



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Crim appli 314 of 2006**

**ROY KIAMA GICHUHI.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

The Applicant herein, **ROY KIAMA GICHUHI** has by Chamber Summons dated 9<sup>th</sup> June 2006 applied to have his case, Kibera **Criminal Case No. 7708 of 2004** be transferred from Kibera Court to any other court in the Republic of Kenya. The Applicant based his application on the provisions of **Sections 78, 79 and 80** of the **Criminal Procedure Code**. All these provisions give power to a subordinate court to transfer a case from one subordinate court to another. These provisions do not apply to the circumstances of this application. That notwithstanding, I will consider the application being satisfied that under **Section 81** of the **Criminal Procedure Code** and especially **subsection (1) (a) and (2)**, this court has jurisdiction to determine the matter. **Section 81 (1) (a) and (2)** provides as follows: -

***“81(1) whenever it is made to appear to the High Court***

***(a) that a fair and impartial trial cannot be heard in any criminal court subordinate thereto; or...***

***(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.” (emphasis mine).***

I have considered the Application, the supporting affidavit, the submission by the Applicant and those by **Miss Wafula** learned State Counsel made on behalf of the Respondent and have perused the proceedings in question.

The Applicant has applied for the transfer of his file from Kibera Court where he is being tried by Hon. **Mrs. H. Wasilwa**, Principal Magistrate. The Applicant submitted that he was aggrieved by the fact that this bond in that case was cancelled while he was in custody for four other pending criminal cases. That the trial court sent the investigating officer to check on committal warrants in other cases where he had been charged. The Applicant said that he felt prejudiced because the court said openly that it would hold him in custody until the case was heard and finalized. The Applicant submitted that in the circumstances he felt that he would not get a fair trial.

**Miss Wafula** for the State opposed the application and submitted that the applicant had not demonstrated bias nor that he would not be availed a fair trial.

In the case the subject matter of this application, Kibera Senior Principal Magistrate **Criminal case No. 7708 of 2004**, the Applicant is charged with two offences; **making a document without authority** contrary to **Section 357** of the **Penal Code** and **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The Applicant was arraigned before the court with these offences on 28<sup>th</sup> September 2004 and granted bond. The case was set for hearing on 3<sup>rd</sup> December 2004 but it was never heard because the Applicant jumped bail. It later transpired that the Applicant had been arrested for other offences and was in custody in Kisumu. Eventually the Applicant was released on bond again and the case proceeded to hearing before **Hon. Mrs. Wasilwa**, on 18<sup>th</sup> January 2006. Subsequently the Applicant did not appear in court as directed and another Warrant of Arrest was issued. Eventually on 1<sup>st</sup> March 2006 when the Applicant showed up in court and said he had been in custody over another case, the trial magistrate reinstated his bond and set the hearing for 27<sup>th</sup> March 2006. On 27<sup>th</sup> March 2006 the Appellant did not go to court and a production order was issued. Since apparently the Applicant was in custody again for yet another case, the prison produced the Applicant in court on 28<sup>th</sup> March 2006. That is when the trial magistrate decided to cancel the Applicant's bond on grounds that he had other matters at Nairobi Law Courts. Thereafter the Applicant has not been produced in court until 28<sup>th</sup> July 2006 when the case was set for hearing on 4<sup>th</sup> September 2006. On 4<sup>th</sup> the hearing did not take place.

I have set out all these information since they are part of the basis of the Applicant's application to have the case transferred to another court. The Applicant contends that he was unlikely to have a fair trial. At paragraph 5 of the Applicant's affidavit he depones: -

***"5. That, the trial magistrate at Kibera cancelled my bond with full knowledge that I was in custody."***

At paragraph 7 the Applicant depones:

***"7. That the trial magistrate prejudiced me by later sending investigating officers who were accompanied by the Complainant to investigate my other cases in the high court."***

At paragraph 9, 10 and 11 the Applicant depones

***"9. That I find these acts unlawful and exhibit a personal interest which is illegal."***

***10. That, I feel I will not be given a fair trial and for the interest of justice, I believe I will be prejudiced by this court."***

***11. That the magistrate swore in open court that I will do my case while in custody to completion."***

The Applicant submitted that he requested the trial court to disqualify itself from hearing the case but the court declined to so do. I do not see any such an application having been made before the trial court. Be that as it may, before a transfer of any case is granted on the application of an accused person a clear case must be made out that the Applicant has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred. See **Republic vs. Hashimu 1968 EA 656**.

The test to be applied in such a matter is whether a reasonable apprehension has been created in the mind of the applicant that he will not have a fair and impartial trial before **Hon. Mrs. Wasilwa**. See **Republic vs. Hashimu**, Supra, where **Wilson J.** in **Herman Milde vs. Republic (1937) 1 TLR 129** and the same Judge in **Bhag Singh vs. Republic [1941] 1 TLR 133** were relied on. To quote **Wilson J.** in the latter case;

***"That the test whether a change of venue should be granted is not whether the magistrate is actually prejudiced against the accused, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the magistrate in question, and that in deciding what is a reasonable apprehension regard must be had not to abstract***

***standards of reasonableness but to the standard or honesty and impartiality of the accused himself and his decree of education and intelligence.”***

In the instant case, the Applicant complains that his bond was unfairly cancelled. The right to bail is a fundamental right guaranteed by the **Constitution** as a right to liberty. That ought not to be interfered with unless there are compelling reasons to do so. A trial court can cancel bail for good ground. Some of the consideration that the court ought to take into account before canceling bond include: -

***Whether the accused is likely to commit offences pending trial***

***or***

***Whether the accused has committed other offences pending trial***

As appears from the record of the trial court, the Applicant has since the instant case, been charged with several others which he himself admitted in his affidavit. The decision by the learned trial magistrate to cancel his bond was neither unfounded nor oppressive. If as the Applicant deposed in his affidavit, the trial magistrate sent the investigating officer of the case to find out whether the Applicant had other cases against him, then I would find the trial court's action to that end quite in order. The trial magistrate was right to satisfy herself whether the Applicant had other cases pending against him as from the record, those other cases had contributed greatly to the delay in the hearing and disposal of the instant case. Those actions cannot possibly lead to any reasonable apprehension in the mind of the Applicant that he will not have a fair and impartial trial before the trial court.

I find the Applicant's apprehension was entirely unfounded and unreasonable. In the circumstances, I dismiss his application in its entirety.

Dated at Nairobi this 18<sup>th</sup> day of October 2006.

**LESIIT, J.**

**JUDGE**

**Ruling read in presence of:**

Applicant

Miss Wafula for the Respondent (State)

CC: Tabitha

**LESIIT, J.**

**JUDGE**