



REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE KISUMU

CRIMINAL MISCELLANEOUS APPLICATIONS NOS 50 AND 51 OF 1979 (CONSOLIDATED)

JAMES OMOLO MAKINDAAPPELLANT

FRANCIS WANDERA ROMANO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This is an application for transfer of Criminal Case No 1028 of 1978 now being heard by the Senior Resident Magistrate, Kisumu, to another subordinate court. It is made under section 81 (1) (a) of the Criminal Procedure Code which empowers the High Court to make such an order for transfer:

whenever it is made to appear to the High Court-(a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto.

I dismissed the application and now give my reasons.

The circumstances which gave rise to the application are as follows. The two applicants are accused 1 and accused 2 below. They are charged jointly with two others (accused 3 and 4) with robbery with violence, contrary to section 296(2) of the Penal Code, the particulars being that jointly with others not before the Court, while armed with pistols and *rungus*, they robbed Ochol s/o Amenda of cash (Shs 8300) and a motor vehicle (valued at Shs 56,000) and at, or immediately before, or immediately after, used personal violence on him.

The trial (Criminal Case No 1028 of 1978) commenced before the Senior Resident Magistrate, Kisumu on 17th January 1979, the two applicants being represented by Mr DA Owino, accused 3 and 4 by Mr Behan and the Republic by Mr Etyang State counsel. The trial resumed on 18th January and then there were three days of hearing on 14th, 15th and 16th February 1979. There was then another full day's hearing on 23rd March 1979; and by then the Court had heard seventeen prosecution witnesses. On the resumed hearing on 29th March 1979, the record indicates what happened:

All four accused:

Mr Owino for accused 1 and 2 [the [applicants]].

Mr Behan for accused 3 and 4.

Mr Etyang

Mr Owino: My clients, accused 1 and 2, want to say something to the Court.

Court: Be it so.

Accused 1: I want this case to be heard by another magistrate, the reason being that when you came to the prison as a visiting justice you told us that unless we pleaded guilty we will be hanged.

Accused 2: I support that.

Court: I am surprised at the allegation. I agree that I visited the Prison on 26th March in the afternoon. I was taken round the prison by the prison officers with my court clerk, Mr Ochila. When I asked the accused and other prisoners if they had any complaint, accused 1 asked me if it was proper for the police to charge anyone for robbery under hanging bill instead of murder. To that I replied saying that it was up to the State to decide, bearing in mind the evidence available. I then pointed out that fact that they were charged for robbery under the hanging bill and in case of conviction the penalty would be death by hanging. At that stage I added that they were represented by advocates and if they had committed the offence they should speak to them and perhaps the charge may, in that case, be reduced to simple robbery which would carry prison term. Accused 1 wanted to talk further with me; but I firmly told him not to saying I wouldn't discuss the matter further. Accused 4 was not amongst the above remand prisoners since he was ill. I have read out what I have just written above and asked the court clerk Mr Ochila as well as accused 3 to comment upon it.

Mr Ochila: That is exactly what you said in the prison.

Accused 3: That is so. I agree that that is what you said.

Court: I have considered the allegations. I am convinced that they are false ones. I am in a position to give a fair and impartial trial to all the accused persons in the case. The application for trial by another magistrate is refused. Case to proceed.

VV
Senior Resident Magistrate

Patel

Later, at 2.30 p.m. (coram as before):

Mr Owino: I wish to withdraw from the case.

Accused 1: I have no objection.

Accused 2: I object to the withdrawal. I now say that I don't want Mr Owino to defend me.

Order: Mr Owino is allowed to withdraw from the case with immediate effect.

VV
Senior Resident Magistrate

Patel

In this application, the two applicants have put in a joint affidavit in which they have sworn as follows:

- (1) That we are the 1st and 2nd accused herein on a charge of robbery with violence contrary to section 296(2) of the Penal Code;
- (2) That this case is part heard before VV Patel Esq, Senior Resident Magistrate, Kisumu;
- (3) That on 26th March 1979 in the afternoon the said Senior Resident Magistrate visited G K

Prison, Kodiaga, Kisumu;

(4) That in the course of his visit he talked to us;

(5) That the Senior Resident Magistrate informed us that if we accepted the offence or offered to plead guilty the State may reduce the charge to simple robbery under section 296(1) of the Penal Code;

(6) That the Senior Resident Magistrate further stated that if we pleaded guilty he would sentence us to five or six years' imprisonment but that if we did not plead guilty then he would sentence us to death;

(7) That on 27th March 1979 we jointly informed our advocate, DA Owino, of this and he informed us that if we felt strongly about the same then we had to raise the matter before the Senior Resident Magistrate in open Court and ask for trial before another Court of competent jurisdiction;

(8) That on 29th March 1979 we jointly raised the issue before the trial resumed and the Court ruled against us saying we had exaggerated the incident and/or told lies about same;

(9) That we jointly then said that in the circumstances we could not further take part in the trial nor could we allow our advocate to continue representing us in the trial;

(10) That thereafter our advocate applied to withdraw, which application we did not oppose as we had already decided not to take further part in the trial;

(11) That in view of all these matters and the Court having decided that we exaggerated the incident we feel we may not get a fair and impartial hearing nor would justice seem to be done to us by the said Court;

(12) That we therefore make this affidavit in support of our joint application for transfer of this case to another Court of competent jurisdiction; and

(13) That the contents of this affidavit are true to the best of our own knowledge, information and belief as indicated above.

Although Mr Owino had withdrawn from the case, he appears to have been re-engaged for the purposes of making this application for transfer. His principal submission was that, in view of what had happened, a reasonable apprehension has been created in the minds of the applicants that they will not have a fair and impartial trial before the Senior Resident Magistrate at Kisumu.

I accept that this is the test which must be applied: see *In the Matter of an Application by MS Patel* (1913) 5 KLR 66 and *The Republic v Hashimu* [1968] EA 656 and the Indian decisions cited there.

The question here is whether a clear case has been made out that the applicants have such a reasonable apprehension, having regard to what actually occurred.

In my judgment the answer is clearly in the negative. The principal complaint in the applicants' affidavit is that contained in paragraph (6) that they were informed by the Senior Resident Magistrate that:

if we pleaded guilty then he would sentence us to five or six years' imprisonment but that if we did not plead guilty then he would sentence us to death.

Both applicants repeated this when they applied for transfer on 29th March, viz:

the reason being that when you came to the prison as a visiting justice you told us that unless we

pleaded guilty, we will be hanged.

As appears from the record, the Senior Resident Magistrate said no such thing. This magistrate is one of the most senior and experienced in the country. He could not possibly have said any such thing and the allegations of the applicants are clearly false.

The rest of the conversation could not possibly lead to any reasonable apprehension in the minds of the applicants. The Senior Resident Magistrate said that the applicants are charged with robbery with violence which carries the death sentence, but the Republic may be willing to reduce that to simple robbery which carries a term of imprisonment. This is a statement of fact which is absolutely true. In any case he told them they were represented by an advocate and should discuss the matter with him.

I have no doubt in my mind whatever that these two applicants will get the fairest and most impartial inquiry before the Senior Resident Magistrate, Kisumu, and that any apprehension in their minds that they will not is entirely unfounded and unreasonable.

Application dismissed.

Dated and delivered at Kisumu this 11th day of April 1979.

E. COTRAN

JUDGE