



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
ACEC MISC E029 OF 2020

JORAM OPALA OTIENO.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

ZACHARY OKOTH OBADO.....1ST INTERESTED PARTY

DAN ACHOLA OKOTH.....2ND INTERESTED PARTY

SCARLET SUSAN OKOTH.....3RD INTERESTED PARTY

JERRY ZACHARY OKOTH4TH INTERESTED PARTY

EVERLYIN ADHIAMBO ZACHARY.....5TH INTERESTED PARTY

JARED PETER ODOYO OLUOCH KWAGA.....6TH INTERESTED PARTY

CHRISTINE AKINYI OCHOLA T/A

ATINUS ERVICES AND DANKEY PRESS.....7TH INTERESTED PARTY

PATROBA OCHANDA OTIENO SOFTWARES:

JOYOUS BUSINESS & SWYFCON ENGINEERING....8TH INTERESTED PARTY

PENINAH AUMA OTAGO T/A PESULUS SUPPLIES.....9TH INTERESTED PARTY

CAROLYNE ANYANGO ACHOLA.....10TH INTERESTED PARTY

MISOFT LIMITED.....11TH INTERESTED PARTY

TARCHDOG PRINTERS LIMITED.....12TH INTERESTED PARTY

KAJULU BSIENSS LIMITED.....13TH INTERESTED PARTY

VICTORIUOS INVESTMENT LIMITED.....14TH INTERESTED PARTY

DELTRACK ICT SERVICES LIMITED.....15TH INTERESTED PARTY

RULING

1. By a Notice of Motion brought under Articles 1, 2, 10, 19, 20, 21, 22, 23, 25, 47, 48 and 50 of the Constitution of Kenya, 2010, Sections 66, 67, 71, 72, 76, 81 of Criminal Procedure Code and Sections 3, 4, 5 of the Fair Administration Actions Act, 2015 the applicant moved the court for the following orders.

a) That the Chief Magistrate Anti-Corruption Case No. 18 of 2020 **REPUBLIC v ZACHARIA OKOTH OBADO & 15 OTHERS** be dismissed or struck out from the register of the said court for want of jurisdiction.

b) THAT in the alternative to the above, this Honourable court be pleased to order that **Milimani Chief Magistrate Anti-Corruption Case No. 18 of 2020, REPUBLIC v ZACHARIA OKOTH OBADO & 15 OTHERS** be transferred from Nairobi Milimani Chief Magistrate's court Anti-Corruption Division to the appropriate division at Migori Law Courts with anti-corruption court case jurisdiction in Migori or with such and immediate proximity to Migori with local jurisdiction where the alleged crime is purported to have been committed.

2. The application was supported by an affidavit sworn by the applicant and grounds as follows;

a) The alleged offences for which the applicant and others were charged with were purported to had been committed in Migori County and no good or legal reason justifies the filing of the charges in Milimani Law Courts save to cause hardship and punishment against the applicant, against the provisions of Sections 67, 72 and 73 of Criminal Procedure Act as well as the provisions of Articles 10, 47, 48 and 50 of the constitution and further no leave was sought justifying the prosecution choice of seat of trial thus illegality and want of jurisdiction against the provisions of the Fair Administration Actions Act.

b) That all the witnesses and tools of trial are in Migori County and the applicant is apprehensive that there will be unusual difficulty in transporting them to testify, thus inconveniencing all the parties herein and further that the choice of seat of trial is to influence attention of the case.

c) That the deliberate filing of the case in Milimani Anti-Corruption Court many miles from Migori where the offence is alleged to have happened, where all witnesses, evidence, investigation are purported to reside or taken place has no legal excuse or justification but a ploy to deny the accused persons especially the applicant herein access to justice and make the hearing process all expensive and impossible for the applicant. In the process frog match the accused persons thereto to a conviction.

d) That **Nairobi Milimani Chief Magistrate Court in Case No. 18 of 2020** has no jurisdiction or territorial jurisdiction to hear and determine **Anti-Corruption Criminal Case No. 18 of 2020** and the same cannot be ventilated or heard before it.

3. In support of the application, it was deposed by the applicant that he together with 15 others were variously, jointly and severally charged with the offence before the trial court at Nairobi, many miles from Migori where the offence is alleged to had happened without any legal justification but as a ploy to deny him access to justice.

4. It was contended that unless the case is transferred from Milimani to either Migori or to a court with immediate proximity to Migori, the applicant shall be prejudiced as the trial in the subordinate court shall proceed against them to their detriment and shall be denied the constitutional rights under Article 50(1) of the Constitution.

5. It was the applicant's case that there was no legal justification that gave the prosecution powers to file and prefer charges against him in **Milimani Chief Magistrate Court Anti-Corruption Case NO. 18 of 2020** instead of Migori Law courts and that there was no legal excuse or justification to the court in **Milimani Chief Magistrate Criminal Court to receive case file No. 18 of 2020**, register the same and open jurisdiction thereby assuming jurisdiction thereto.

6. It was deposed further that the court can only act with jurisdiction and that without jurisdiction the court is in breach of Articles 48 and 73 of the Constitution and that the ODPP as well as the courts cannot arrogate themselves state powers contrary to Article 2(2) of the Constitution.

7. It was the Applicant's contention that this court exercises supervisory jurisdiction and has powers to decide which court the offence should be tried and that under Article 50(1) of the Constitution, every person has a right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court.

8. The applicant stated that no leave of court was sought and no reasons given to court to justify the change of locus or seat for hearing the matter and that the trial court was duty bound to reject any charges preferred by the ODPP which do not give the court jurisdiction and any assumption of or exercise of power over the matter would be null and void.

9. Finally, the applicant contended that the ODPP vide **High Court Anti-Corruption and Economic Division Case No. 32 of 2018 (OS)** obtained orders freezing all the assets of the accused persons herein and that it will cause them untold suffering in managing the hearing.

10. In response to the application, the Respondent filed a replying affidavit sworn by ANN MURIGIH an Investigator with EACC in which she deposed that the applicant and his co-accused were given an opportunity during plea taking to state whether any of them had an objection to plea taking and none raised an objects and therefore the application herein is misconceived and an afterthought.

11. It was contended that the commission commenced investigations into allegations of fraudulent procurement and payment in Migori county Government, where it was alleged that Zacharia Okoth Obado the Governor, embezzled public funds through his designated proxies and employees of the county who later allegedly made payments to the personal accounts of the governor's children leading to the case complied about.

12. It was contended that the case was properly filed before the Chief Magistrate court, Milimani since one Jared Peter Odongo Kwaga 16th interested party received monies in his cooperative bank account domiciled at Parliament Branch from various companies that were receiving payment from Migori county Government and part of the said monies were moved to the 1st interested party's Children Accounts for school fee, upkeep, rent and hospital bills and purchase of high-end vehicles while studying in Australia, Scotland and interested kingdom.

13. It was deposed that some of proceeds were used to purchase a house on behalf of the 1st interested party situated in LR No. 21080138 Title Number, IR 74362 Loresho Ridge within Nairobi County and that most of the companies/business entities the subject matter of the application have Bank Accounts domiciled at Nairobi specifically co-operative bank Parliament Branch.

14. It was contended that the 1st interested party and the other accused persons will promote business persons in Migori and of great influence over four employees at the county government, colleagues and local citizens who will be lined up as witnesses and therefore highly likely to interfere with witnesses.

15. It was deposed that there were substantial grounds that the first interested party will obstruct the course of justice by influencing or compromising or inducing or terrifying or doing such other acts to witnesses with the aim that the witnesses will not give evidence.

SUBMISSIONS

16. Directions were given by the court that the application be determined by way of written submission, the court having determined not to grant order of stay at this stage. On behalf of the applicant 8th, 9th and 11th and 15th accused persons it was submitted that the offences were allegedly committed in Migori County, but the charge sheet was filed in Nairobi Milimani Chief Magistrate Court Anti-Corruption Division, which did not have territorial jurisdiction over the matter pursuant to Section 71 and 72 of the Criminal Procedure Act, as such the same ought to be struck out or transferred to Migori Law courts or such court with Anti-Corruption court jurisdiction in Migori or with such and immediate proximity to Migori for the satisfactory competent trial of the matter and for expedient of law and ends of justice.

17. It was submitted by the applicant, that the fundamental question for determination was where the seat of the trial in this matter was. It was contended that as per Section 71 of Criminal Procedure Code, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction the accused was apprehended, is in custody on a charge for the offence or has appeared in answer to a summons lawfully issued charging the offence. The same position it was submitted was restated in Section 72 thereof.

18. It was the applicant's contention therefore, that since the offence was allegedly committed in Migori County, the cause should have been filed thereat. In support of the submissions reference was made to the American case of **PEOPLE v WERBLOW 241 N.Y 55, 148 N.E. 786 (1925)** to the effect that jurisdiction is to be exercised where a significant level of criminal activity had occurred.

19. It was contended that criminal jurisdiction of a magistrate's is provided under the Magistrate Court Act Section 6 which provides that the court shall have and exercise jurisdiction and powers in proceedings of a criminal nature as may be confirmed on it by the Criminal Procedure Code and any other written law. It was contended that to array the matter from Migori to Nairobi will deny the chance for the Applicant to assemble all witnesses and avail them in court, within reasonable time and at the least possible expense as provided for in Article 50 of the Constitution.

20. It was the Applicant's case that by moving the trial to Nairobi instead of Migori or nearer court, the right to adequate time and facilitation to prepare for defence of the applicant had been violated. It was stated that subjecting the accused persons to a trial out of the territorial jurisdiction where the alleged offence was committed was a breach of their right to fair trial in accordance with Article 50(1) as read together with Article 25(1) of the constitution.

21. It was contended that no good legal reason justified the filing of the charge in Milimani Law Courts, save to cause hardship and punishment against the applicant contrary to Sections 67, 72 and 73 of the Criminal Procedure Act and that the respondent sought no leave justifying the prosecution choice of seat for trial and was therefore illegal for want of jurisdiction against the provisions of the Fair Administration Action Act.

22. It was submitted on the authority of **OWNERS OF MOTOR VESSELS "LILIAN S v CALTEX OIL (K) LTD [1989] EA** that jurisdiction was everything and a court that lacks it should down its tools. It was stated further that the witnesses and tools of trial were in Migori and that the applicant was apprehensive that there will be an unusual difficulty in transporting them to testify, thus inconveniencing all the parties and further denying the applicant access to justice, by making the hearing process all expensive and impossible. It was contended that the accused persons have a right to a fair trial which commences from the moment the person is treated as a suspect or is arraigned in court for plea as was stated in the case of **JOSEPH NDUNGU KAGIRI v REPUBLIC [2016] eKLR**

23. It was submitted further that under Article 165 (6) and (7) this court has supervisory powers over the subordinate court and may in exercise of the same under Section 362 of the Criminal Procedure Code call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as the correctness, legality and propriety of the decision thereof. It was contended that Section 76 of the Criminal Procedure Code gives the High court power to decide in cases of doubt and any such decision shall be final and conclusive.

24. It was the applicant's case that Section 81 of the Criminal Procedure Code gives the court the power to change the venue of the trial. It was contended that the application was brought without delay and at the earliest opportune time and should therefore be allowed.

25. On behalf of the Respondent, it was submitted that the offence in question was committed partly in Migori, Nairobi and internationally including Australia, United Kingdom and Scotland and out of the possible 59 witnesses lined up by the State to testify, only 8 were

domiciled in Migori County. It was contended that the Applicant had disingenuously invoked the jurisdiction of this court wrongly as the same was seeking orders of transfer of the case as a constitutional right and therefore should have filed a petition on Judicial Review proceedings.

26. It was contended that the applicant did not object to the jurisdiction of the magistrate court at Milimani during the plea taking and therefore the application was an afterthought. It was stated that in considering the application for transfer of a case, the same must be anchored on Section 81 of the Criminal Procedure Code and that it is only when it is made to appear to the High Court that a fair trial cannot be held in the subordinate court. It was contended that the trial herein hinged on mainly documentary evidence and therefore no need for locus in quo.

27. It was submitted that as stated in the case of **MAINA KINYATTA v REPUBLIC (1980)** in deciding whether to transfer a case from one court to another the test is whether the appellant may not have a fair and impartial trial. The same position was stated in the case of **JOHN BROWN SHILENJA v REPUBLIC Nairobi Criminal Appeal No. 180 of 1980**. It was contended that where there were allegations of witnesses' insecurity then the court may order transfer of cases as was stated in the case of **REPUBLIC v AYUB GULLED & 2 OTHERS [2014] eKLR**. It was submitted on the authority of **DPP v PERRY MANJUKH KANSAGARA & 8 OTHERS [2018] eKLR** that under Section 81(3) of the Criminal Procedure Code, the discretion of the DPP in request for transfer of cases is only subject to Article 157 (11) having regard to public interest.

28. It was contended that the applicant had not demonstrated with clarity to a fair trial had been threatened or infringed upon by having the trial conducted in Nairobi and therefore the case should not be transferred.

ANALYSIS AND DETERMINATION

29. From the application herein, the submissions by the parties Advocates together with the authorities in support, the following issues have been identified for determination by the court.

a) What is the statutory place where the Applicant and co-accused should have been charged at and whether the applicant was charged at the correct venue?

b) What is the statutory provision for change of venue of a criminal trial?

c) Whether the applicant has made out a case for transfer of the criminal case No. 18 of 2020 now pending before the Chief Magistrate Court at Nairobi to any other court.

30. The Constitution of Kenya, 2010 established the Office of the Director of Public Prosecution under Article 157 (1) and in sub article (6) thereof granted the same the exercise of State power of prosecution as follows:

a) Institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed.

b) To take over and continue any criminal proceedings, commenced in any court (other than court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority and

c) Subject to Clause (7) and (8) discontinues at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP.

31. In exercising the powers conferred upon the DPP, the same shall have regard to the **public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process** (Emphasis added)

32. Section 71 of Criminal Procedure Code provides for the ordinary place of inquiry and trial in the following manner: -

“Every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed or within the local limits in whose jurisdiction the accused was apprehended or is in custody on charge for the offence or has appeared in answer to a summons lawfully issued charging the offence.”

33. Section 72 of the Criminal Procedure Code provides 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.

34. Section 73 provides for trial where offence is connected with another offence and states that when an act is an offence if the doer were capable of committing an offence, a charge of the first mentioned offence may be tried by a court within the local limits of whose jurisdiction either act was done.

35. As regards offences under the Anti-Corruption and Economic Crimes Act Cap 65, Section 4 of the Act provides that the offences under the Act shall be tried by the special magistrates from the area within which it was committed or by a special magistrate appointed for the case or where there are more special magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice.

36. It therefore follows, that unless there are special circumstances the cases should be filed in court within the local limit where the offence was committed or within the local limits where the accused as apprehended or is in custody for a charge for the offence or has appeared in answer to summons. As regards Anti-Corruption matter, the place for charging is as per Section 4 of the Act.

37. In respect of this application, based on the affidavit evidence before the court, it is not disputed that the alleged offence was committed in Migori County. The Respondent on the other hand has submitted, which has not been rebutted by the Applicant, that the execution of the same went beyond Migori County as the proceeds of the alleged offence were disbursed from Nairobi. It is also not disputed that the applicant in compliance with the provision of Section 71 of the Criminal Procedure Code appeared before the Chief Magistrate Anti-Corruption Court at Nairobi either by way of warrant of arrest or in answer to lawful summons issued to answer to the charge, it therefore follows that the Anti-Corruption court at Nairobi lawfully assumed jurisdiction over the cause.

38. From the material placed before me, it is clear that having assumed jurisdiction, the court proceeded to issue pre-trial directions which were complied with and the trial of the applicant and his co-accused is presumed to be lawfully ongoing before the said court.

39. I have further noted that there was no material placed before me by the Applicant to show that the trial Magistrate was not a special magistrate appointed under the provision of the Anti-Corruption and Economic Crimes Act Section 4 to try this cause and the court was therefore left to speculate on the said issue.

40. On the issue of the transfer of the Anti-Corruption case No. 18 of 2020, the jurisdiction of this court to transfer cases from one court to another is provided for under Section 81 of the Criminal Procedure Code, which provides for the power of High Court to change venue in the following terms:-

“81 (1) wherever it is made to appear to the High court

a) That a fair and impartial trial cannot be heard 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 offences.

d) That an order under this section will lead to the general convenience of the parties or witnesses or

e) That such an order is expedient for the end of justice or is required by any provision of this court, it may order

(i) That an offence be tried by a court not empowered under the proceedings Sections of this past but in others 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.”

41. Faced with a similar applicant for transfer, the court in **REPUBLIC v STEPHEN LELEI & Another [2020] eKLR** stated as follows:

“11. It would therefore necessitate that before invoking section 81 of the CPC, 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. I have not seen the court file in the Milimani case and am unable to speak about witnesses or the nature of evidence that has been presented; I also have not seen the witnesses or nature of evidence to be presented before the that court. The right to a fair trial as stated by counsel for the 1st accused is guaranteed by article 50 (1) of The Constitution of Kenya and it requires "a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. As analyzed earlier, there is nothing to show what steps had been taken in the Milimani case and there is nothing to convince me that there would be any affront to a right to a fair trial if the application is allowed.

12. On the other hand, "Forum shopping" that was mentioned by Miss Kalii typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour. Such an action would be a subversion of justice with the result that the principle of equal protection of the law is undermined. In McShannon v. Rockware Glass Ltd. [1978] A.C. 795, Lord Diplock rejected existence of forum non conveniens (the non-convenience doctrine positing the discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case) in common law stating that for the interests of all the parties and for the ends of justice, the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts.”

42. In the case of **JOHN BROWN SHILENJE v REPUBLIC [1980] eKLR** dealing with a similar situation where only one or two of the accused persons applied for transfer of the cases had this to say:-

“The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure

on such officer.

.....

It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.

which I am prepared to accept; but this does not relieve the Court from resolving the question on the evidence before it in the light of what the section under discussion provides, which is what, as I understood it, counsel for the respondent urged upon me.

On pages 612 and 613 of Woodroffe we have:

... This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere ... A more ordinary class of case is that in which, although the High Court is not itself of opinion that a fair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have fair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security ... The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer The question in such cases is not whether there is actual bias ... but whether there is reasonable ... ground for suspecting bias ... and whether incidents may not have happened which, though they might be susceptible of an explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused reasonable apprehension that he may not have a fair and impartial trial ... The necessary condition, however, for the transfer in such a case is that the apprehension to justify a transfer must be reasonable, that is, the Court ought not to be guided by the impressions produced in his own mind as to the impartiality of the magistrate, but must look to the effect likely to be produced in the mind of the parties to the action of the magistrate ... Abstract reasonableness, however, ought not to be the standard ...

.....

Having said so much let me apply it to the facts of this case, but first let us see what section 81 of the Criminal Procedure Code (so far, that is, as it concerns us) says. It states that whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in any criminal court subordinate to it, or that such an order is expedient for the ends of justice, it may order the transfer of a case from a subordinate court to another such criminal court of equal or superior jurisdiction.”

43. In this matter, it is only the applicant and his related companies who has approached the court for the transfer, all the other accused persons though served are silent on whether they would like the matter transferred. The only issue raised is the hardship created to the same through the filing of the charge at Nairobi. The allegations of hardship have not been supported by any evidence of his inability to attend court and mount appropriate defence in Nairobi. There is further no allegations that the trial in Nairobi will not be free and fair and free from bias.

44. The Respondent on the other hand has submitted that taking into account the position of the accused persons in life and especially in Migori and surrounding areas it would not be possible for a free and fair trial to be conducted at Migori and or courts near the same which issue were considered while granting bail. In the case of **MAINA KINYATTA v REPUBLIC [1984] eKLR** the court of Appeal while setting out the test to be satisfied under Section 81 of the Criminal Procedure Code for transfer settled:-

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

45. I take the view that where there is reasonable ground and apprehension that there cannot be a fair and impartial trial within the territorial jurisdiction where the offence was committed, then notwithstanding the fact that the statute provides for institution of proceedings before the said court and as was stated in **REPUBLIC v INSPECTOR GENERAL OF POLICE & 2 OTHERS EXPARTE BONIFACE NGIYO MWAURA [2019] eKLR** thus

“Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has the jurisdiction to try and hear the case. The reason for this rule is two-fold. First, the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. Second, laying the venue in the locus criminis is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available.”

The court will be slow to order transfer in the interest of free and fair trial.

DISPOSITION

46. Having taken into account this matters raised therein and in particular the applicant's ground upon which the same sought for transfer weighed against the responses thereto and the fact that his co-accused seems to be comfortable with the matter proceeding before the Anti-Corruption Court at Nairobi. I hereby find no merit on the application herein which I hereby dismiss.

*Dated, signed and delivered at Nairobi virtually **this 24th day of February, 2021***

.....

J. WAKIAGA

JUDGE

In the presence of:

Mr. Awino for 5th interested party

Mr. Kinyanjui for DPP - Respondent

Mr. Kithi for the applicant

Potishoi court assistant