



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISCELLANEOUS CRIMINAL CASE NO. E054 OF 2025**

**JENERY NGAIRA .....**

**APPLICANT**

**VERSUS**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS,  
KAKAMEGA ..... 1<sup>ST</sup>**

**RESPONDENT**

**PATRICK MUKHWANA ..... 2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1. By a Notice of Motion dated 8/4/2025 and brought by the Complainant under Section 81 of the Criminal Procedure Code, the Applicant seeks the transfer of Butali Criminal Case No. E364 of 2023 to the Kakamega Chief Magistrate's Court for hearing and determination.
2. The application is predicated on the grounds on the face of the application and the supporting affidavit sworn by the Applicant.

3. The Applicant's primary contention as deponed in his affidavit sworn on 8/4/2025 is that the Applicant has a genuine and reasonable apprehension that he may not receive a fair hearing before the trial court in Butali owing to previous experiences in which two of his earlier matters were heard and dismissed by the same court. The Applicant deponed that he has lost confidence in the impartiality of the trial court.
4. It was the Applicant's deposition that having raised the issue with the trial court, it had since recused itself.
5. The application was heard through oral submissions. The ODPP did not file any response but opposed the application. Ms. Mwaniki for the ODPP submitted that the Applicant had only alleged bias on the part of Hon. R. S. Kipngeno who had already recused himself and had not given any evidence for his lack of confidence in the entire Butali Law Courts as since the trial court's recusal, the matter had been subsequently placed before Hon. J. N. Maragia. She urged the court to dismiss the application and allow the case, which had been pending for two years to proceed.
6. In rejoinder, the Applicant's Counsel raised a new fact, alleging that the Accused brags about being close to the judicial officers at Butali Law Courts. The Applicant did not serve the Accused person with the application.
7. Arising from the application, the court identifies the issues for determination as follows:-

- (i) *Whether a Complainant has locus standi to apply for a transfer of case directly.*
  - (ii) *Whether the Accused ought to have been served with the application.*
  - (iii) *Whether the Applicant has met the threshold for transfer of the case.*
8. Section 81 (1) (a) and (ii) of the Criminal Procedure Code provides that:-
- “(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; it may order—**
- (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.”**
9. Pursuant to Section 81 (2) of the CPC, the law empowers the High Court, acting on the report of the subordinate court, or on its over initiative, or on the application of an interested party, to transfer a case provided that where the application is made by an applicant other than the Director of Public Prosecutions, it shall be supported by an affidavit.
10. An “Interested Party” is an individual group or organization with a direct stake, right or legal standing in a specific matter, in this context, a law suit and who would be directly affected by the

outcome of the decision. The Cambridge Advanced Learner's Dictionary and Thesaurus defines Interested Party as:-

**“Any of the people or organizations who may be affected by a situation, ...”**

11. Based on the aforesaid, the Applicant who is a Complainant in **Butali Criminal Case No. E364 of 2023** is an interested party as is envisaged by Section 81 (2) of the CPC as he has a personal legal interest in the case and is entitled to protect his interest. The Applicant therefore has the locus standi to file the application for transfer notwithstanding the fact that such application should ordinarily be filed by the Director of Public Prosecution.
12. Regarding the second issue, Article 50 (1) of the Constitution confers on every party the right to a fair trial. The Supreme Court in the case of **Hon. Christopher Odhiambo Karan v. David Ouma Ochieng & 2 others [2018] KESC 4 (KLR)** in determining the legal implications of the right to a fair trial stated that:-  
**“It is therefore settled law that all persons who come to any Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters.”**

13. Articles 49, 50 (1) and 50 (2) (e) (j) and (k) of the Constitution contemplate that an Accused person shall receive prompt trial without unreasonable delay and that at all times, he shall be kept informed, be present and be heard on all matters affecting him.
14. Furthermore, Section 81 (4) of the Criminal Procedure Code requires that an accused person making an application must give notice to the Director of Public Prosecution, and provides:-
- “An accused person making any such application shall give to the Director of Public Prosecutions 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.”**
15. Flowing from the above, by extension and under the principles of *audi alterem partem*. I am of the view that a Complainant seeking to transfer a trial to a different jurisdiction must notify the accused as the transfer may affect the accused’s right to be tried without unreasonable delay.
16. The final issue for determination is whether the application meets the threshold for transfer. In **Shilenje v. Republic [1980] KLR 132** which was cited by the court in **Republic v. Michael Otieno Onyango [2021] KEHC 1662 (KLR)**, the Court stated that:-

**“The High court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him; especially when the statement implies a personal censure on such officer.”**

17. I have perused the trial court’s proceedings and the supporting affidavit. The matter proceeded before the Principal Magistrate on 14/8/2023 and 4/9/2024 and after hearing two witnesses, the Applicant requested the court to recuse itself on the ground that the same court had heard and determined a similar land case. The court recused itself and referred the matter to a different Magistrate. When the matter came up for hearing on 4/2/2025, the Complainant informed the court that he did not feel that he would get justice in Butali as the Accused was bragging about it. The trial Magistrate then adjourned the case to allow the Applicant pursue an application for transfer before this court.
18. In his application for transfer filed on 10/4/2025 the Applicant merely deponed that he had raised his complaint to the judicial officer who is handling the case and the Magistrate has since recused himself. The Applicant makes no reference whatsoever to the Hon. J. N. Maragia, the Magistrate who is currently handling the case after the first Magistrate recused himself.
19. The Applicant’s main fear is founded on the fact that two of his earlier matters were dismissed by the same court. To me, the same

court refers to the court presided over by Hon. R. S. Kipngeno. The Applicant did not advance any reason in his affidavit as to why he does not want Hon. Maragia to hear the case. Since Hon. Maragia is the Magistrate now seized of the matter, and considering that she did not recuse herself, the court has to balance the interests of the Applicant and the Accused in making its determination while bearing in mind the statutory provisions.

20. Bragging by an accused person regarding a case, whether it is of their expectation to win the case or of alleged closeness to the judicial officer, without any corroborating evidence of the trial Magistrate's own conduct or specific rulings showing bias, is insufficient to justify a transfer. Allowing transfers based solely on the utterances of a party would result in an upsurge in "forum shopping" and undermine the independence of the subordinate courts. In **Galaxy Co. Ltd v. Falcon Guards Ltd [1999] eKLR**, the Court of Appeal stated:-

**"Although it is important that justice must be seen to be done it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeing the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."**

21. Additionally, in **Republic v. Michael Otieno Onyango (Supra)**, it was held:-

**“The applicant contends that he has no faith in all the courts in Migori. However, only one magistrate was seized of this matter. There are other competent courts that can deal with the case. There is no evidence that a trial in any other court in Migori would be inconvenient or prejudicial to the applicant. That is why I am convinced that there is mischief in the application.”**

22. Having carefully considered the application, I am not persuaded that it meets the high threshold for “reasonable apprehension of bias” as contemplated by Section 81 of the Criminal Procedure Code.

23. The upshot is that the application is dismissed. The trial court to proceed with the hearing as scheduled.

Dated, signed, and delivered at Kakamega, this 16<sup>th</sup> day of March 2026.

**A. C. BETT  
JUDGE**

**In the presence of:**

Mr. Orute holding brief for Mr. Manyoni for the Applicant

Ms. Chala for the Respondent

Court Assistant: Polycap

COPY