



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CRIMINAL APPLICATION NO. E001 OF 2021

GERMANO GITONGA NJERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Application before the Court is the one dated 14th January 2021 seeking to have this Court order for the transfer of Meru Chief Magistrate's Criminal Case No. E406 of 2020 currently pending before the Chief Magistrate's Court at Meru to the Chief Magistrate's Court at Nanyuki.

2. The Applicant brought his application under Section 81 (1) (a) & (c), 81 (3) and 81 (4) of the Criminal Procedure Code, Cap 75 Laws of Kenya and he relied on the following grounds as per his supporting affidavit and his application:-

- i) *That there is pending before the Meru Chief Magistrate's Court Criminal Case No. E406 of 2020.*
- ii) *That the cause of action for the subject criminal proceedings arose in Ngusishi Area.*
- iii) *That the Applicant and all witnesses disclosed by the Respondent hail from and/or work for gain within Ngusishi Area.*
- iv) *That the incident forming the charge against the Respondent was reported at Timau Police Station which is closer to Nanyuki Law Courts than to Meru Law Courts.*
- v) *That the orders sought will tend to the convenience of the parties owing to the close location or place where the cause of action arose in relation to Nanyuki Chief Magistrate's Court.*
- vi) *That the application has been brought without undue delay and before the hearing date which is scheduled for 29th March 2021.*
- vii) *That it is only fair and just for the orders sought to issue.*
- viii) *That the Director of Public Prosecutions will not suffer any prejudice as it has in the past filed criminal cases arising within Ngusishi Area with the Nanyuki Chief Magistrate's Court.*

3. The Respondent filed grounds of opposition through the Prosecution Counsel B. Nandwa on the following grounds: -

- i) *That Meru Chief Magistrate's Court has a mobile court every Wednesday at Timau.*
- ii) *That Meru Chief Magistrate's Court is very well capable of hearing the case in issue i.e Criminal Case No. E406 of 2020 during the mobile court it conducts every Wednesday.*
- iii) *No inconvenience will be caused to the witnesses if the matter is heard in the Meru Chief Magistrate's mobile court but this will instead accommodate them.*
- iv) *That the Applicant's application is incompetent, lacks merit and is an abuse of court process and ought not to be entertained by this Honourable Court.*

Issues for Determination

4. There is only one issue which the instant Application presents for determination: -

i) Whether or not this Court should grant an order for transfer of Criminal Case No. E046 of 2020 from Meru Chief Magistrate's Court to Nanyuki Chief Magistrate's Court.

Analysis of the Issue

5. The provisions relating to transfer of cases are found in Section 81 of the Criminal Procedure Code.

Powers of High Court to change venue

(1) Whenever it is made to appear to the High Court —

(a) That a fair 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;

(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.

6. The provision relating to place of trial are found at Section 71 of the Criminal Procedure Code as follows: -

Ordinary place of inquiry and trial

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.

7. It is argued by the Applicant that the cause of action arose in Ngusishi Area which is closer to Nanyuki Chief Magistrate's Court than it is to Meru Chief Magistrate's Court. He further argues that the incident was reported at Timau Police Station which is closer to Nanyuki Chief Magistrate's Court than it is to Meru Chief Magistrate's Court. The Prosecution on the other hand has argued that the Meru Chief Magistrate's Court has a mobile court in Timau, which can very well handle the matter.

8. Having perused the charge sheet by which the Applicant was charged, this Court observes that the offence took place at **Michogene Village, Ngusishi Location, Buuri West Subcounty, Meru County**. In essence, the offence took place in Meru County. Going by the provisions of Section 71 aforesaid, it being that the offence took place in Meru County, and that the offence was reported at Timau Police Station, the Respondent rightfully instituted the proceedings at the mobile court in Timau.

9. Ngusishi Area, where the cause of action admittedly arose is geographically found within Meru County. Further, the distance from Ngusishi where it is said that the witnesses hail from to Timau where the mobile Court is stationed is relatively shorter than the distance from Ngusishi to Nanyuki. In the circumstances, it appears to be more convenient for the parties and witnesses to have the matter proceed at Timau where the mobile Court is stationed and sits every Wednesday.

10. Furthermore, in such criminal matters, where the Prosecution has the first chance to adduce evidence, it should not interest the Accused person as to how convenient or otherwise the Court station is for the Prosecution's witnesses. That is for the Prosecution to be concerned about. The expenses incurred by the Prosecution witnesses in coming to Court are catered for by the State. (Although it is in the public interests to have the funds expended for this purpose be utilized in a cost effective manner)

11. The application would appear was made for the convenience of Counsel who from the record can be seen to be practising from Nanyuki.

12. Further, the wording of Section 81 of the Criminal Procedure Code uses the word 'may' implying that the Court has discretion to make or fail to make any orders pursuant to the provisions of the said section.

13. This Court has perused the authorities cited by the Applicant to support his application. The common finding is that the accused person should be tried in a court within and proximate the region where the offence was allegedly committed i.e where the cause of action arose.

Conclusion

14. In the end, this Court finds that the Applicant has failed to demonstrate that there is proper reason to warrant transfer of the criminal matter from Meru Chief Magistrate's Court to Nanyuki Chief Magistrate's Court.

15. The offence having allegedly been committed at Ngusishi, which is found in Meru County, the nearest Court within the local limits of the jurisdiction thereof, in terms of section 71 of the Criminal Procedure Code, is Meru Chief Magistrate's mobile court located at Timau. Since the witnesses admittedly hail from Ngusishi which is just but a short distance from Timau, no prejudice is likely to be suffered by them in attending court. In any event the convenience of the witnesses is, largely, a matter for the concern of the DPP who has to call the witnesses to prove the charge, and who now opposes the application for transfer, rather the defence.

16. It would appear that the transfer would only be at the convenience of the defence counsel, and no sufficient reason is given within the provision of section 81 of the Criminal Procedure Code for the order for transfer.

Order

17. Accordingly, for the reasons set out above, this Court makes the following orders: -

1. The application dated 14th January 2021 is hereby dismissed.

2. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 23RD DAY OF MARCH, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S J. M. Mwangi & Co. Advocates for the Applicant.

Miss B. Nandwa, Prosecution Counsel for the Respondent.