



**Moronya v Republic (Miscellaneous Criminal Application E066 of 2023)
[2023] KEHC 22708 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E066 OF 2023
HM NYAGA, J
SEPTEMBER 28, 2023**

BETWEEN

RAPHAEL NYANDORO MORONYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant filed an application dated May 30, 2023 brought pursuant to sections 123 (1) &(2) of the [Criminal Procedure Code](#), articles 27,28 and 29 of [the Constitution](#) of Kenya ,2010 seeking for orders:
 1. Spent
 2. That the Honourable Court be pleased to admit the Applicant to Anticipatory Bail or Bail pending arrest for any bailable offence consequent to arising from any matter related to the yet to be specified offence that the Applicant is likely to be charged with.
 3. That the Applicant be given a date to appear in Kisii Law Courts or any other Court within Kisii County to take plea for any preferred charges and consequently be tried there.
 4. That in case a court file has been opened already, the same be transferred to Kisii Law Courts or any other court within Kisii County and/or in the alternative, the same to be closed and another one to be opened in Kisii Law Courts or any other court within Kisii County.
 5. Spent.
 6. That the costs of this Application be provided for.
 7. That such other or further orders and/or directions as the Honourable Court may deem fit and just to grant.



2. The Application is premised on the grounds set therein and supported by an affidavit of Raphael Nyandoro Moronya sworn on the even date.
3. He deposed that he is a resident of Kisii and that between 2018 and June 2022 he was employed by Thur & Mody Co. whereby he was offering transportation services for their goods which are limited to household utensils strictly within Kisii and Nyamira Counties.
4. He deposed that he has never offered services outside the two counties until when he resigned from the above company to try his luck somewhere else.
5. He averred that on Saturday of May 21, 2023, the police officers from Nakuru went to his house at Kisii, arrested him and took him to Nakuru Central Police station on grounds that his former employer's directors had lodged a complaint against him for allegedly forging receipts during subsistence of employment.
6. He contended that he was forced to spend the night at Nakuru Central Police station and the following day he was released on a cash bail of Ksh.40,000/= and he was not issued with a receipt since the person issuing the same was not around.
7. He contended that the receipt was eventually issued to him on May 25, 2023 but it was for Ksh.10,000/= and the rest of the money was unaccounted for.
8. He deposed that he tried to plead with the police officers at the station not to charge him in Nakuru since the contract was signed in Kisii County and he worked there, and the goods were issued to him from the complainant's store in Kisii but the police officers could hear none of it and ordered him to appear in Nakuru Law Courts on May 29, 2023 for plea taking.
9. He deposed that he is a man of meagre means hence commuting to and from Nakuru whenever the case is in court will cause him wanton jeopardy and that all the witnesses he may wish to rely on reside in Kisii and Nyamira Counties.
10. He averred that he is apprehensive warrants of arrest will issue to his detriment if this application is disallowed.
11. He is willing to fully cooperate with the police officers and he prayed that this application be allowed to enable him defend himself seamlessly.
12. The applicant swore a further Affidavit on June 12, 2023 wherein he averred that the charge sheet particulars that he was operating within Nakuru Township are misleading.
13. He deposed that all the exhibits the prosecution intends to rely on show that he was operating business in Kisii and Nyamira Counties.
14. It was his deposition that the matter was presented before the Magistrates court on May 29, 2023 in his absence and warrants of arrest issued and the same kept being extended which is an indication that his cash bail was long forfeited hence he risks arrest intermittently.
15. He averred that the powers are being abused to his detriment and it is only this court that can remedy such travesty by allowing him to be tried in the right court.
16. The Respondent opposed the application through a replying affidavit sworn by its state counsel, Loice Nekesa Murunga, on June 16, 2023. She averred that the application lacks merit, it is frivolous, and a waste of court's precious time and the same should be dismissed.



17. She averred that the applicant was arrested as he clearly stated and was released on a cash bail of Ksh.10,000/= on condition that he appears before court on 29th March, 2023 to take plea and that date was written on his cash bail receipt which he was issued with.
18. According to the respondent the Applicant did not attend court on March 29, 2019 as agreed and the warrants of arrest were issued and his cash bail forfeited to the state.
19. She averred that when the applicant learnt that warrants had been issued against him he chose to file the instant application and deliberately on June 13, 2023 mislead this court that he was not aware of the suit preferred against him in the Nakuru court on the above date.
20. She contended that the Applicant deliberately chose not to attend court as he wanted to take plea in Kisii Law courts as demonstrated in his prayer no.3 of this Application and urged this court not to allow the Applicant to fish for a court in which he can take plea.
21. She deposed that the complaint was made in Nakuru and the Nakuru chief magistrate has jurisdiction to hear and determine the matter pursuant to section 3(2) of the Magistrate's Act.
22. She deposed further that the complainant and the prosecution witnesses are working for gain within the Jurisdiction of Nakuru Law Courts and are comfortable attending Nakuru Law Courts.
23. She contended that the Applicant should be allowed to take plea in Nakuru court where the complaint was made and thereafter he can make an application on the Jurisdiction of the Nakuru Court to handle the case.

Submissions

Applicant's Submissions

24. The Applicant filed his submissions on July 19, 2023.
25. The applicant urged this court to transfer the matter to Kisii for hearing and determination. To support his submissions he referred this court to the provisions of section 67 ,71,72 and 81 of the *Criminal Procedure Code* and the case of *Republic v James Irungu Magondu* [2020] eKLR where the court held that Section 81 thereof donates wide powers to the High Court to transfer criminal cases from one Subordinate Court to another, and also to itself, upon exercise of Judicial discretion, and upon tangible reasons that demonstrate that a fair trial will not be had if the case is not transferred to another court.

Respondent's submissions

26. The respondent submitted that the anticipatory bail sought is untenable as they were sought whilst warrant of arrest were issued.
27. The respondent also submitted that it was unsure of where the cause of action arose as the applicant was supplying goods throughout the country. It was reiterated that the complainant resides in Nakuru and that the question of jurisdiction is answered by the Magistrate Court Act.

Interested Party's submissions

28. On July 20, 2023 the complainant was granted leave to appear in this proceedings as an interested party.
29. The counsel for the interested party associated himself with the submissions by the Prosecution.



30. In a quick rejoinder, the Applicant submitted that to prove that he was operating business in other counties.

Analysis & determination

31. Having considered the application, the affidavit in support and in opposition to the application plus the submissions on record, I consider the following issues arise for determination: -
1. Whether the Applicant should be granted anticipatory bail.
 2. Whether this court should grant the transfer orders sought.

Issue no.1

32. The grant of anticipatory bail should be an exercise of the court's discretion where the Applicant has shown that there is imminent danger of arrest in breach of their right.
33. In the Judiciary Bail and Bond Policy Guidelines, it is suggested thus at Paragraph 4.29:
- “The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect his right. Further, the applicant must demonstrate that the apprehension or arrest is “real and not imagined or speculative.”
34. In the instant case, the applicant has asked the court to grant him the bail pending arrest because he is apprehensive that warrants of arrest will issue against him if this Application is disallowed. In his further affidavit he averred that he risks arrest intermittently since his cash bail was long forfeited.
35. The charges have already been preferred against the Applicant in Nakuru Criminal Case no. E1251/2023 as shown in the annexed charge sheet. In that case, the fear of apprehension has been overtaken by events AND anticipatory bail sought is untenable.

Issue No.2

36. The provisions of; sections 78 to 81 of the [Criminal Procedure Code](#), relates to transfer of a cases.
37. Section 78(1) of the Criminal Procedure Code provides that;
- “If upon the hearing of a complaint it appears that the cause of complaint arose outside the limits of the jurisdiction of the court before which the complaint has been brought, the court may, on being satisfied that it has no jurisdiction, direct the case to be transferred to the court having jurisdiction where the cause of complaint arose.”
38. Section 81 of the [Criminal Procedure](#) which provides as follows:
- “81(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.”

39. The power of the High Court to transfer any specific case from one subordinate court to another under this provisions is aimed at to meet the ends of justice and satisfy the principles of fair trial.
40. The principles upon which change of venue may be granted has been crystalized in the leading case of *Shelenje v Republic* (1980) KLR 132 which lays down the principle that the for the High Court to transfer a matter from one venue to another, there should be reasonable apprehension in the applicant’s or any right thinking person’s mind that a fair and impartial trial might not be given before the Magistrate whether one takes the incidences individually or collectively. At the same time, there ought to be something before court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.
41. The applicant contends that he used to offer transportation services for Thur and Mody Company strictly within Kisii and Nyamira and that all the witnesses he intends to call reside in Kisii and Nyamira. He deposed that nothing whatsoever links him to Nakuru Jurisdiction. The Respondent on its part contended that the complaint was made in Nakuru and that the complainant and her witnesses reside in Nakuru.
42. I have perused the charge sheet. The Applicant is charged with four counts. Namely: obtaining goods by false pretense contrary to section 313 of the *penal code*; forgery contrary to section 349 of the *Penal Code*; Making a document without authority contrary to section 357 (A) of the *Penal Code*; and uttering a false document contrary to section 353 of the *Penal Code*.
43. The particulars of the above offences show that each offence was committed at Nakuru Township within Nakuru East Sub County in Nakuru County. Indeed, none of the particulars in the charge sheet place the commission of the offence in either Kisii or Nyamira.
44. The contention by the applicant that all exhibits that the prosecution has and intends to rely on establish that he was operating in Kisii and Nyamira Counties is not backed by any evidence.
45. Section 3 (2) of the *Magistrates Courts Act* provides:

“ the Resident Magistrates Court shall have jurisdiction throughout Kenya.”



46. Pursuant to the above provisions and the grounds advanced above, I find the magistrate court in Nakuru has jurisdiction to hear and determine the case lodged against the Applicant. There are no sufficient grounds to transfer the matter.

47. The application therefore is devoid of merit and I hereby dismiss it.

48. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 28TH DAY OF SEPTEMBER, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Applicant present

