



Office of the Director of Public Prosecution v Mkowa & another (Miscellaneous Criminal Application E020 of 2022) [2023] KEHC 2650 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2022**

JN ONYIEGO, J

MARCH 28, 2023

(IN THE MATTER OF AN INTENDED APPEAL)

BETWEEN

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

BONIFACE KIMBO MKOWA & ANOTHER RESPONDENT

RULING

1. The accused herein were on September 6, 2022 arraigned before Garissa Chief Magistrate's court jointly charged with the offence of: being a member of a terrorist group contrary to section 24 of the [prevention of terrorism act](#) 2012. (count 1)

Particulars are that on or before August 20, 2022 at Fafi area in Garissa County within the Republic of Kenya, he was found to be a member of a terrorist group, namely Al – Shabaab terrorist group which is an outlawed terrorist organization by the Kenyan gazette notice number 12585 of 2010 in contravention of the said act.

2. Count 2: They were charged with presumption of travelling to a country for the purpose of being trained as a terrorist contrary to section 30 (c) of [Prevention of Terrorism Act](#). Particulars are that on or before August 20, 2022 at unknown place, jointly and knowingly received instructions to attend terrorism training in Somalia, a country designated to be a terrorism training country as per Gazette notice number 200 of 2015 in preparation for the commission of a terrorist act within the Republic of Kenya in contravention of the said act.
3. Count 3, accused 1 was charged with the offence of being in possession of articles connected with the Commission of a terrorist act contrary to section 30 of the [prevention of terrorism act](#) 2012.



Particulars states that on or before August 20, 2022 at Fafi area in Garissa County, within the Republic of Kenya, knowingly had in possession A silver grey laptop HP Elite Book Folio 9470 M Imei 359166046520603 and Serial number CNY34399JV which contained image files titled; IMG 20220511 – WAO106, IMG-20220511 – WAO105, IMG -20220417 – WA0006, IMG -20220417 - WA0008, IMG -20220417 - WA0021, IMG -20220417 - WAO104, IMG -20220511-WA0034, IMG -20220511 – WA0038, And audio files titled; AUD -20220523 – WA0029, AUD -20220526 - WA0038 AND AUD -20220718 - WA0002 which are articles for use in instigating the commission of a terrorist act in contravention of the said act.

4. Having entered a plea of not guilty, the court proceeded to fix the same for hearing. During the pendency of the trial, the state moved to this court vide a notice of motion dated November 16, 2022 seeking an order to transfer the case to Kahawa Law Courts for hearing and determination. That there be a stay of proceedings in Garissa Criminal case number E586 of 2022, pending the hearing and determination of the application herein.
5. The application is anchored on grounds that due to the serious nature of the charges, Accused were remanded at Kamiti Maximum prisons for security reasons. It was further stated that owing to insecurity in Garissa, it will be difficult and unsafe to produce the accused persons before Garissa Law Courts for mentions and hearing. That due to the nature of the offence, it will be difficult to conduct the trial online as most of the exhibits require physical presence to aid in identification and production hence impossible to have a fair and impartial trial before Garissa Law courts. On their part, the respondents were agreeable to the application hence no objection. They basically conceded to the application.
6. I have considered the application herein which is brought pursuant to Section 81 of the [Criminal Procedure Code](#) which provides that:

Power of High Court to change venue

- 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 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.
7. Under normal circumstances, pursuant to Section 72 of the *Criminal Procedure code*, an offence is tried within the court in whose local jurisdiction it is committed. However, there are exceptional circumstances which may warrant trial of such an offence to be conducted outside jurisdiction. Such exceptions may include but not limited to, security of the trial court, accused himself or the complainant or generally convenience of the trial including travelling of witnesses and the cost attendant thereto and the interest of justice.
8. In the instant case, the accused are for security reasons owing to the nature of the offence held at Kamiti GK Prisons. They are not opposed to the transfer of the case to Kahawa Law Courts for trial.
9. For all purposes and intent, the convenience of the trial, it is secure for the witnesses to attend the trial at Kahawa Law Courts than in Garissa where they will be exposed to danger. Equally, the court premises may be exposed to attack hence the justification for transfer of the case.
10. For the above reasons stated, I am inclined to direct as follows;
- a. That Garissa Criminal Case No E586/2022 be and is hereby transferred to Kahawa Law Courts for hearing and determination.
 - b. The trial court Garissa Law Courts to cause the transfer of the said file to Kahawa Law Court as soon as possible.
 - c. Mention before Garissa Chief Magistrate's court on 5-4-2023 for further directions on when to appear before Kahawa Law Courts.

DATED SIGNED AND, DELIVERED IN OPEN COURT THIS 28TH DAY OF MARCH, 2023.

J N ONYIEGO

JUDGE



In the Presence of:

Mr Kihara for the state.

Martin/ Mohamed- Court Assistants.

Applicant

J N ONYIEGO

JUDGE

