lower court. These grounds are lopsided. The convenience of one party was never intended to be the pole consideration, especially when it is the person charged raising the issues out of his current place of residence.
10. After considering the application I find that it has no merit whatsoever. In the circumstances I dismiss the application in its entirety.

Read and delivered this 4th day of July, 2013.

J. LESIIT

JUDGE.

COURT: The stay given over the proceedings in the lower court is lifted files be returned to lower court.

J. LESIIT

JUDGE.