



**Republic v Edung & 7 others (Criminal Revision E489 of 2024)  
[2024] KEHC 16409 (KLR) (23 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16409 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E489 OF 2024  
RN NYAKUNDI, J  
DECEMBER 23, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PETER LOKUTUNY EDUNG ..... 1<sup>ST</sup> ACCUSED  
DAVIS NANG'IRO LOPOYO ..... 2<sup>ND</sup> ACCUSED  
JEMOSTAR AKOOYEN SILALE ..... 3<sup>RD</sup> ACCUSED  
BRONFESTUS NABUN EKAL ..... 4<sup>TH</sup> ACCUSED  
JOSEPJ EKITELA ELIKPAN ..... 5<sup>TH</sup> ACCUSED  
PETER EDONGA KODET ..... 6<sup>TH</sup> ACCUSED  
SAMMY EKITELA ESINYEN ALIAS WHENSONKO ..... 7<sup>TH</sup> ACCUSED  
JAMES ABEI ESINYEN ..... 8<sup>TH</sup> ACCUSED**

**RULING**

**Representation:**

M/s Munyaga Githaiga Advocates LLP

Mr. Mark Mugun for the state

1. Before me for determination is an application by the prosecution expressed to be brought under the provisions of Art. 157 and 165(6) of the Constitution, section 362, 364, 66, 71, 72 and 81 of the Criminal Procedure Code. The applicant seeks orders to wit: -

a. Spent.



- b. The Honorable court be pleased to review and set aside orders of Hon. S.D Sitati SRM dated 16<sup>th</sup> December, 2024 in *Eldoret CMCR E2514/24*.
  - c. That there be an order directing that the accused persons be denied bond pending the hearing and determination of this matter.
  - d. Costs be in the cause
2. The application is supported by an affidavit sworn by Mr. Mark Mugun and anchored on 11 grounds whose contents have been set forth comprehensively herein to provide the requisite context for proper determination. The applicant avers that:
- a. This Honorable court has reserved the matter for ruling on the referral by the subordinate court on the determination of the issue of forum non conveniens.
  - b. The order by Hon. Sitati declining to admit jurisdiction to take plea, hear and determine the matter was incorrect, illegal and improper.
  - c. This Honorable court's supervisory jurisdiction was improperly invoked by the lower court in referring the matter to this court for determination of the issue of forum non conveniens.
  - d. That all the accused persons hail from Turkana County where they were arrested.
  - e. The accused persons are people of influence, with the accused 7 and 8 holding positions of power within that society. There will be an apprehension of injustice that will be occasioned if they are tried in Turkana County.
  - f. The complainant is still a minor and a secondary school pupil. He is soon of the sitting governor of Turkana County. Should the matter be heard and determined within Turkana County, it is possible that the supporters of the complainant's father will get irate and turn on the accused persons.
  - g. Eldoret law courts will provide a neutral forum that will guarantee the security of the accused persons, the complainant and the crucial witnesses in this matter.
  - h. The officers investigating the said matter have been threatened and it will be impossible for them to go back in the said county. At one point they evaded a well-orchestrated plan that was to end their lives.
  - i. The crucial witnesses in this matter have already been threatened and have fled the County for the sake of their safety.
  - j. That the witnesses are yet to be placed in the witnesses Protection Agency for purposes of prosecuting the same.
  - k. That there are sufficient reasons to justify a review of the said order due to security concerns raised.
3. In response to the application, Mr. Vincent Munyaga Githaiga filed a replying affidavit in which he deposed as hereunder:
- a. That the instant application is devoid of merit, frivolous, vexatious, brought in bad faith with the sole intention to deny my clients enjoyment of their constitutional right to liberty and fair hearing.



- b. That on 13<sup>th</sup> December, 2024, the suspects were picked up by police officers at Lodwar and were transported to Eldoret city and booked at Eldoret Police Station at 1840hrs *vide* OB Number (booking back)7/10/12/2024 of Nakuru police station.
- c. That since the date of booking at the police station, no police bail has been issued by the officer commanding station. Requests for the said bail myself on behalf of the suspects have been met with opposition on the guise that the matter is pending ruling by this court.
- d. That since the said date, the suspects have been in police custody since the said date the defence raised an issue with jurisdiction of Eldoret Chief Magistrate's court, the alleged offences having occurred at Lodwar, hence the instant review application.
- e. The parties, both the defence and the prosecution made rival submissions of 17<sup>th</sup> December, 2024 and the court reserved a ruling for 20<sup>th</sup> December, 2024 on which date the ruling was not delivered as the judge in conduct was unwell.
- f. That to our utter shock and surprise, we learnt of the filing of this application in court at 2PM today, 23<sup>rd</sup> December, 2024 and the court ordered that the application be served upon for reply by close of business. The application was ultimately served at 1414hrs on email.
- g. That this amounts to trial by ambush given that with the current technological trends, the learned counsel for the prosecution ought to have served the same by Friday 20<sup>th</sup> December, 2024 when the application was filed.
- h. That no solid grounds or at all as to the reasons for arresting the court's decision and as such, it can be safely concluded that the application is only meant to frustrate the suspects and further punish them for offences they never committed.
- i. That no sufficient grounds have been laid down as to why the suspects should be tried in Eldoret save for that the 7<sup>th</sup> and 8<sup>th</sup> suspects are influential people in the society. As a matter of fact, the 7<sup>th</sup> and 8<sup>th</sup> suspects are yet to be arrested and arraigned in court, the 6 suspects who have already been incarcerated should therefore not be punished for the imagined influence of the 7<sup>th</sup> and 8<sup>th</sup> suspects.
- j. That the alleged threats against the complainant and the witnesses are mere allegations as no statements or affidavit has been availed as evidence of the alleged threats.
- k. That the allegations at paragraph 5 of the affidavit are misleading and without merit as no single file has been availed as evidence of the same. No correspondence either by security organs to prove the said allegations.
- l. That the invitation to deny the suspects bond pending trial is purely malicious and without basis with the current constitutional dispensation, all offences areailable offences including capital offences.
- m. That a cursory look at the nature of the charges intended to be preferred against the accused persons shows that the alleged offences are misdemeanors and the chances of the suspects jumping bail are very remote hence a need to have them admitted on bond.
- n. That no compelling reasons have seen set out by the prosecution as to warrant a denial of bond to the suspects hence they should be admitted on bond pending trial.



- o. That no sufficient grounds have been laid down by the prosecution as to warrant it to disturb the orders of the Hon. Sitati SRM. As a matter of fact, it is not clear if the instant application is a review or an appeal and as such, the same ought to be dismissed for want of merit.

### **Analysis and determination**

4. The matter before me presents significant questions regarding the appropriate forum for criminal proceedings and the circumstances under which a transfer of proceedings may be warranted in the interests of justice. At its core, this application requires careful balancing of several fundamental principles: the right to a fair trial, access to justice, security concerns, and the proper administration of criminal justice.
5. The prosecution seeks to have this matter transferred to Eldoret, citing serious security concerns for witnesses and investigating officers, while the defense opposes this transfer, arguing it would prejudice their right to a fair trial and access to justice.
6. I am cognizant of the foundational principles governing the proper forum for criminal trials as enshrined in our procedural law. The *Criminal Procedure Code* provides a clear framework under Sections 71, 72, and 73 that guides courts in determining the appropriate venue for criminal proceedings. The general rule, as established under Section 71, dictates that criminal matters should ordinarily be tried within the local limits of the jurisdiction where the offense was committed, where the accused was apprehended, or where they are in custody. This principle is further elaborated by Section 72, which extends jurisdiction to courts where the consequences of the criminal act have ensued, and Section 73, which addresses scenarios involving connected offenses.
7. However, these provisions must be read alongside the overarching constitutional imperatives of ensuring fair trial rights under Art. 50 and the right to access courts in Art. 48 of the *Constitution* which involves protecting witnesses, and maintaining the integrity of judicial proceedings. While the law establishes default forums for criminal trials, these procedural requirements must yield where compelling and exceptional circumstances demonstrate that the interests of justice would be better served by transfer to a different jurisdiction. The question before me, therefore, is whether the prosecution has established such circumstances in this case to warrant a departure from these general principles.
8. The law regarding venue transfer in criminal matters is primarily governed by Section 81 of the *Criminal Procedure Code*. The section speaks in the following terms:

“ 81

- (1) wherever 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
  - 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 offences.
  - d) That an order under this section will lead to the general convenience of the parties or witnesses or



- e) That such an order is expedient for the end of justice or is required by any provision of this court, it may order
  - (i) That an offence be tried by a court not empowered under the proceedings Sections of this part but in others 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.”

9. The provision was articulated in *Republic v Stephen Lelei & Another* [2020] eKLR, where the court stated:

- “ 11. It would therefore necessitate that before invoking section 81 of the *CPC*, the matter be looked at wholesomely for a change of venue ought not to be granted whimsically, so as not to put into question the independence and integrity of the judiciary. I have not seen the court file in the Milimani case and am unable to speak about witnesses or the nature of evidence that has been presented; I also have not seen the witnesses or nature of evidence to be presented before the that court. The right to a fair trial as stated by counsel for the 1<sup>st</sup> accused is guaranteed by article 50 (1) of The *Constitution* of Kenya and it requires "a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. As analyzed earlier, there is nothing to show what steps had been taken in the Milimani case and there is nothing to convince me that there would be any affront to a right to a fair trial if the application is allowed.
- 12. On the other hand, "Forum shopping" that was mentioned by Miss Kalii typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour. Such an action would be a subversion of justice with the result that the principle of equal protection of the law is undermined. In *McShannon v. Rockware Glass Ltd.* [1978] A.C. 795, Lord Diplock rejected existence of forum non conveniens (the non-convenience doctrine positing the discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case) in common law stating that for the interests of all the parties and for the ends of justice, the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts.”



10. Similarly, the court in *John Brown Shilenje V Republic* [1980] eKLR had to say on this question of transfer:

“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.

.....

It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.

which I am prepared to accept; but this does not relieve the Court from resolving the question on the evidence before it in the light of what the section under discussion provides, which is what, as I understood it, counsel for the respondent urged upon me.

On pages 612 and 613 of Woodroffe we have:

... This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere ... A more ordinary class of case is that in which, although the High Court is not itself of opinion that a fair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have fair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security ... The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer .... The question in such cases is not whether there is actual bias ... but whether there is reasonable ... ground for suspecting bias ... and whether incidents may not have happened which, though they might be susceptible of an explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused reasonable apprehension that he may not have a fair and impartial trial ... The necessary condition, however, for the transfer in such a case is that the apprehension to justify a transfer must be reasonable, that is, the Court ought not to be guided by the impressions produced in his own mind as to the impartiality of the magistrate, but must look to the effect likely to be produced in the mind of the parties to the action of the magistrate ... Abstract reasonableness, however, ought not to be the standard ...

.....



Having said so much let me apply it to the facts of this case, but first let us see what section 81 of the Criminal Procedure Code (so far, that is, as it concerns us) says. It states that whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in any criminal court subordinate to it, or that such an order is expedient for the ends of justice, it may order the transfer of a case from a subordinate court to another such criminal court of equal or superior jurisdiction.”

11. This court has had an advantage of reading and appreciating the impugned ruling of the magistrate’s court who was at the helm of exercising jurisdiction of admitting the plea for the suspects for the various offences falling under the protocol of the decision to charge by the Director of Public Prosecution. The learned trial magistrate dismissed Eldoret as the proposed forum of *conveniens* and did adequately address himself to the matter. In my view, proposals that *forum non-conveniens* dismissals should depend on whether a realistically adequate alternative forum is available. If no adequate alternative is available, courts should not even engage the private and public factor balancing test described in the criminal procedure code and a well-developed line of similar cases.
12. In Kenya courts have presumed that a court is adequate if it can legally assert jurisdiction or the defendant has agreed to subject himself/herself to the court’s jurisdiction. Yet the adequacy requirement additionally demands that parties not be deprived of all remedies or treated unfairly. This court has not been told how the defense intends to address the issues raised by the state in the affidavit of the investigating officer sworn on 17<sup>th</sup> December, 2024. This matter is realistically being looked at from the traditional parameters of the *forum non-conveniens* as articulated in the *Criminal Procedure Code*. Therefore, the defense arguments that the forum at Eldoret lacked adequate procedural safeguards and the modicum of independence and partiality necessary to ensure compliance with Art. 50 to hear the pending criminal indictment has been discounted by the material evidence by the state.
13. As in most *forum non-conveniens* cases, primarily the court must focus on the two competing forums interest in the dispute or criminal case. Even when the court decides the forum is adequate, important public policy interests have the potential to tip the balance of the ensuing private and public interest analysis in favor of denying an accused person or the defendant motion to dismiss the preferred forum on the ground of *forum non-conveniens*. The review court must go further and consider any administrative difficulties including whether an unreasonable amount of time may pass before the alternative forum would realistically hear the Plaintiff’s/Accused’s case. As a matter of emphasis, quite compelling circumstances have been pleaded by the state in the respective affidavits sworn by Lilian Kamudei Ekamais and Margaret CI Margaret Awino Ong’ale on intelligible evidence disqualifies Lodwar court as a *forum of conveniens*. The primary inquiry for this court is in balancing both the accused and thee public interests in so far as this criminal litigation is concerned. Here, it is not whether some other forum might be a good one or even a better one than the accused’s chosen forum.
14. The question to be answered is whether the accused chosen forum is itself inappropriate or unfair because of the various private and public considerations involved. That the alternative forum chosen by the state may be an indication of it having an interest in these criminal proceedings does not in any way alter the fact that the accused’s chosen forum also has a significant interest in its outcome or that the crucial liability evidence in this case is more convenient to the proposed present forum. *Forum non-conveniens* is a jurisdiction in which the court must be committed to exercise sound discretion and holistically addressing any emerging issues which were not contemplated during the drafting of the criminal procedure code. In essence, trial courts should consider the history, purpose and actual effect *forum non-conveniens* in Lodwar would have before exercising their discretion in any particular



case. These considerations must be purposive to promote the higher calling of the court's maxim to act in the best interests of justice.

15. The prosecution has presented several reasons for transfer. First, that there is credible evidence that the investigating officers have faced serious threats to their lives, having "evaded a well-orchestrated plan that was to end their lives." This is not a mere speculative concern but represents a concrete threat to the administration of justice.
16. Second, the prosecution averred that crucial witnesses have already fled the county for their safety after receiving threats. Third, the influence of the accused persons in Turkana County presents a legitimate concern. The 7th and 8th accused hold positions of power within that society, and significantly, the complainant is the son of the sitting governor.
17. The defense has raised several objections to the transfer, primarily focusing on the prejudice they might suffer from having to defend themselves in Eldoret. However, while these concerns are legitimate, they must be weighed against the more pressing concerns of witness safety and the integrity of the judicial process. As stated in *John Brown Shilenje v Republic* (*Supra*):

"The High Court will always require some very strong grounds for transferring a case from one judicial officer to another... It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held."

18. In the case of *Maina Kinyatta V Republic* [1984] eKLR the court of Appeal while setting out the test to be satisfied under Section 81 of the *Criminal Procedure Code* for transfer settled: -

"Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character there notwithstanding that there may be no real bias in the matter, the facts of incident having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."

19. The evidence presented demonstrates that Eldoret provides a neutral forum that can better guarantee the security of all parties involved while maintaining access to justice. It is geographically positioned to serve as a reasonable compromise between the interests of all parties, being neither too remote to effectively deny access to justice nor too close to the area where security concerns have been identified.
20. Furthermore, the prosecution's evidence suggests that witnesses have already been threatened and have fled the county. The Witness Protection Agency has not yet been engaged, making the transfer to a neutral venue even more crucial for witness security. This aligns with the principle that the administration of justice must not only be done but must be seen to be done in a manner that engenders public confidence.
21. Having carefully weighed all these factors, I am satisfied that the prosecution has established compelling grounds for transfer. The combination of documented threats to investigating officers, witness intimidation, and the complex power dynamics in Turkana County creates a situation where a fair and impartial trial would be significantly challenged if held in the original jurisdiction. Eldoret offers a suitable alternative venue that can better ensure the safety of all parties while maintaining the accused persons' right to a fair trial.
  - a. This Honorable Court hereby reviews and sets aside the orders of Hon. S.D Sitati SRM dated 16th December, 2024 in *Eldoret CMCR E2514/24* of declining to admit the plea for reasons of it being a forum of non-conveniens.



- b. The forum available at Eldoret, having competent jurisdiction should have been allowed for the accused persons to take plea of the offences so charged and thereafter other interests of the all parties and the ends of justice can be addressed by the court or this court pursuant to Art. 165(6) and (7) of the Constitution.
- c. The personam jurisdiction of the magistrates' court at Eldoret was not ousted by the provisions of the Criminal Procedure Code. The application of this reasoning is on the Blueprint on social transformation on access to justice with a mantra "*Mahakama popote*".
- d. That a declaration be and is hereby made that the Director of Public Prosecution files the indictment against the accused persons for the plea to be taken forthwith without any further delay and any matters arising which may fall within Art. 50 of the Constitution shall be addressed by this court.
- e. The initial forum presided over by the session magistrate Hon. S.D Sitati be and is hereby reviewed and the Chief Magistrate be at liberty to assign the case docket to another magistrate with competent jurisdiction to admit and hear the case on a priority basis.
- f. Costs shall be in the cause.

**DATED SIGNED AND DELIVERED AT ELDORET VIA CTS, THIS 23<sup>RD</sup> DAY OF DECEMBER 2024**

.....

**R. NYAKUNDI**

**JUDGE**

In the Presence:

Mr. Githaiga, Advocate for the Accused persons

Mr. Warigi, Advocate for the victim

Mr. Mugun for the state

