REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL MISC. APPLICATION NO.43 OF 2013

PAUL EMURIA EDOME ..... 1ST APPLICANT

STEPHEN KAMAU MUTHONI ..... 2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

RULING

By an application dated 14/08/2013, made pursuant to **Articles 25(c) 50 (1)** and **2(3) (k), 159** and **165 (6)** of the **Constitution of Kenya**, the Applicant seeks that **Naivasha CMCR No.1099 of 2011** be transferred to Nairobi Chief Magistrate's Court.

The applicants are charged before the Chief Magistrate's Court at Naivasha with several counts of robbery with violence Contrary to Section 296(2) of the Penal Code.

When the matter came up for hearing on 30th May 2013, the court was not sitting and the hearing was fixed for 10th July, 2013. The applicant's counsel did not attend court for hearing as he was involved in **Election Petition No.1 of 2013**, from 8th July 2013 – 12th July 2013. He informed the court of this fact and requested for an adjournment.

The trial court rejected the request and proceeded with hearing two witnesses. On 29th July 2013, the Applicant's counsel applied for a recall of the two witnesses for purposes of cross-examination, but the court declined.

It is on this basis that the applicants seek for transfer of this matter, saying that the court's mind is made up as to the guilt of the applicants, contrary to the constitutional principle of presumption of innocence. It is contended that applicants are unlikely to attain justice if the trial continues in Naivasha and the same be transferred to Nairobi or any other competent court.

The trial date was given in court on 10th May 2012 and confirmed on three subsequent occasions when the matter came up for routine mention – each time, it was made clear to the accused that hearing would proceed on 10th July 2012. However, the applicant's counsel, Mr. ISAAC K. KITUR took up an Election petition brief in Kericho High Court being **ELECTION PETITION NO.1 OF 2013**, which was listed for hearing from 8th – 12th July 2013. Counsel describes the situation as a matter which was beyond his control. On 9th July 2013, the applicant's counsel sent a letter to the Executive Officer informing him of

his dilemma. The letter reads in part:-

> **"The said matter is scheduled for ruling and further directions on 19th July 2013 at 10.00 a.m. before Justice Aggrey Muchelule. . . .**
>
> **The purpose of this letter is to notify the court of my inability to attend the hearing and that I shall be sending a colleague to seek for adjournment. . . . preferably in October when we will have disposed of all election petitions."**

The court, despite being so notified, ordered that the trial proceeds, and two witnesses testified. The applicant was charged along with five others for the offence of robbery with violence Contrary to Section 296(2). According to him, despite his insistence that he would not proceed with the case in the absence of his counsel, ***"the court arrogantly dismissed me, stating that I was the one on trial and not my advocate."***

The applicants believe that the court's decision to proceed with the hearing in the absence of counsel was in contravention of his constitutional rights to be represented by counsel and to challenge the evidence of the prosecution witnesses.

On 29th July 2013, their advocate applied to the court to recall the two witnesses who had testified on 10/07/2013 for cross-examination, but this was rejected.

The applicants contend that the court has made it manifestly clear that it is biased against him and he doubts that justice will be attained if the case continues before the Chief Magistrate's Court in Naivasha. It is for this reason that a request is made for the matter to be transferred to Nairobi Chief Magistrate's Court, or any other court of competent jurisdiction.

The application is opposed, and in a replying affidavit sworn by JOEL CHIRCHIR, a prosecution Counsel at the DPP's office states that the application is tainted with deception, deliberate misrepresentation, distortion and/or suppression of material facts and should be dismissed. The application is described as aimed at delaying and/or frustrating the expeditious hearing of the criminal case.

It is pointed out that, the hearing date in the trial court and the absence of counsel at the trial was occasioned by the defence counsel's own fault. He also refers to the trial court's record that, the case came up for hearing on 3rd October 2011, before Hon. Mulwa, when the prosecution availed two witnesses, namely William Nigel Croft-Adams, and Sveva Gallman, both of whom are ordinarily resident in the United Kingdom, but travelled to Kenya, to testify in the case.

Thereafter, the case was adjourned several times, for various reasons, including the absence of some accused persons or magistrates. Hon. Mulwa who had partly heard the case, was transferred. On the application and insistence of the defence, it was ordered that the case proceeds De Novo, when several witnesses, including the two who had travelled from the United Kingdom, had testified. The case has been heard by 4 different magistrates over a period of 2 ½ years. On all occasions when the matter came up for hearing, the prosecution diligently availed witnesses.

The defence is accused of delaying the trial on several occasions and through several means, including filing applications to the High Court to stay proceedings, which were issued on 21/08/2013. Apparently, in the past similar applications were made by the 1st applicant, for instance:-

a. In March 2012, when the matter was part heard, the 1st applicant filed an application **High Court Misc. Application No.15 of 2012**. When the matter was to proceed to hearing, the 1st applicant served the parties and the court with an order dated **14th March 2012**, which required the court

file in **Naivasha Criminal Case No.1099 of 2011**, to be availed to the High Court. As a result of that order, the hearing of the case was adjourned.

Sveva Gallman, a prosecution witness, who had testified previously, was recalled from the United Kingdom and was in court, a second time on 15th March 2012, to testify in the case.

The defence counsel is accused of frustrating the hearing, discouraging and/or unsettling prosecution witnesses. Prosecution Counsel points out that Sveva Gallman incurred huge expenses traveling from the United Kingdom on 15th March 2012. It is also argued that, the 1st applicant's ceaseless applications will prejudice the prosecution, the complainants, and other accused persons who are in custody. This court is urged to dismiss the applications.

In a supplementary affidavit sworn by the applicant's counsel, he protests the issues raised by the Prosecution Counsel saying they are personalised attacks on his professional integrity, yet he has no personal interest in the matter. He denies that an application similar to this one has ever been made, saying the earlier application in Misc. Criminal Application No.15 of 2012 was seeking review of specific orders made by the court. Further that the only witness who does not live in Kenya is William Nigel Croft- Adams.

The right to legal representation is a constitutional right under Article 50 of the Constitution of Kenya. Did the trial magistrate deliberately deny the applicants a chance to be represented by an advocate of their own choice? By the time parties took dates on 30th May 2013, the Judiciary personnel appointed to hear election petitions had already been gazetted. The Constitution of Kenya, and the Elections Act 2013, were long in existence – both providing that election petitions must be heard and concluded within six months. I take judicial notice that this was a fact well known to both Judicial Officers, and practising advocates, as well as the general populace. Where an advocate elected to take up an election brief, then it was up to him to organise how his other briefs would be handled. It certainly was not the duty of any court to bend over backwards to accommodate any counsel who suddenly found his hands full.

It was within Mr. Kitur's privilege to elect which matter to give priority to on 10th July 2013, but that preference was not binding on the trial magistrate. The trial magistrate was at liberty to exercise his discretion (after weighing all the circumstances) whether to indulge counsel's request or not. I have considered the decision cited regarding legal represention, fair hearing and the right to cross-examine witnesses. These rights do not mean that the court has to act at the convenience and whims of the defence.

The hearing date was given on 30th May 2013, yet the applicant's counsel chose to wait until just a day before the hearing, to write a letter to the Executive Officer citing his inability to attend court. That letter was only copied to his client. He did not consider it prudent to inform the prosecution. That hardly demonstrates diligence or good faith on the part of counsel. He had at least over a month within which to inform the court and prosecution in good time that he would be unavailable. Then may be prosecution would have advised the witnesses not to travel from the United Kingdom.

But it is not just the fact that recalling of those witnesses attracts an unnecessary expense, it is the pattern adopted by the defence which unfortunately communicates a deliberate attempt to delay the matter.

Justice cuts both ways and the court must balance the interest of all who appear before it.

There seems to be a pattern adopted by the 1st applicant which is cruel and unfair to the prosecution. The matter proceeded De Novo – which meant that witnesses who had testified in the year 2012 were recalled. Thereafter the 1st applicant applied for review of certain orders made by the trial court, and the proceedings had to be stayed. Then just when the matter was to start due to issues raised by the 1st applicant, the matter could not proceed because the High Court called for the trial court's file.

This pattern now replays itself with a demand to recall the witnesses, and of course an application for

review, to boot.

This back and forth conduct is vexing to the witnesses, and I agree with the prosecution counsel that it is aimed at wearing out, and discouraging the witnesses. That is why when an adjournment was sought, the prosecution opposed the prayer citing the inconveniences that the witnesses were being subjected to.

Did this indicate bias on the part of the trial magistrate? I don't think that being firm and realistic is the same as being partial. I am guided by the holding in **Kinyatti V R** [1985] KLR pg 652, that:-

> **"In deciding whether or not to transfer a case from one court to another, the test was whether the applicant has made out a clear case by discharge. . . . the burden of showing that the apprehension in his mind that he may not have a fair and impartial trials is of a reasonable character."**

In this instance, nothing could be further from the situation contemplated in the **Kinyatti case**. The instant case is one where counsel simply failed to organise himself, expected to have his way, and upon realising that he could not be in two places at the same time, decided to cry wolf. I do not detect any signs of bias on the part of the trial magistrate. What I find is a judicial officer who upon applying his mind to the prevailing situation used his discretion (and in my view properly so), to order that the trial proceeds. I cannot fault the trial magistrate, and I find no merit in the application which is dismissed forthwith.

Delivered and **dated** this **8th day of November, 2013** at **Nakuru**.

H.A. OMONDI

JUDGE