



REPUBLIC OF KENYA



**Murabacha & another v Republic (Criminal Revision  
E056 of 2022) [2023] KEHC 944 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 944 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL REVISION E056 OF 2022  
RPV WENDOH, J  
JANUARY 26, 2023**

**BETWEEN**

**STEPHEN NJUNGE MURABACHA ..... 1<sup>ST</sup> APPLICANT**

**KEZIAH WANJIRU GIKONYO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Stephen Njunge Murabacha and Keziah Wanjiru Gikonyo face a charge of obtaining goods by false pretences contrary to Section 313 of the [Penal Code](#) in the Chief Magistrate’s Court Migori in Criminal Case E1056 of 2021.
2. The applicants filed a Notice of Motion dated 20/7/2022 through the firm of Shisanya Advocates. They have come to this court under Article 165 (6) of the [Constitution](#), Section 81, 362 and 364 of the [Criminal Procedure Code](#). They seek the following orders:-
  1. Spent;
  2. That there be a stay of the proceedings in Migori CMCR E1056 of 2021 Republic vs. Stephen Njunge and Keziah Wanjiru pending the hearing and determination of this application;
  3. That the court be pleased to call for and examine the record of the proceedings in the said case for purposes of satisfying itself as to the correctness and legality of the findings of the CM’s court given on 7/7/2022;
  4. That the court do revise and or set aside the order made on 7/7/2022 in the said case;
  5. That the court do order the transfer of the said case to Makadara Law Courts Nairobi for hearing and determination;



6. Any other order that the court deems fit to grant.
3. The application is premised on grounds found in the body of the application and the affidavit of Keziah Wanjiru.
4. It is the applicant's contention that on 7/7/2022, the Chief Magistrate Migori ruled that the court had jurisdiction to hear and determine the case which ruling offends Section 71, 78, 79 and 81 of the [Criminal Penal Code](#). She further contents that both applicants were arrested in Nairobi, transported to Migori; that the grounds allegedly obtained were delivered in Nairobi and that the applicants allegedly obtained the goods from the complainant's store in Nairobi and that ordinarily the place of trial is the place of arrest and where the cause of action arose which is Nairobi; that under Section 71 of the [Criminal Procedure Code](#), offences will ordinarily be tried by a court within the local limits of whose jurisdiction it was committed or where accused was arrested. It is the applicant's further contention that they are residents of Nairobi, and there is no justification for them to be tried in Migori; that they are incurring high travel and accommodation costs to come to attend the case; that if they fail to attend court, then they are likely to be arrested; that they have to facilitate the costs of the advocates to; that the Nairobi courts conduct virtual hearings and the complainant and his witnesses can be heard virtually and need not travel to Nairobi but if they are required on hearing day, the applicants are willing to facilitate their travel to Nairobi. They relied on the decision in [Elsek Osman Erdinc vs Republic](#) (2021) eKLR where the court considered what is to be considered in transfer of a case from one court to another. It was their contention that their rights under Article 50 of the [Constitution](#) have been violated by the orders of 7/7/2022.
5. Shisanya Advocates also filed submissions on October 12, 2022 in which he reiterated the contents of the affidavits. Counsel identified two issues for determination.
  1. Whether this court can order transfer of the subject case from Migori to Nairobi Law Courts.
  2. Whether this court can revise the order of 7/7/2022.
6. On the first issue, counsel reiterated the provisions of Section 71 of the [Criminal Procedure Code](#). He urged that goods were delivered to Nairobi from Migori where the applicants allegedly took possession of them or came into contact with them and hence the cause of action arose in Nairobi. Counsel denied the relevance of Section 7 [Criminal Procedure Code](#). He invited the court to look at the witnesses' statements which proved that the alleged offence was committed in Nairobi, the appellants were arrested there and transferred to Migori. He also submitted that the fact that the applicants and their Advocates travel 400Kms to Migori for their case violates the applicants rights to access justice. Counsel also relied on Section 81 of the [Criminal Procedure Code](#) which grants this court power to change volume of the hearing of criminal case. He faulted the decision to try the applicants in Migori court as it meant to vex, harass and oppress them and that they have demonstrated sufficient reasons for the court to order a transfer.
7. On whether this court can revise the Chief Magistrate's order, counsel relied on Sections 362 and 364 of the [Criminal Procedure Code](#) where this court has power to revise a lower court's decision to ensure that the ends of justice are met. Counsel cited the case of [Emily Sanguli Mabishi vs Republic](#) (2016) eKLR cited with approval, the case of [Charles Gitau vs Republic](#) (2008) in which the court held that a court can act suo moto where a matter has been brought to its notice, even if the party had a right of appeal.
8. It was Mr Shisanya's further submission that PC Bonface Ngare who has sworn the affidavit in reply to this application is not the investigating officer in the matter and has deponed to some facts which are not within his knowledge and therefore the court should only rely of the statements of PC E Njue and



- PC Luke Rotich the witnesses; Mr Shisanya submitted that he withdrew from acting for the applicants after an oral argument between him and the trial magistrate but came back to argue this application and he was of the view that another magistrate should deal with the case.
9. PC Bonface Ngare who described himself as the investigating officer in this matter swore a replying affidavit in reply to the application. The prosecution. Counsel also filed grounds of opposition on 29/9/2022 and submissions on October 12, 2022. The application was opposed for reasons that it is misconceived and seeks to challenge the merits of the trial court’s decision through revision yet revisionary jurisdiction in the High Court should be to consider the correctness, legality and propriety of the lower court’s finding or sentence; that the application is frivolous and vexatious, meant to delay the hearing of the case and hence an abuse of the Court process. Counsel relied on the decision of *Kevin Shitambasi Amayi vs Republic* (2017)ECLR and *Kamande & 3 Others vs Republic* (2004) eCLR.
  10. The investigating officer deponed that the applicants seek the transfer of the case to Makadara Chief Magistrate’s Court for trial because it will be convenient to them, and which the court declined to grant and now the applicant wants this court to examine the lower court record to satisfy itself whether the finding of the court was correct, legal and proper and proceedings regular and that the applicants constitutional rights under Article 45 were violated. It was submitted that the court declined to grant the applicant’s application after hearing both sides; that the law applicable to transfer of criminal cases from one Judicial Officer to another or to another station. Section 81 of *Criminal Procedure Code* which sets out the factors to be considered. These factors were considered in *Kamande’s* case supra and *Shilenje vs Republic* (1980) eCLR 132 and *Kevin’s* case supra; that the revisionary powers of this court under Section 362 and 364 of the *Criminal Procedure Code* and Article 165 (6) of the *Constitution* grant the High Court power to examine the lower court’s finding or record for any mistake, error, omission or if the order is unlawful; that the applicants seek a transfer because the offence was committed in Nairobi, the applicants live in Nairobi and it is costly for them to travel from Nairobi to Migori for the trial and that the trial in Migori offends their rights guaranteed under Article 48, ie access to justice; that there is no allegation that the court acted unfairly or impartially; but it is for convenience of the applicants; that the charge and witness statements clearly show that the offence was committed in Migori, the report was made at Migori police station and that convenience of the parties favours the complainant and his witnesses; that this application is meant to derail the hearing of the case and delay it. The court was urged to dismiss the application.
  11. This court has considered the application before it, the Replying Affidavit, grounds of opposition and submissions filed by both sides.
  12. An application for revision as provided for under Article 165 (6) of the *Constitution* and Section 362 and 364 *Criminal Procedure Code*.
  13. Under Section 362 *Criminal Procedure Code*, the High Court has the powers to call for and examine criminal proceedings in the subordinate court to satisfy itself as to the correctness, legality or propriety of any finding, sentence, order passed and the regularity of the proceedings. Under Section 364 of the *Criminal Procedure Code*, the court may order an acquittal or alter or reverse the order of the subordinate court. It follows that this court has the powers to examine the proceedings and the order made by the Hon the Chief Magistrate. In the decision of *Emily Sanguli* (supra) eCLR the court quoted with approval the case of *Charles Gitau vs Republic* (2008) eCLR in which the court held:-
 

“While the Prosecution rightly submitted that no appeal shall be entertained if a finding, sentence or order could have been appealed therefrom, it is clear from the case of Charles Gitau vs Republic (supra) that the court can act suo moto and consider an application for revision as if the same were an appeal. In that case Ojwang J (as he then was) stated thus:-



“..... In our judgment, the court can in its discretion, act suo moto even where the matter had been brought to its notice by an aggrieved party who had a right of appeal..”

It is on that basis that this court proceeded to consider the Applicants’ application for Revision in a holistic manner.”

14. From the above decision, apart from the grounds upon which this court can order a revision for error, illegality or irregularity on the proceedings, it can also deal with a grievance where one had a right of appeal.
15. The question is whether the application for revision meets the above threshold. Section 71 of the *Criminal Procedure Code* provides that:-

"71. .... 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 of the offence, or has appeared in answer to a summons lawfully issued charging the offence."
16. The question here is, where was the alleged offence committed? The charge sheet clearly indicates that the offence was committed in Migori and therefore the accused could be charged in the said court. In the alternative, they could have been charged where the applicants were arrested, that is in Nairobi. The trial court in its ruling found that no affidavits had been sworn to demonstrate that the offence was committed anywhere else other than what was stated in the charge and which the prosecution were enjoined to prove.
17. It is the applicants’ contention that the subject goods were delivered in Nairobi and it is where the applicants allegedly took possession of the goods and therefore it is where the offence took place. The trial court observed that as the place specified in the charge is Migori. It is for the prosecution to prove the charge and it is premature for the applicant to challenge the charge as filed. As it is the applicants are actually challenging the merit of the trial court’s ruling yet this is an application for revision.
18. The application before the trial court was said to be under Section 71, 78, 79 and 80 of the *Criminal Procedure Code* seeking transfer of the case to a court in Nairobi. The reasons being that the offence was committed in Nairobi, the accused were arrested in Nairobi, and that the accused and Advocates come from Nairobi and were being inconvenienced. I have seen the statements of the witnesses. They all reside in Migori, the offence was reported and investigated in Migori, the agreement to supply rice was made in Migori, though the goods were delivered in Nairobi. The trial court found that none of the applicants had filed affidavits in support of their averments which were made the bar as to where the offence was committed. The magistrate therefore relied on the particulars of the charge which indicated that the offence was committed in Migori. Without evidence I find that the trial court correctly relied on what was before him.
19. Before this court, the parties have filed affidavits in support of their different positions. One of the key questions is where the offence was committed. Section 71 and the 74 of the *Criminal Procedure Code* provide for the place of inquiry or trial.
20. As observed above, the first steps in the commission of the offence i.e. the representation, the agreement and the dispatch of the goods were all made in Migori. The witnesses including the complainant reside in Migori and the trial cannot properly observed that an order of transfer cannot be wide merely because the accused are inconvenienced. The factors set out in the above sections must be considered.



Besides, the trial court considered whether it had jurisdiction to transfer a case. Section 79 of the [Criminal Procedure Code](#) provides for transfer of case between magistrates. It reads as follows:-

“Section 79. A magistrate holding a subordinate court of the first class-

- (a) May transfer a case of which he has taken cognizance to any magistrate holding a subordinate court empowered to try that case within the local limits of the first class subordinate courts jurisdiction and
- (b) may direct or empower a magistrate holding a subordinate court of the second class who has taken cognizance of a case and whether evidence has been taken in that case or not, to transfer it for trial to himself or to any other specified magistrate within the local limits of his jurisdiction who is competent to try the accused and that magistrate shall dispose of the case accordingly.”

21. The trial court considered Section 79 and 80 of the [Criminal Procedure Code](#) and correctly found that it could only transfer a case within the local limits of courts jurisdiction but not outside. Transfer of a case outside the Chief Magistrate’s jurisdiction lies with the High Court . Section 81 [Criminal Procedure Code](#) provides:-

“(1) Whenever it is made to appear to the High Court:

- a. fair and impartial trial cannot be had in any criminal court subordinate to it.
- b. That some question of law of unusual difficulty is likely to arise.
- 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.
- d. That an order under this section will tend to the general convenience of the parties or witnesses.
- 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 offences;
  - (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 Prosecution notice in writing of the applications 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.”
22. The above provisions have been considered before. In *Shilenje vs Republic* (1980) eKLR 132 Trevelyan J said 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 sensory on such an officer”
23. In this case the applicant seek review of the trial courts ruling declining the transfer of the case. So far the applicant has not demonstrated any of the grounds for transfer of the case. There is no error or illegality in the trial court’s ruling. In fact the applicants should have appealed against the said ruling if aggrieved. The applicants had been before the trial court for 8 months, represented by the same counsel since arrest. They waited until the hearing date to make this application. No satisfactory reason has been shown to this court why the delay, If indeed they believed the offence had been committed in Nairobi as alleged.
24. The applicants’ counsel has added that he wants the case transferred because of an off record back and forth argument between him and the magistrate. If at all that occurred which I cannot confirm, the court had already given its ruling and there is no evidence that the court was biased or was likely to be.
25. Like observed in the *Kamande* case and the case of *Kevin Shitambasi Amayi vs Republic* 2017 eKLR the courts should try to protect trust and dignity of the court by not allowing applications for transfer based on malingering parties or shopping for a ‘suitable’ court. In this case, I note that the applicants’ counsel purported to withdraw from representing the applicants once the Magistrate read his ruling on 7/7/2022 and the court allowed the applicants time to get another advocate. The same counsel is however still acting for the applicants and he went ahead to file this application before this court on 21/7/2022. One wonders whether the ceasing to act for applicant’s was made in good faith or was it meant to get an Adjournment and delaying the case further and file this application.
26. I make this observation because this is a common practice among counsel, to apply to cease acting for a party when an application for or adjournment is declined a ruling is adverse to them only for them to come back on record once the adjournment is allowed. In my view such conduct by counsel is unbecoming and not made in good faith.
27. Having said the above, I am of the view that there are totally no grounds to warrant revision of the Chief Magistrate’s orders. I also find no grounds that can cause this court to transfer this case to Makadara Court Nairobi for trial. The trial is before a competent court and the trial should proceed to its logical conclusion.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**R. WENDOH**  
**JUDGE**



**Judgment delivered in the presence of**

Mr. Mulama for the State.

Appellant present in person.

Evelyne Nyauke – Court Assistant

