



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC.CRIMINAL APPLICATION NO. 5 OF 2020**

**BENEDICT ATANGI ONDIEK.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

[1] Before the Court for determination is the Notice of Motion dated **14 January 2020**. It was filed by the applicant pursuant to **Section 81** of the **Criminal Procedure Code** for the following orders:

[a] Spent

[b] That pending the hearing and determination of the application the hearing of **Kiambu Chief Magistrate's Criminal Case No. 1921 of 2019** be stayed or suspended; (also spent)

[c] That **Kiambu Chief Magistrate's Court Criminal Case No. 1921 of 2019: Republic vs. Benedict Atangi Ondiek**, be transferred to the Chief Magistrate's Court at Eldoret for hearing and determination.

[2] The application was predicated on the grounds that the offence was allegedly committed in Eldoret; that the accused is a resident of Eldoret Town; and that the Exhibits are held at Eldoret Police Station. It was further the contention of the applicant that the only reason the case was filed in Kiambu is because the complainant hails therefrom; and that he will be highly prejudiced by having to travel to Kiambu every time the case comes up before the Kiambu Chief Magistrate's court. These grounds were explicated in the applicant's Supporting Affidavit sworn on **14 January 2020**, to which he annexed copies of the Charge Sheet and witness statements to buttress his assertion that the alleged offence was committed in Eldoret; and therefore that the application for transfer is justified.

[3] In response to the application, the respondent relied on the Replying Affidavit sworn on **17 February 2020** by **PC Moses Mutwiri**, a police officer attached to Kiamumbi Police Station, who is also the investigating officer in **Kiambu Chief Magistrate's Criminal Case No. 1921 of 2019**. **PC Mutwiri** averred that on the **29 November 2019**, the complainant in the matter filed a report at their police station, alleging that her goods had been stolen from her warehouse located along Kamiti-Ruiru road, which falls under Kiamumbi Police Station. **P.C. Mutwiri** further averred that investigations into the matter led to the recovery of some of the stolen goods and the arrest of the applicant in Eldoret on **30 November 2019**.

[4] It was further the averment of **PC Mutwiri** that, whereas the recovered goods were initially kept at Eldoret Police Station, that was only a temporary measure pending action by the scenes of crime personnel; and that the exhibits have since been moved to Kiamumbi Police Station. He also averred that, since all the witnesses involved in the case are residents of the Counties of Kiambu and Nairobi, it would be costly to transport them together with the exhibits to Eldoret for hearing. **PC Mutwiri** posited that the only reason proffered by the applicant to support his application for transfer of the case is his own convenience, which, in the interest of justice, ought to be balanced against the convenience of the State witnesses.

[5] The application was urged by way of written submissions, pursuant to the directions of the Court, made on **20 February 2020**. Thus, in his written submissions filed herein on **5 March 2020**, **Mr. Momanyi** for the applicant relied on **Sections 71, 72 and 81** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** to support his submission that the case ought to have been filed in Eldoret; granted that the offence was allegedly committed in Eldoret, which is also the place where the accused was arrested and the goods recovered. He urged the Court to confirm this from the Charge Sheet and witness statements annexed to the applicant's Supporting Affidavit and reject the averments of **PC Mutwiri** as mere falsehood.

[6] On behalf of the State, **Mr. Chacha** relied on his written submissions dated **3 December 2020**. He urged the Court to find that, although

the stolen goods were traced to and recovered in Eldoret Town, they originated from the complainant's warehouse in Kiambu County, within the constructive jurisdiction of Kiambu Chief Magistrate's Court. Counsel further submitted that, quite apart from the fact that the investigations commenced at Kiamumbi Police Station, the majority of the witnesses reside in Kiambu County, while the rest are residents of Nairobi County.

[7] **Mr. Chacha** also urged the Court to consider that the exhibits include 1,200 bags of hydrated lime, each weighing 25 kilograms, currently in the custody of Kiamumbi Police Station, awaiting production during trial. He therefore submitted that the balance of convenience tilts in favour of the Prosecution for purposes of **Section 81(1)(d) and (e)** of the Criminal Procedure Code. He added that, in any case, the applicant has not demonstrated any of the grounds under **Section 81** to merit the issuance of the prayers sought by him. In particular, it was the submission of **Mr. Chacha** that the applicant has not shown any difficulty he would face in travelling to Kiambu at the appointed time for trial. He relied on High **Court Miscellaneous Application No. 14 of 2014: Mohammed Noor Kassim Gando vs. Republic** and **High Court Miscellaneous Criminal Application No. 27 of 2015: Dorothy Aoko Njika vs. Republic** and urged the Court to dismiss the instant application.

[8] Having perused and considered the application and the affidavits filed in respect thereof as well as the written submissions filed by learned counsel for the parties, it is plain that indeed the applicant was arraigned before the Chief Magistrate's Court at **Kiambu in Criminal Case No. 1921 of 2019** and that the case is pending hearing and determination before that court. Whereas **PC Mutwiri** averred, at paragraph 4 of his Replying Affidavit that the charge is stealing; and that it was committed at the complainant's warehouse located along Kamiti-Ruiru Road in Kiambu County, the Charge Sheet annexed to the applicant's Supporting Affidavit confirms that the offence is theft of goods in transit contrary to **Section 279(c)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**; and that the goods were allegedly stolen while in transit from Kiambu to Bondo.

[9] I have also perused the witness statements exhibited by the applicant, and they too lend credence to the contention that the goods were stolen while in transit from Kiambu to Bondo. The witness statement of the complainant, **Annah Katusya**, is to the effect that the goods were to be ferried to Bondo and that she made all the necessary arrangements to have them loaded onto the subject **Motor Vehicle Registration No. KBR 124K-Trailer ZC 8681**. She further indicated that the goods were diverted and sold in Eldoret Town. This is also the purport of the statements of the investigating officer and two other witnesses. It was therefore not correct for the **PC Mutwiri** to aver that the goods were stolen from the complainant's hardware on Kamiti-Ruiru Road in Kiambu County. To the contrary, it is apparent that the theft, in all likelihood, occurred in Eldoret Town.

[10] **Section 71** of the **Criminal Procedure Code** provides that:

**“Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily 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 a summons lawfully issued charging the offence.”**

[11] Likewise, **Section 72** of the **Criminal Procedure Code** is explicit 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 or the consequence has ensued.”**

[12] It is manifest, therefore, that given the circumstances in which the subject offence is alleged to have been committed, the case ought to have been filed at the Chief Magistrate's Court at Eldoret, for the offence is alleged to have occurred in Eldoret, which is also where the applicant was arrested. Additionally, the goods were recovered by the police based at Eldoret Police Station; and whereas it was the averment of **PC Mutwiri** that the goods were ferried to Kiambu after their processing by the scenes of crime personnel, the statement of the complainant appears to show the same were sold in Eldoret, at Eldoret Police Station.

[13] In the circumstances, it would be in the interest of justice, and the provisions of **Sections 71 and 72** of the Criminal Procedure Code require, that the offence that is the subject of **Kiambu Chief Magistrate's Criminal Case No. 1921 of 2019** be tried at Eldoret Chief Magistrates Court. Accordingly, pursuant to **Section 81** of the **Criminal Procedure Code**, it is ordered that **Kiambu Chief Magistrate's Court Criminal Case No. 1921 of 2019: Republic vs. Benedict Atangi Ondiek**, be and is hereby transferred to the Chief Magistrate's Court at Eldoret for hearing and determination.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF FEBRUARY 2021**

**OLGA SEWE**

**JUDGE**