



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. E153 OF 2021

BINTI ATHUMANI SULEIMAN.....1ST APPLICANT

MOHAMED SUWARI SULEIMAN.....2ND APPLICANT

-V/S-

REPUBLIC.....RESPONDENT

RULING

Application

1. The application dated 15th July 2021 was brought under Section 362 of the Criminal Procedure Code and all other enabling provisions of law.
2. The Applicant seeks for orders that the Honourable Court be pleased to offer revision, set aside and/or quash the order cash bail terms by Honourable Chief Magistrate E. Nyaloti in Mombasa Criminal Case No. E420 of 2021 made on 18th March 2021 by revising the same to less punitive amounts and order a refund of the balance to the depositor, 1st Applicant herein. That the Honourable Court be pleased to offer revision, set aside and/or quash the order declining transfer of the matter to Kwale Law Court reason by Honourable Resident Magistrate V. Adet made on 8th July 2021 in Mombasa Criminal Case No. E420 of 2021. That the Honourable Court be pleased in the alternative to order the above that the matter be transferred for hearing and determination in Kwale Court.
3. The application was premised on the grounds that the offence with regards to which the Applicants herein is alleged to have committed is within the local limits of Kwale Law Courts. That the Accused persons were arrested in the precincts of Kwale Law Courts and charged at Mombasa Law Court in open disregard of the law. That the alleged offences all took place within the jurisdiction of Kwale Law Courts. The Applicants cited Sections 66, 71 and 78 of the Criminal Procedure Code. That it is not an answer that some of the witnesses are based in Mombasa to have the proceedings conducted in Mombasa Law Courts in express contravention of statute. That Mombasa Law Court is a forum of non-convenience given the Accused ordinarily reside within the local limits of Kwale Law Courts and are forced to incur travel expenses to attend court in Mombasa.
4. The application is supported by an affidavit sworn on 15th July 2021 by Binti Athumani Suleimani, for 1st Accused Applicant competent to swear the affidavit and on behalf of the co-Applicant as well and with such other grounds.

Response

5. When the matter came up for mention on 29th November 2021, the prosecution counsel for the respondent pointed out to court that they wished to adopt their submission in the lower court.
6. The Replying Affidavit sworn on 21st May 2021 by No. 230143 SSP Simon Wabwire of Regional Directorate of Criminal Investigations Unit and the leading investigating officer in the matter stated that the facts of the case are that during the year 2019 in Mbuguni Area within Kwale County, the accused persons jointly with others not before court took possession of plot number Kwale/Mbuguni phase IS S/391 property of one Abdulsalam Mohammed Kassam without colour of right and held possession of the said property in a manner likely to cause a breach of peace against Abdulsalam Mohammed who is the rightful legal owner of the property.
7. The Investigating Officer stated that it is not disputed that the offence was committed within Kwale County, however, the filing of the matter at the Mombasa Law Courts is in keeping with the *forum non conveniens* principle as it shall ensure that the case meets the ends of justice. That the investigation has established that holding a fair and proper trial will not be conducive if the matter was transferred to Kwale

Law Courts. That the investigations have established that all of the witnesses in this matter reside within Mombasa County.

8. The Investigating Officer stated that during the investigations they faced a lot of resistance and animosity by the accused persons supported by the locals of the area when they went to view the said property and take photographs. Hence given the conduct of the accused persons and the locals and the sensitivity of the case as it deals with land, there is a clear evidence that the security of the witnesses in the matter will be highly compromised if they are made to travel to Kwale County for trial.

9. The Investigating Officer stated that the investigations have established that the first accused person has a very strong political influence within the county hence there is a high likelihood that the witnesses may be threatened and the evidence in place may be interfered with and this will undermine the likelihood of a fair trial. That filing the matter in Mombasa Law Courts is for the interest of all parties and for the ends of justice. That the Applicants have not demonstrated what prejudice they stand to suffer if the matter is heard and determined in the Chief Magistrate's Court in Mombasa.

Analysis and Determination

10. This court has considered the Notice of Motion Application dated 15th July 2021 and the Supporting Affidavit thereto sworn on the same day by Binti Athumani Suleiman and the Replying Affidavit sworn on 21st May 2021 by No. 230143 SSP Simon Wabwire of Regional Directorate of Criminal Investigations Unit and the leading investigating officer in the matter. The issues for determination therefore are:-

- i) Whether the matter can be transferred from Mombasa Law Courts to Kwale Law Courts for hearing and determination
- ii) Whether the cash bail terms can be revised to less punitive amounts and a refund of the balance made to the depositor, 1st Applicant herein

Whether the matter can be transferred from Mombasa Law Courts to Kwale Law Courts for hearing and determination

11. The Applicants prayed for transfer of the matter from Mombasa Law Courts on grounds that the offence with regards to which the Applicants herein is alleged to have committed is within the local limits of Kwale Law Courts. That the Accused persons were arrested in the precincts of Kwale Law Courts and charged at Mombasa Law Court in open disregard of the law. That the alleged offences all took place within the jurisdiction of Kwale Law Courts.

12. **Section 81** of the **Criminal Procedure Code** provides for the power of the High Court to change venue as follows:-

(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.

(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.

13. In the case of *Joseph Korir alias David arap Chonjo v Republic* [2018] eKLR that relied on *Kamande & 3 Others v Republic* [2014] eKLR it was held that:-

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them. If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”

14. The Respondent requested that Court relies on their Replying Affidavit sworn in the lower court which stated that the matter was filed in Mombasa Law courts in keeping with the *forum non conveniens* principle to ensure the case meets the ends of justice. The Investigating Officer who is the Deponent in the Replying Affidavit stated that they faced a lot of resistance and animosity by the accused persons when they went to view the property and take photographs and that the security of the witnesses who are based in Mombasa will be highly compromised if they are made to travel to Kwale for trial. It was further stated in the Replying Affidavit that the 1st Accused had very strong political influence within the county hence a high likelihood of witnesses being threatened or the evidence in place being interfered with.

15. This court finds that there is evidence on record to show possession of the piece of land in dispute. The two witnesses whose statements are on record do not state who the owner of the land is. Further, the Investigating Officer who swore an affidavit on 21st May 2021 stated that all the witnesses reside in Mombasa but the two witnesses state in their statement on record that they stay in Kwale County. The Investigating Officer further stated in the affidavit that the 1st Accused person has strong political influence which will affect the security of witnesses. However, there is no affidavit on record by the witnesses showing that they are being threatened. Additionally, the said influence does not affect judicial officers in dispensation of justice. Also, the Investigating Officer did not state the political designation of the 1st Accused person and whether she is an MCA, MP, Governor, Senator, or even a village elder. If at all the witnesses were being threatened, what ought to have been done by the Respondent was to apply for witness protection. Therefore, this matter should be transferred from Mombasa Law Courts to Kwale Law Courts which is the proper jurisdiction for hearing and determination.

Whether the cash bail terms can be revised to less punitive amounts and a refund of the balance made to the depositor, 1st Applicant herein

16. The Applicants in the Supporting Affidavit sworn on 15th July 2021 stated that the Honourable Court be pleased to offer revision, set aside and/or quash the order cash bail terms by Honourable Chief Magistrate E. Nyaloti in Mombasa Criminal Case No. E420 of 2021 made on 18th March 2021 by revising the same to less punitive amounts and order a refund of the balance to the depositor, 1st Applicant herein to enable her cater for her day to day needs noting the financial challenges brought about by the pandemic, she had to make arrangements of raising a cash bail sum of Kshs. 400,000 to cater for both Applicants.

17. In the case of *Harish Mawjee & another v Republic* [2020] eKLR, Lesiit, J. held that:-

“There are certain overarching principles that govern the administration of bail and bond by Courts. First of all, courts have sole discretion to give determinate bond terms and they can impose a combination of terms including supervision of accused released on bail if found necessary. Secondly, bond terms should not be arbitrary, but the court must consider the relevant factors affecting issuance of bond including penalty of offence and the accused ability to meet the bond terms. Thirdly, the bond terms should not be excessive or unreasonable. Fourthly, an accused has right to seek review of bond terms from trial court or high court or appeal. The issue is when an accused can enjoy bail review?”

“The Bail and Policy Guidelines were developed to give guidance in decisions making on bail in line with the constitutional provisions. The guidelines recognized the need for a balanced approach in preserving the public interest and the right of an accused person to fair trial. On guiding courts in determining reasonable bail terms, the guidelines provided that bail or bond amounts should not be excessive, they should not be far greater than was necessary to guarantee that the accused person would appear for his or her trial, amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. What was reasonable would be determined by reference to the facts and circumstances prevailing in each case.”

18. Rights of an accused person are provided for by the **Constitution of Kenya, 2010** under **Article 50(2)(a)** which states that every accused person has the right to be presumed innocent until the contrary is proved. Further, **Article 49(1)(h)** provides for entitlement to bail where he can be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released. Therefore, the entitlement to bail exists as a constitutional right and enjoyment of the same can only be limited if there is establishment of exceptional circumstances.

19. Further, **Section 123A** of the **Criminal Procedure Code** provides as follows:-

1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular:-

a) the nature or seriousness of the offence;

b) the character, antecedents, associations and community ties of the accused person;

c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and

d) the strength of the evidence of his having committed the offence.

20. The accused persons were charged under **Section 91** of the **Penal Code**, which states:-

‘Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer. ‘

21. However, punishment for a misdemeanor has not been provided, in the above section. However, **Section 36** of the **Penal Code** states as follows on the same:-

‘When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.’

22. The offence herein is a minor offence and this court has noted on the court records that the cash bail terms of Kshs. 400,000 were granted in respect to the two Applicants with each having cash bail terms of Kshs. 200,000 which according to this court is excessive. It is on this basis that the court revises the cash bail terms to Kshs. 100,000 for each accused person. The balance of Kshs. 200,000 to be refunded to the depositors.

23. In conclusion, this application is allowed with no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 13TH DAY OF JANUARY 2022**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga holding brief Mr. Mulamula for Respondent

No appearance for Mr. Mwangunya for the Applicants

Notice of Ruling to issue

HON. LADY JUSTICE A. ONG’INJO

JUDGE