



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 19 OF 2015

PIERA CIATA NYAGA.....1ST APPLICANT

DR. TITUS NDEGWA.....2ND APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

JOHN NGARI NJERU.....2ND RESPONDENT

R U L I N G

1. This is the application dated 20/4/2015 for orders for transfer of Criminal Case No. 1100 of 2012 from Siakago Law Courts to the High Court Embu. The application is based on the affidavit of Dr. Titus Ndegwa. In the affidavit it is stated that there was a similar criminal case No. 774 of 2012 at Siakago Law Courts and the magistrate was not fair in the judgment. The applicant is not satisfied with the judgment passed in the said case. The applicant alleges there was corruption on part of the court.
2. In a replying affidavit, the 1st respondent states that the applicants do not have any reasonable grounds as provided for under Section 81 of the Criminal Procedure Code to warrant the transfer of the case. The applicants should have exhausted all avenues before moving to this court for instance asking the magistrate handling the case to recuse herself. The respondent further admitted that the applicants should also have invoked the provisions of Section 79 of the Criminal Procedure Code.
3. It was further argued by the respondent that the The trial magistrate was not given an opportunity to respond to the serious allegations against her. The applicants have failed to demonstrate that if the case is not transferred to the High Court they will not have a fair trial. The applicants had the right to appeal against the judgment.
4. The respondent further stated that the high court does not have jurisdiction to hear the criminal case and that the best it can do is to transfer it to another subordinate court. The true test of whether there was a reasonable apprehension in the mind of the accused from the incidents that occurred has not been stated in the application. Accordingly to the respondent transferring the matter will cause delay. The witnesses are based in Siakago and it is best that the trial be conducted there.
5. The applicants filed a further affidavit stated that it is clear in paragraph 3 of their affidavit that the magistrate corrupted criminal case number 774 of 2012 by not being fair after getting the right answers from the accused when he admitted to have received KShs.5,000/= twice from the 1st applicant. The magistrate in her judgment stated that the applicant had never given the accused

any money. Magistrate Omwange stated in the proceedings that he could not handle the matter the trial magistrate handling it was attending a training at JTI. The deponent of the replying affidavit has not proved that she is a state counsel.

6. The application was canvassed by way of written submissions.

7. The applicant submitted that they did not have confidence in the handling of Criminal Case No. 1100 of 2012 by the Siakago Court. This court has jurisdiction to hear the matter under Article 189 of the Constitution where this court has powers to call for proceedings before any subordinate court. The trial magistrate did not allow the Resident Magistrate to handle the case when she was attending training at JTI raising indications of corruption. The magistrate was unfair and corrupt when she refused to consider the unsworn statement of the accused.

8. The 1st respondent submitted that Section 79 of the Criminal Procedure Code has not been complied with. The applicants should have requested the magistrate at Siakago to recuse herself and requested that the matter be transferred to another court. It was unfair to deny the trial court the opportunity to hear the application for recusal.

9. According to the respondents the magistrate ought have been accorded an opportunity to respond to the allegations against her. The applicants have not proved that the magistrate at Siakago is corrupt. The applicants should have appealed against the decision in 774 /12 if they had sufficient grounds. The 1st respondent cited and attached the following cases;

10. **JOHN NJERU KITHAKA & ANOTHER VS REPUBLIC [2009] eKLR.** The court of appeal cited the case of **REPUBLIC V HASHIMU [1968] EA 656** where it was held that 'before a transfer of any trial is granted a clear case must be made out that the accused has reasonable apprehension in his mind that he will not have a fair trial before the magistrate from whom he wants the transfer.

11. **GALGALO ABGUDO WARIO & 2 OTHERS VS REPUBLIC [2015] eKLR** where the court stated that it was unfair to deny the trial court an opportunity to consider an application for recusal first before moving to the High Court to have the matter transferred.

12. **Section 81 of the CPC 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; 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 Director of Public Prosecutions, be supported by affidavit.*

(4) *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.*

(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.*

13. It is important to note that the parties in a criminal case are the prosecutor and the accused. The question that arises is whether the complainant has the capacity to apply for transfer of a case. The complainant is always the aggrieved party in a criminal case and it is from his/report report to the police that the criminal case is instituted by the Director of Public Prosecution. Although he/she is not a party in a criminal case, the complainants has a substantial interest in a criminal case and there is no legal provision prohibiting him from making an application for transfer.

14. The applicant in Siakago criminal case No. 1100 of 2013 is Pierra Gata Nyaga the 1st applicant. The second applicant is her husband and is not a complainant in the case. It is my finding that the 2nd applicant lacks the *locus standi* to make this application.

15. The supporting affidavit is sworn by Titus Ndegwa the 2nd applicants. Having found that he has no *locus standi*, the affidavit is hereby struck out. This leaves the application not supported by any grounds and it cannot therefore stand. The application is hereby struck out accordingly.

16. This court in exercise of its supervisory jurisdiction under Article 165 (3) of the constitution and in accordance with the principles set out under Article 159 of the Constitution directs that Siakago criminal case No. 1100 of 2013 be heard by another magistrate in Siakago other than the trial magistrate in Criminal case no.1100 of 2013. it is important to mention that the applicants made wild allegations against the trail magistrate without any evidence in support. The complainant in criminal case no 774 of 2012 had an option to appeal through the director of public prosecutions but chose not to do so.

17. The file to be mentioned before Hon. Omwange at Siakago on 18th January 2016.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF DECEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Applicants present

Ms. Nandwa for 1st respondent.



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