



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

MISC CRIMINAL APPLICATION E150 OF 2021

PATROBA MICHIEKA OMWENGA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The applicant herein was on 25th October 2012 arraigned before Voi Chief Magistrate's court vide Cr. No E1499/2021 facing the charge of cyber harassment contrary to Section 27 of the computer misuse and cybercrime Act of 2018

(Count 1)

2. Particulars are that, on diverse dates between 1st May 2021 and 30th September 2021 at unknown place within the Republic of Kenya wilfully communicated to one Micar Shem mwazighe through whatsapp account, to wit "Oyaaa buda ulisikia Michieka Omwenga Patroba alipita mthani? Anakuja kununua hio firm yako cash cash no bargain! Waliomdharau watamwangalia kwa kioo na viu sasa. Sijui utafaje you deal with this man! Because your mganga concoctions have backfired on him....he's also been admitted to LLM in Pretoria surely he has a God who he calls JESUS.. you need to shun your devil ways and embrace the bible and stop wishing others bad hope you are well kijana and your law firm grew at least an inch. Is this our M Pesa number can I send money for free for buying diaries' which are grossly offensive in nature and detrimentally affects Micar Shem Mwazighe.

3. In respect to count two, he is charged of publication of false information contrary to section 23 of the computer misuse and cybercrime Act 2018. Particulars are that, on diverse dates between 1st May and 30th September 2021, at an unknown place within the republic of Kenya posted on his Facebook account to wit "avoid a law firm owned by a man named Justice Micar Mwazighe in Voi town. Especially women! Avoid him! very tricky fellow ...esp pupil'knowng to be false which is calculated to discredit the reputation of Michar Shem Mwazighe and his law firm.

4. Having entered a plea of not guilty, the matter was fixed for hearing. However, before hearing could take off, the applicant (accused) moved to this court vide a Notice of Motion dated 9th November 2021 and filed on 10th November 2021 seeking orders that;

a. This application be certified urgent and as needing prior hearing through a virtual platform.

b. Pending hearing and determination of this applicant interpartes there be a temporary stay of proceedings in Voi chief magistrate's court Cr Case No 337/2021

c. This court does order that Voi chief magistrate's court Cr. Case No 322 of 2021 be and is hereby transferred to the chief magistrate's court at Milimani Nairobi for hearing and determination.

5. The application is premised upon grounds stated on the face of it and amplified by averments contained in the affidavit in support sworn on 9th November 2021 by the applicant. It is the applicant's case that; the cause of action herein arose in Nairobi which is outside Voi CM's court; the applicant and his witnesses live in Nairobi which falls within the jurisdiction of Milimani CM's court; the distance from Nairobi to Voi is quite long hence costly for him and the intended witnesses to attend ; he is suffering from high blood pressure which worsens when traveling long distance journeys and as a pupil he cannot secure a lawyer on probono services in Voi unlike Nairobi where Ochiel Dudley and company advocates have volunteered to offer him free legal services.

6. In response, the respondent through Joel Kibet prosecution counsel filed a replying affidavit which is not dated but filed on 18th January 2022. According to Joel Kibet Chirchir the cause of action according to the charge sheet arose at unknown place and therefore Voi CM's court has jurisdiction pursuant to Section 74 of the criminal penal code. He further stated that the complainant being a practising

advocate within Voi and, the complaint having been investigated by Voi DCI, the Voi CM's court is the right court to hear and determine the matter.

7. In his oral submission, M/s Kwang'a holding brief for Mr. Ochiel counsel for the applicant contended that a high court has powers under Section 81 of the Criminal penal code to transfer a criminal case from one subordinate court to another if it appears that; a fair and impartial trial cannot be had in any criminal court subordinate to the high court; general convenience of the parties and, that such an order is expedient for the ends of justice to be met.

8. Learned counsel submitted that the cause of action arose in Nairobi as the applicant resides in Nairobi and that for the general convenience of all parties and the interest of justice, it would be convenient to have the trial held in Nairobi.

9. On his part, Mr Chirchir prosecution counsel opposed the application by adopting the content contained in his undated affidavit in reply to the application. It was counsel's submission that; there is no evidence tendered to prove that the offence was committed in Nairobi; all prosecution witnesses being the complainant and investigating officer are Voi residents; there is no proof that the applicant resides and comes from Nairobi; the application is brought in bad faith and therefore, intended to delay the hearing. As regards bias, counsel submitted that there was no proof of partiality or likelihood of bias. I have considered the application herein, response thereto and oral submissions by both counsel.

10. The application herein seeks transfer of CR case No E1499/2021 erroneously indicated as Cr. Case No. 337/21 from Voi CM's Court to Milimani CM's Court on various grounds interalia; the cause of action arose in Nairobi ; applicant resides in Nairobi; convenience for both parties as witnesses come from Nairobi; the applicant is sick hence not advisable to travel long distance it will be expensive for the applicant and his witnesses to travel from Nairobi to Voi and that in the interest of justice, the case should be heard in Nairobi.

11. On the other hand, the respondent is of the view that; there is no proof that the cause of action arose in Nairobi and that the applicant lives in Nairobi; the applicant has not been put on his defence to think of his witnesses traveling to Voi and that the complainant and investigating officer all reside in Voi.

12. The only issue that crystalizes for determination is, whether the applicant has met the threshold for transfer of the subject case from Voi to Milimani law courts. It is trite law that under ordinary circumstances, every offence shall 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 for the offence, or has appeared in answer to summons lawfully issued charging the offence (See Section 71 of the criminal procedure code).

13. Section 72 goes further to provide that;

“when a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done the consequence has ensued ”

14. However, where there is doubt as to which of the several areas an offence was committed; or an offence is partly committed in one local area and partly in another or offence is continuing one, or continues to be committed in more than one local area , or an offence consists of several units done in different locals areas, it may be tried by a court having jurisdiction over any of those areas(see Section 74 of the CPC)

15. This court's intervention for the transfer of the subject case from Voi to Milimani has been summoned pursuant to Section 81 of the criminal penal code which empowers the high court to transfer a criminal case from one subordinate court to the other if it is made to appear to the court;

a. That a fair and impartial trial cannot be had in any criminal 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.

16. It is the duty of the high court in exercise of its discretion to carefully consider the grounds cited for transfer of a case from one

subordinate court to another. Therefore, transfer of a case from one subordinate court to another is not a ritual but rather an aspect of laying a factual and legal foundation to justify grant of the orders so as to maintain certainty in litigation of criminal cases as well the dignity of the court. See **Stanley Muia Makau Vs Republic (2020) e KLR** where the court stated that;

“it would therefore necessitate that before invoking Section 81 of the criminal penal code, the matter be looked at wholesomely for a change of venue ought not to be granted whimsically so as not to put into question the independence and integrity of the judiciary.

17. In the instant case, the applicant has listed three main grounds inter alia; the cause of action arose in Nairobi; he and his likely witnesses resides in Nairobi; convenience and possibility of bias if tried in Voi. Regarding the first ground, the particulars of the charge sheet state that the offence occurred at unknown place. The applicant contended that he resides in Nairobi, where he was arrested from and that at the material time he was staying in Nairobi where he is engaged in doing pupillage. Prosecution did not controvert this claim by way of evidence that the applicant does not live in Nairobi. However, Mr Chirchir counsel for the state confirmed that the applicant was arrested in Nairobi and then taken to Voi where he was charged.

18. If the applicant was apprehended in Nairobi and the investigating officer was not sure of the place or location the offence was committed, why was the applicant not charged in the court in whose local jurisdiction he was apprehended pursuant to Section 71 of the criminal penal code? Further, since the offence is alleged to have been committed through digital platform (WhatsApp), the point or location when the offensive message was disseminated would be possible after analysing the gadget used if available or other telephone service providers' sources of information.

19. The applicant indicated that during the material time relevant to this case, he was in Nairobi from where he was subsequently arrested. In the circumstances, the right court would be any criminal court within Nairobi area hence Milimani CM's court would be appropriate. This is meant to protect the applicant from suffering unnecessary inconvenience in terms of travel and attendant costs in attending proceedings in Voi Court simply because the case was filed in Voi on account of the fact that the complainant comes from Voi a factor which does not count when preferring criminal charges before a court of law.

20. Regarding the question of bias, the applicant did not specifically state who is likely to be biased or the specific nature of bias or partiality within the parameters contemplated under Section 81 of the criminal penal code. It was incumbent upon the applicant to prove to a reasonable degree the extent of bias. Mere apprehension of bias or partiality which is not supported with facts is not sufficient ground to invoke powers of the high court to transfer a matter from one subordinate court to another?

21. In the case of **Maina Kinyatti vs Republic (1984) e KLR** the court of appeal laid out the test for consideration to be applied where allegations of bias are raised as follows;

“where the apprehension in the mind of the accused that he may not have fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer”.

22. Similar position was held in the case of **John Brown Shelenje vs Republic cr.Appeal No. 180 of 1980**. In the instant case, nothing tangible has been placed before the court to warrant any inference that there was likelihood of the applicant suffering bias if proceedings were held in Voi law courts. To that extent, the ground of bias or impartiality fails.

23. Having considered the applicable law, convenience and the interest of justice to the exclusion of forum shopping, I would safely conclude that there was no sufficient ground attached to the preferment of the charges against the applicant in Voi law courts instead of Nairobi. According to the respondent, the complainant is from Voi and the complaint was made at Voi. I do not think the residence of the complainant is a factor for consideration or determination before preferring charges in a particular court.

24. As regards witnesses' convenience, the applicant asserted that it will be expensive to transport his witnesses from Nairobi to Voi. The respondent claimed that the applicant having not been put on his defence cannot raise the issue of witnesses' convenience at this stage. Will the application be appropriate after the applicant has been put on his defence? I do not think so. It would be too late in the day and not in the interest of justice to transfer a case at that stage. However, the question of location of an accused person's witnesses is immaterial when determining the appropriate court competent to try a criminal case.

25. If the applicant was apprehended in Nairobi and the offence was committed at a time when he was still residing in Nairobi, justice would then demand that the case be heard in Nairobi for the convenience of both parties hence the interest of justice. Cases cannot be initiated in courts before whose jurisdiction the complainant resides. In view of the above finding I am satisfied that the reasons cited for transfer of Cr case 1499/2012 from Voi CM's court to Milimani CM's court is convincing. Accordingly, It is hereby directed that Voi CM's court Cr case No E 1499/2021 be and is hereby transferred from Voi CM's court to Milimani CM's court criminal section for hearing and determination. The magistrate seized of the criminal case in question Voi Law Courts to forward the trial court's file in Cr. Case No. 1499/2021 to Milimani CM's Court criminal section with a specified mention date for further directions.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2022

J. N. ONYIEGO

JUDGE