



Manyara alias Boniface Mirenga Keago v State (Miscellaneous Criminal Application E160 of 2024) [2025] KEHC 1168 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E160 OF 2024**

**TA ODERA, J
FEBRUARY 27, 2025**

**BETWEEN
DOMNIC MANYARA ALIAS BONIFACE MIRENGA KEAGO APPLICANT
AND
STATE RESPONDENT**

RULING

Introduction

1. The Applicant herein filed an undated notice of motion Application seeking this court invokes its supervisory powers over magistrate courts to stop the amendments to the charge sheet. He also seeks this court to transfer his case (792 of 2020) to another court of competent jurisdiction since the magistrate court handling the matter is biased.
2. In support of his Application, the Applicant averred that he was charged before the magistrate court with the offense of obtaining money by false pretense contrary to section 313 of the penal code. He averred that it is the complainant directing the ODPP to amend the charge and bring new exhibits. He thus urged this court to review his file and stop the amendments so that the case can proceed from where it had reached. He decried that this case has been in court since 2020 and thus an amendment of the charge at this stage would be prejudicial to him.
3. He argued that for that the reason he wants the file transferred to another magistrate court with competent jurisdiction is because the magistrate is biased and has refused to release him on reasonable bond terms despite the fact that he is sick.
4. He also claimed that he has on several occasion asked the court to transfer the file but the court has refused to do so. He also asked the court to review the bond terms. He said that this court has supervisory power to grant the orders sought in the Application and that he will greatly be prejudiced unless the orders are granted.



5. In respondents opposed the Application on the following grounds;
 - a. That the application is frivolous, vexatious and abuse of the court process.
 - b. That the application is fatally defective and bad in law.
 - c. That the trial court is mandated to allow amendments of the Charge by the ODPP under section 214 of the *Criminal Procedure Code*.
 - d. That in allowing the amendment of Charge under the above provision of the law the court cannot be condemned and/or be deemed to be biased.
 - e. That the grounds advanced does not meet the principles and the requisite threshold for the grant of the orders sought.
 - f. That the Applicant has not demonstrated what prejudice he will suffer if the case is heard and determined in Kisii Law Court
 - g. That the application is made in bad faith and not in the interest of justice.
6. The court directed the parties to file their submissions. The Applicant filed his written submissions on 17th December, 2022 while the Prosecution did not file their submissions.

The Applicants Submissions

7. In his submission the applicant disclosed that he was charged with three counts being;
 - a. Count 1-obtaining money by false pretenses contrary to section 313 of the penal code.
 - b. Count 2-Forgery contrary to section 349 of the penal code,
 - c. count 3-Personation contrary to section 382(1) as read with section 36 of the penal code and
 - d. Count 4-uttering a document with intent to deceive contrary to section 353
 - e. of the penal code.
8. He disclosed further that the alleged offence was presented before the magistrate's court for plea taking whereby, he denied all of the charges and trial commenced of the case from the year 2020 till to date. He decried that for all that time the prosecution at the magistrate's court has played a role of violating his rights to fair trial by conducting changes in his case without his consent.
9. He decried that it has been almost 5 years now since he was charged with the offences outlined hereinabove but the prosecution never realized that there were errors in the charge until when he cross examined the witnesses and the prosecution brought in the application for amendment of the charge sheet.
10. He lamented the prosecution is conspiring with the complainant to ensure that he does not get out of prison. He stated that initial particulars of the offence were that:

Dominic Manyara alias Boniface Miranga Keago on the 8th day of June, 2020 at Kisii Township within Kisii County jointly with others not before court, with intent to defraud obtained from Haroni Onsare Onchonga the sum of Ksh.1,200,000' = by falsely pretending that, title deed for land parcel Number central/Kitutu/Mwamusioma/6182 which you produced and delivered to the said Haroni Onsare Onchonga was a genuine title deed for



the said parcel of land measuring 0.005 hectares and the said land was on sale, a fact you knew to be false”

11. He however claimed that the prosecution maliciously decided to change particulars to read as follows:

Dominic Manyara alias Boniface Miranga Keago on the 8th day of June, 2020 at Kisii township within Kisii County, jointly with others not before court, with intent to defraud, obtained from Haroni Onsare Onchong'a. the sum of Ksh.1,200.000/=by falsely pretending that, title deed for land parcel Number central/Kitutu/Mwamusioma/6182 which you produced and delivered to the said Haroni Onsare Onchong'a was a genuine title deed for the said parcel of land measuring 0.05 hectares and the said land was on sale a fact you knew to be false.

12. He pointed out that, in the previous claim the parcel land was measuring 0.005 hectares and now that the prosecution is conspiring with the complainant, they have now changed the said figures of the parcel of land to 0.05 hectares. He also claimed that, the prosecution equally changed section 349 of the penal code to section 351 of the penal code something could have been done for the last 4 years. He complained that the police file has been missing in court several times leading to several adjournments. He thus urged the court to transfer case be transferred to another different court since the prosecution is always liaising with the complainant who from time to time is seen together probably paying the him to ensure that his case takes long in court.
13. He claimed that he is always sick and has a health letter record letter from Kenyatta National Hospital, which shows how he used to get medication. He therefore requested for a review of the bond terms so that he can seek medication out of court. He contended this application has been brought in timely manner and in the sole interest of justice and fairness and the respondent will not be prejudiced if for the reasons advanced hereinabove the Application is allowed. He decried however he greatly be prejudiced if the reasons sought herein will not be granted.

Determination

14. Having perused the application, the supporting affidavit, the grounds of opposition filed by the respondent and the written submission I find that issues for determination are;
- a. Whether the court should order for a transfer of the file to another magistrate for reasons of bias
 - b. Whether the court should make an order stopping the amendment to the charge sheet
 - c. Whether the court should review the bond terms.

Whether the court should order for a transfer of the file to another magistrate for reasons of bias

15. The Applicant has sought to have the file to be transferred to another magistrate court because the current Magistrate has refused to release him on reasonable bond terms for despite the fact that he is sick.
16. From the record of the lower before me accused person's file has been handled by several magistrates since its inception and one would wonder then who amongst the magistrates unfair to him in so far as his issue of release on bond is concerned.
17. It is on record that plea was taken in the lower court matter on 22nd June, 2020 and accused after pleaded not guilty to the charges he was awarded bond of Kshs. 200,000 and a surety of similar amount by Hon. Luta (CM). On 23rd June, 2020 surety documents were presented before Hon. Obina who



- observed that the same were not sufficient and the directed that at least two sureties be availed. Later in the day two sureties availed themselves who were Mark Nyakora, and Samwel Indiatsi Sidika. Hon. Obina proceeded to approve the bond.
18. On 26th October, 2020 when the matter was set for hearing, the accused person was absent. The court went on to issue a warrant of arrest against him and summons to the sureties. The matter was mentioned severally thereafter to find out if the warrant has been executed to wit; on 21st January, 2021, 25th January, 2021, 22nd February, 2021, 1st April, 2021, 29th April, 2021, 21st June, 2021, 8th July, 2021, 2nd August, 2021, 2nd September, 2021 and 24th September, 2021.
 19. On 24th September, 2021 when the Matter was mentioned before Hon. S.K Onjoro, the prosecution informed the court that one of the sureties had been arrested and was before the court. The surety informed the court that he had been struggling to find the accused in vain. The court directed to have surety remanded.
 20. The surety was later set free on a false claim that the accused person had been charged in another matter as Ibrahim Ishmael. It later turned out that the said Ishmael was another person and the surety was once again put to task to find the Applicant.
 21. By good luck, the Applicant was eventually arrested and arraigned in court on 2nd June, 2023. He claimed that after being set free on bond he got an accident and was bed ridden for a while. When he was discharged from hospital, he was informed by one of his friends that the case against him had been withdrawn and therefore he was free. Hon Mac' Andere before whom he was arraigned was not convinced by his excuse and proceeded to cancel the bond terms.
 22. On 29th June, 2023, the Hon. Ocharo noting the proceedings of the court on 2nd June, 2023 proceeded to discharge the surety. The Applicant prayed to be granted alternative bond terms and he was reminded that his bond terms had already been cancelled and asked the accused to appeal in the High court or make a review Application in the same court. The Applicant choose to seek review.
 23. On 20th July, 2023 Hon. Ocharo being kind to the accused person who had been missing for a period of three years and allowed the Review Application and granted the Applicant alternative enhanced bond terms of Kshs. 500,000 with one surety. The Applicant requested the court to further review the bond downwards. He reiterated that he did not understand the proceedings of the court and that had thought that the case was over when he was let free on bond. He stated he is ailing and needs to go to KNH for treatment. He claimed further that he is an orphan and his wife was epileptic and was unable to visit him. The learned magistrate reminded him that he went at large 3 years after being set free on bond and his bond were cancelled. Thus, he was lucky to have been given new bond terms.
 24. On 4th September, 2023, the honorable magistrate equally extended her kindness and ordered or a probation officer report. On 16th September, 2023 the accused person informed the court that the probation officer report was not favorable to him and therefore sought a cash bail. The learned Magistrate reminded the accused that he had already been advised by the court to appeal and proceeded to dismiss the Application.
 25. On 19th June, 2024, the Accused person now appearing before Hon. Nyariki once again made yet another Application for bond this time claiming time he is suffering in custody and his children are in school but the court once again reminded him that ought to appeal in the High court.
 26. It is outright the Applicant enjoyed the benevolence of the trial court and was granted bond despite the fact that he had previously absconded for a long time. Section 81(1) specifies the ground upon



which the High Court may, either upon an application or on its own motion, transfer a case from one subordinate court to another or to the High Court itself for trial for the following reasons for the:

- (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 same; or
- (d) That an order under this section will tend to the general convenience of the parties or witness; or
- (e) That such an order is expedient for the ends of justice or is required by any provision of this Code.

27. In *Shilenje V R* (1980) KLR 132, Trevelyan, J. cited with approval Sir H.T. Prinsep and Sir John Woodroffe in their commentaries – *Commentary and Notes* (14th Edn) 1906 and *Criminal Procedure in British India* (1926) as follows:

“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”

- 28. Hon. Nyariki who is currently dealing the matter cannot be said to be biased in so far as the release of the Appellant on bond is concerned because he took over the matter after Hon. Ocharo had already pronounced herself on the alternative bond terms and the Applicant has not appealed against the same.
- 29. From the analysis I have given hereinabove there is nothing that paints a picture of an unfair arbiter that would trigger this court to order for a transfer of the file under section 81(1).
- 30. From forgoing, the request for the transfer of the file to another magistrate of competent Jurisdiction for reasons of bias of trial court is baseless and the same dismissed. I direct that the matter proceeds before Hon. Nyariki until it’s logical conclusion.

Whether the court should make an order stopping the amendment to the charge sheet

- 31. On 3rd October, 2024 the prosecution sought to amend the particulars of the charge sheet to change the typographical error relating to the size of the plot which had been indicated as 0.005 on charge sheet to 0.05 ha as per the agreement that had been produced as an exhibit. The Application was opposed by the applicant who claimed the charge sheet was defective and the prosecution had all the time to amend it. The court upon considering the arguments by the parties rendered its ruling on 17th October, 2024 allowing the amendment. In his ruling the court appreciated that the prosecution was allowed by section 214(1) to amend the charge sheet at any time before closure of its case and that amendment to correct a typographical error cannot make a charge sheet defective or a conviction a nullity. The court gave the Applicant 7 days to appeal but he has not done so. This court has supervisory jurisdiction over sub-ordinate court to correct apparent mistakes and to prevent a miscarriage of justice.
- 32. In the case of *Martin Mavuti Kituyi v Republic* HCCR. Revision No. 27 of 2013 the court rendered itself as follows;
- 33. “... the very nature of revision as a discretionary remedy explains the policy underpinnings of Section 364 (5) of the *Criminal Procedure Code*; that revision should not be a substitute for an appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for.



Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity...

34. By virtue of Section 364(5), a revision is not available to a party who failed to exercise its right of appeal from a finding, sentence or order of the court, when that right is available. The Applicant ought to have moved this court by way of an appeal as opposed this revision.
35. In any event the amendment was to correct a clerical error in digits which is excusable and the applicant will not be prejudiced by the same .as he has a right to recall the witnesses whose evidence was affected by the said amendment for further cross examination if need be.

Whether the court should review the bond terms.

36. As I have observed hereinabove the trial court was kind enough to extend mercy upon an accused person whose bond terms were cancelled after he went at large and granted him fresh bond terms. As I have also noted herein the trial court extended its kindness and allowed for a Probation Officer to be filed which the Applicant herein conceded was not favorable. The Purpose of bond is to ensure that an accused person attends court. The bond terms were enhanced by Hon Ocharo in her wisdom to ensure that the applicant does not abscond again. Considering the bond history of the appellant and the nature of the charges I find that the bond terms are fair and I will not disturb the same.
37. Based on the above analysis I in end find that Application is unmerited and proceed to dismiss the same. Hearing to proceed before the trial court on 3.3.35 as earlier scheduled.

T.A ODERA

JUDGE

27.2.25

Delivered Virtually Via Teams Platform in the presence of:

The applicant

Mr. Koima for the State.

Court Assistant - Oigo

