



**Wamwere v Republic (Miscellaneous Criminal Application
E002 of 2023) [2023] KEHC 17860 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2023**

RB NGETICH, J

MAY 25, 2023

BETWEEN

JOHN MWANGI WAMWERE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, John Mwangi Wamwere, filed application dated January 23, 2023 seeking for the following orders:-
 - i. Spent
 - ii. Spent
 - iii. That this Honourable court do transfer Kabarnet Traffic case No E038 of 2022 from Kabarnet Chief Magistrate's court to Nakuru Chief Magistrate's court for hearing and determination and or any other court of similar jurisdiction.
2. The application is based on the grounds that a fair and impartial trial cannot be had in Kabarnet and the immediate surrounding courts as the applicant and his close relatives, friends and business associates at Kabarnet, Marigat and the surrounding areas have been threatened either individually and or collectively with unspecified consequences during the hearing of the case.
3. That the accused and his community have been profiled and are a target for revenge attacks and the accused is not able to attend court freely as he is fearing for his life hence cannot be able to appear for the proceedings as the surrounding area is hostile towards him and lastly that Kabarnet court is not conducive for the Applicant and his witnesses.
4. The application is supported by the affidavit sworn by the applicant on the January 23, 2023 where he avers that on the October 3, 2022, he was charged before this court with a charge of causing death



by dangerous driving contrary to section 46 of the [Traffic Act](#) cap 403 Laws of Kenya and he appeared before the Chief Magistrate's court at Kabarnet where he denied the charge and was later released on bond.

5. He states that the case was scheduled for hearing on the January 9, 2023 at Marigat mobile court and the accident occurred at Kabarnet- Marigat area a place known as Cumming area, a few kilometers to Marigat Town.
6. The applicant further stated that he used to do business at Marigat and Kabarnet Town and almost all the surrounding markets, where he has worked for almost 10 years; that he is well known in the area and has several relatives and friends who also work from the same place.
7. He further states that when the accident occurred, members of the public wanted to burn his car and attack him but he was saved by the police but they have openly vowed to take revenge against him and his relatives/friends who do business in the area.
8. The Applicant states that due to the severe threats, he, his friends and relatives have closed down their businesses and moved elsewhere as the area has become too hostile to them.
9. That even attending court has become a challenge to him as he cannot concentrate due to fear though he does not have any problem with the court and any other officers but his problem is the relatives of the deceased and their sympathizers who have openly vowed to revenge the death of their relatives. He prays for transfer of this matter to Nakuru and or elsewhere away from Baringo and Koibatek.
10. The application proceeded by way of written submission.

Submissions By Applicant

11. The applicant filed submissions dated March 28, 2023. Counsel submitted that when the matter came up in court, the situation was tense as the members of the public wanted to attack the applicant and was only saved by the police officers present.
12. Counsel further submitted that attending court has been a challenge as the police are forced to place the accused in cell and produce him together with other remandees; and after the session, the police release him through the back door.
13. Counsel submitted that the police who appeared before court did confirm that they have serious challenges whenever the applicant appear in court and under the circumstances, the accused cannot be able to follow up the proceedings freely and exercise his constitutional right to fair trial.
14. Counsel further submitted that this is a perfect case under section 81 of the criminal procedure code where the High court can transfer a case either on an application of the accused and or on its own motion.
15. Counsel further submitted that the Respondent has not filed any response to the application and the facts stated are true.

Submissions By Respondent

16. The Respondent filed submissions dated February 17, 2023 and argues that the transfer of a case from subordinate court to another court is governed by Section 79 of the [criminal Procedure code](#), but the grounds for transfer are set out in section 81 of the same code. That section 81 specifies the grounds upon which the High court may, either upon an application or on its own motion, transfer a case from one subordinate court to another or to the High court itself for trial.



17. The Respondent refers the court to the case of Nairobi Court of Appeal, criminal Appeal No 60 of 1983 between Maina Wa Kinyatti and Republic. Where reasons for the transfer of a case itemized (a) to (e) were clearly outlined and may be invoked by the court on its own motion or on an application made to the court under section 81 of the *criminal procedure code*.

18. The Respondent submitted that the facts as deponed are not supported by material evidence.

Analysis And Determination

19. Power of the High Court to transfer a criminal case from one venue to the other is provided by section 81 of The *Criminal Procedure Code* which provides as follows:-

81. 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 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.

20. Whereas Article 50 of the *Constitution* guarantees a fair trial through impartial and independent court, tribunal or body, section 81 of the *Criminal procedure Code* allows this court to order a criminal case to be transferred from one court to another when there are grounds advanced to demonstrate that a fair and impartial trial cannot be had in that court.

21. What I wish to consider is whether the applicant has demonstrated to this court that he will not get a fair and impartial trial at Kabarnet Law Courts.

22. The applicant stated that when members of public recognized him after the accident, they wanted to attack him; he was saved by the police but have vowed openly to take a revenge on him and his relatives/ friends who do business in the area; he adds that he has closed business in the area and relocated elsewhere due to security reasons



23. The applicant stated that he has no problem with the court but only fears for his security while the case is proceeding; and he cannot concentrate due to fear in him that the deceased's relatives and their sympathizers who have openly vowed to revenge may harm him.
24. He urged this court to transfer this matter to Nakuru and or elsewhere away from Baringo and Koibatek.
25. The test as to whether fair trial will be achieved was stated in the case of *John Brown Shilenje v Republic* Nairobi Cr Appeal No 180 of 1980 by Trevelyan J as follows:-

“Reasonable apprehension in the applicants or any right-thinking person's mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations.”
26. Despite allegations by the applicant, there is no prove of threats. I would have expected the applicant to lodge complaint on threats to police for investigations. He has not availed any document to confirm that.
27. If indeed, such threats existed, the prosecution who have opposed the application would have been aware that the applicant was placed in cell before court session and sneaked out after court session to prevent any attacked by deceased's family, friends or sympathizers.
28. Further I would have also expected the accused or his counsel to bring such threats to the attention of the trial court.
29. From the foregoing, I find that the applicant has failed to demonstrate to the satisfaction of this court that threats to his life exist as a result of the traffic case proceeding in Kabarnet court. In the absence of sufficient grounds as provided under section 81 of *Criminal Procedure Code*, I do not see merit in application herein. In my view this is an attempt by the applicant to forum shop.

Final Orders: -

30 Application dated February 3, 2023 is hereby dismissed.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 25TH DAY OF MAY 2023

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Mnaka holding brief for Mr. Koskei for family of deceased.

No appearance by applicant.

