



State v Okoth alias Sisco alias Govins & another (Criminal Case E034 of 2024) [2024] KEHC 16477 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E034 OF 2024
RE ABURILI, J
DECEMBER 18, 2024**

BETWEEN

STATE PROSECUTION

AND

VICTOR OUMA OKOTH ALIAS SISCO ALIAS GOVINS 1ST ACCUSED

DUNCAN OCHIENG OBONG'O ALIAS OTUCHI 2ND ACCUSED

RULING

1. The two accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). Particulars of the Information dated 18th December, 2024 signed by Mr. Patrick Okango, Senior Principal prosecution Counsel are that between the night of 18th and 23rd of October, 2024 around Nyamboga stream at the border of Gem and Khwisero Sub Counties within Siaya and Kakamega Counties respectively, jointly with others not before the court, the accused persons murdered Willis Ayieko Onyango.
2. The two accused persons have just taken a plea and denied the offence. The Court has directed the prosecution to supply the defence counsel with witness statements and documents intended to be relied on during the trial and I have also directed the probation officer to file a pre bail assessment report on each of the two accused persons on their suitability to be released on bail pending trial. A mention date has been fixed for 31st December, 2024.
3. Whereas this Court had no issue having this matter brought to Kisumu High Court for plea taking as there was no objection from any of the accused persons or their advocates, on the court's own motion, I asked the prosecution to indicate why the case was brought to Kisumu High Court as opposed to either Kakamega or Siaya High Courts where the offence is alleged to have taken place.



4. In response, the prosecution counsel together with the advocate watching brief for the family of the victim of the alleged murder submitted that Kisumu was the most neutral and preferred place of trial because the offence was consummated in Kisumu.
5. It was submitted that some of the suspects were arrested at their hideout in Kisumu; that one of the accused persons has a residence in Kisumu; that the coordination of investigations by the homicide team from Nairobi was done in Kisumu; that some of the witnesses are from Kisumu including Mpesa agents and banks where money was withdrawn using the phone belonging to the victim; that the alleged murder was much publicized and that there is public outrage in Siaya where both accused persons as well as the family of the victim hence the security of the accused persons is at risk; that this Court has unlimited original and appellate jurisdiction in criminal cases, that the two accused persons first met at Kodiaga Prison in Kisumu where they planned to commit the alleged offence and, finally, that the family of the victim of the alleged murder were comfortable with the trial taking place in Kisumu High Court.
6. On the part of the accused person's counsel, they submitted that the trial should be in Siaya or Kakamega where the offence allegedly took place and that the bringing of the accused persons to Kisumu was a forum shopping exercise. That Section 74 of the *Criminal Procedure Code* provides for the place of trial as that where the offence took place; that the 1st accused was arrested in Bondo and taken to Siaya Law Courts where preliminaries were done; that the issue of security of accused persons should be after the pre-bail assessment report is filed.
7. In a rejoinder, Mr. OKango Senior Principal Prosecution Counsel relied on section 74(d) of the *Criminal Procedure Code* which allows change of place of trial. He submitted that in Kisumu High Court, accused persons are assured of fair trial than in Siaya or Kakamega.
8. Asked for their own opinion, the accused persons told the court that they would accept the decision of the court on where to have the trial take place.

Determination

9. I have considered the submissions by counsel for the prosecution, the victim's family and the accused persons on the place of trial of the two accused persons as raised by the court on its own motion. The issue for determination is whether this Court has geographical jurisdiction to try the accused persons herein.

The law

10. Article 50(2) (d) of the *Constitution* guarantees every accused person the right to a fair trial which includes, the right to a public trial before a court established under the Constitution.
11. Article 165 (1) of the *Constitution* establishes the High Court and Sub-Article (3), confers on the High Court unlimited original and appellate jurisdiction in civil and criminal matters.
12. Section 5 of the High Court Organization and Administration Act provides for Jurisdiction of the High Court. Under the said section, the Court shall exercise—
 - (a) the jurisdiction conferred to it by Article 165(3) and (6) of the *Constitution*; and
 - (b) any other jurisdiction, original or appellate, conferred to it by an Act of Parliament.
13. Section 12 of the *High Court Organization and Administration Act* provides for distribution of stations of the Court and states as follows:



- (1) The Chief Justice shall, in consultation with the Principal Judge, facilitate reasonable and equitable access of the services of the Court and establish at least one station of the Court in every county. [emphasis added]
14. The above provisions were enacted to facilitate equitable access to justice and to the High Court where services of the Court are required. One of the hindrances of accessing justice is distance to the courts. Witnesses and justice seekers may find it an inconvenience and, in most cases, too expensive to travel to courts which are far flung. The courts on the other hand are expected to reimburse travel expenses to very needy witnesses in criminal cases yet the funding of the court is a big challenge. It therefore follows that it is appropriate to have cases heard within the local courts where the causes of action or offences accrue.
15. It is for this reason that the ordinary place of trial is provided for by Section 71 of the *Criminal Procedure Code* which stipulates that:
- “Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.”
16. However, where it cannot be discerned as to where the offence took place, Section 74 of the *Criminal Procedure Code* comes into play. The section provides thus:
- “When—
- (a) it is uncertain in which of several local areas an offence was committed; or
 - (b) an offence is committed partly in one local area and partly in another; or
 - (c) an offence is a continuing one, and continues to be committed in more than one local areas; or
 - (d) an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of those local areas.”
17. The prosecution asserts that the persons who are likely witnesses and the officers coordinating the investigations are based in Kisumu where some of the persons of interest were arrested from. It is also alleged that the offence was consummated in Kisumu County where one of the accused persons is said to have residence and that the ground in Siaya County where both accused persons have domiciles is volatile, this matter having aroused great public interest following the death of the victim of the alleged murder.
18. The accused persons are represented by counsel and they heard all the submissions on the place of trial and they indicated to court that they would abide by the Court’s decision.
19. Off course, there is no evidence that a trial in Kisumu would be inconvenient or prejudicial to the accused persons or the witnesses to this case including the victim’s family, considering their role and rights under the *Victims Protection Act*.
20. What this court will therefore consider is to ensure that the law and the tenets of fair trial are not compromised or prejudicial to the accused persons.



Judicial pronouncements

21. In *Joram Opala Otieno v Director of Public Prosecutions; Zachary Okoth Obado & 14 others (Interested Parties)* [2021] eKLR, citing sections 71 and 72 of the *Criminal Procedure Code*, the Court stated that section 72 of the *Criminal Procedure Code* provides that when a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.
22. The court stated that:

“It therefore follows, that unless there are special circumstances the cases should be filed in court within the local limit where the offence was committed or within the local limits where the accused as apprehended or is in custody for a charge for the offence or has appeared in answer to summons.
23. The Court then concluded that:

“I take the view that where there is reasonable ground and apprehension that there cannot be a fair and impartial trial within the territorial jurisdiction where the offence was committed, then notwithstanding the fact that the statute provides for institution of proceedings before the said court and as was stated in *Republic V Inspector General Of Police & 2 Others Ex parte Boniface Nginyo Mwaura* [2019] eKLR thus:

“Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has the jurisdiction to try and hear the case. The reason for this rule is two-fold. First, the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. Second, laying the venue in the locus criminis is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available.”
24. From the above provisions of the law as interpreted by the Courts, it is clear to this court that unless there is proved to exist special circumstances and the reasonable apprehension that the accused will not get a fair trial in the court within the territorial jurisdiction where the offence was committed, or that the victims of the offence will not get justice in such a court, the court must ensure that the place of trial is as provided for under sections 71, 72 and 74 (d) of the *Criminal procedure Code*.
25. In this case, there is no evidence on oath indicating any dangers that may be apparent if the case is heard by the Court where the offence was committed. Siaya High Court has a Judge in session following the demise of the former presiding Judge.
26. I have personally presided over Siaya High Court for 5 years and I heard some of the most volatile homicide cases including one involving the murder of a journalist and the press was in court every day of the hearing to watch brief for their departed colleague. At no time did the parties raise the issue of risks or danger to the accused persons or relatives of the deceased who resided within Siaya County and the family of the deceased attended court on all occasions.
27. In this case, there is no evidence that if the accused persons are arraigned in Siaya High Court, then they will be attacked by the victim’s family and the victim’s family must be forewarned that it is not



about an eye for an eye or taking the law into their own hands as far as suspects of the murder of their kin is concerned. It is about due process and fair trial.

28. The victims of offences have rights guaranteed under the Constitution and so are the accused persons herein who are presumed innocent until proven guilty.
29. Accordingly, as there are no special circumstances calling for a separate place of trial from where the offence allegedly took place, for example, there is no evidence that all the witnesses in the case are from Kisumu County and that it will be to the convenience of all parties including witnesses if the trial is held at Kisumu High Court; and as there is no evidence that the accused persons will not be guaranteed a fair trial in any of the two courts in the counties where the offence is alleged to have taken place, I hereby direct that the two accused persons herein shall be tried before Siaya High Court and that the pre-bail report shall be filed before Siaya High Court for consideration on merit.
30. This Ruling to be typed and uploaded in the online portal and the original file shall thereafter be transmitted to Siaya High Court forthwith for further necessary action.
31. From this end, this file is consequently closed.
32. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

