



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 166 OF 2020

ELSEK OSMAN ERDINC.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Wamotsa Wangila for the applicant

Mr. Alenga for the Respondent

RULING

The applicant **Elsek Osman Erdinc** filed the current notice of motion dated 15.9.2020 under Article 50,165, 159 (2) (d) of the Constitution and Section 362 of the Criminal Procedure Code seeking the following orders:

a). 1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. That this Honourable Court be pleased to direct the trial Court to supply the Applicant with certified typed proceedings within thirty (30) days before inter-partes hearing of this application and the criminal revision filed herein which proceedings should be the handwritten proceedings from 19th August, 2019 to 8th September, 2020 together with typed certified proceedings from 22nd July, 2019 to 8th September, 2020.

7. That this Honourable Court be pleased to issue any such order as it may deem fit and just.

8. That costs of this application be provided for.

b). That the Honourable Court be pleased to order that the proceedings in Malindi Chief Magistrate Court No. 23 of 2019 do start denovo before another Court of competent jurisdiction.

c). That the Honourable Court be pleased to direct the trial Court to supply the application with certified typed proceedings of the trial Court.

In support of the application are grounds on the face of the motion and an affidavit by the applicant dated 15.9.2020.

On the part of the respondent grounds of opposition filed in Court on 30.10.2020 formed the gist of the revisionary jurisdiction orders sought by the applicant together with the replying affidavit sworn by Senior Prosecution Counsel **Mr. Alenga**. The application was disposed off by

way of written submissions filed in Court from both counsels on record.

Submissions by the applicant **Mr. Musinga** Learned Counsel for the appellant submitted and beseeched this Court to review the orders in the pending criminal proceedings before the Lower Court to accord the appellant fair trial rights under Article 50 of the Constitution. Its main complaint was that the file was illegally and unprocedurally transferred from Shanzu Law Courts to Malindi Chief Magistrate Court without notice or an opportunity to be heard by the applicant. That in transferring the file, the Learned trial Magistrate at Shanzu acted in contravention of Section 79 of the Criminal Procedure Code.

Further, that the cause of action arose in Kikambala and therefore the change of forum to Malindi Chief Magistrate Court potentially infringed on the right to access Court by the applicant as entrenched in Article 48 of the Constitution.

It was also a concern of the applicant counsel that the file having been illegally transferred, the Court at Malindi countenanced an illegality by proceeding to try the applicant. Learned counsel also argued that the Chief Magistrate of Malindi **Hon. Dr. Oseko**, was seized of the matter but in the course of the trial recused herself without hearing the parties and subsequently reassigned the case to Hon. **Chepseba (CM)** to proceed with the trial. Learned counsel continued to assert that in **Hon. Chepseba** being seized of jurisdiction failed to adhere to the safeguards on takeover of proceedings of part heard cases from one trial Magistrate to another under Section 200 (3) of the Criminal Procedure Code.

In buttressing his submissions, Learned Counsel cited the following authorities, **Maina Kenyatta v R (1984) eKLR, Joker Bram Shihenge v R (Criminal Appeal No. 180 of 1980, Edgar Kagoni & 4 others v R (2019) eKLR.**

To that extent Learned counsel prayed for review of the order under Section 362 of Criminal Procedure Code.

The Respondent Submissions.

In a brief rejoinder to the applicant's submissions Learned senior prosecution counsel **Mr. Alenga** vehemently opposed any further retransfer of the case to Shanzu or to any other Court of equal jurisdiction with that of **Hon. Chepseba** at Malindi.

Further, learned prosecution counsel submitted that since the transfer of the case from Shanzu Law Courts, witnesses have been summoned and already to testify in support of the prosecution case against the applicant. The only hitch came about when the trial Magistrate **Hon. Dr. Oseko (CM)** disqualified himself from being seized of the case and subsequent reallocation the session Magistrate (**Hon. Chepseba**).

Learned prosecution counsel argued and submitted that no sooner the trial Court took control of the proceedings, the applicant moved to the High Court seeking revisionary orders of the Court arising out of a need for typed proceedings and noncompliance with Section 200 of the Criminal Procedure Code.

Further, learned prosecution counsel submitted that there has been no bias on the part of the trial Magistrate to warrant apprehension of violation of his right to a fair hearing. With that, learned prosecution counsel contended that the Court do decline to grant the orders of transfer on the case to any other Court.

Determination

From the facts distilled prima facie as contained in the affidavits of both parties, this looks like a protracted criminal litigation. Nevertheless, on account of Article 50 (i) of the Constitution every person has the right to have any dispute that can be resolved by the application of the Law decided in a fair and public hearing before an independent court and impartial Tribunal or body.

Under Article 165 (6) & (7) of the Constitution, it entitles the High Court to call for the record of a subordinate Court and inferior Tribunals that indeed they have exercised their jurisdiction independently and impartially as established by Law. This approach also found its way into Section 362 of the Criminal Procedure Code which empowers the High Court to call for and examine the record of any criminal proceedings before any Magistrate Court or Tribunal for the sole purpose and objective of satisfying itself, as to its correctness, legality or propriety of any findings, order proceedings or sentence and or of any of the decision made by that Court or Tribunal. As seen from Article 165 (6) & (7) of the Constitution and Section 362 of the Criminal Procedure Code the power conferred by the provisions are actually that of superintendence and supervisory of inferior Courts and Tribunals. There is no dispute therefore as to the jurisdiction of the Court to entertain the matter.

In the instant application its clear from the applicant affidavits and grounds in support of the motion that he seems to be dissatisfied with the conduct of proceedings before the Chief Magistrate Court at Malindi. Thus in attempting to reconcile, the real issues raised preceding the motion or revision, I consider this to be key grievances in which this Court's jurisdiction has been invoked:

(a). Whether the transfer of the Criminal Case from Shanzu Law Courts to Malindi Chief Magistrate Court was justified and as such entails an illegality.

(i). Whether assumption of proceedings by the Chief Magistrate Court at Malindi has occasioned prejudice or injustice to the applicant and the victims.

(b). Whether so strictly speaking the applicant was entitled to a decision under Section 200 of the Criminal Procedure Code and right to a copy of the typed proceedings.

(c). Whether the applicant has satisfied the criteria on transfer of the case by the High Court from one subordinate Court to

another set out in Section 81 of the Criminal Procedure Code

Issue No. (A) & (i)

The legislative scheme on transfer of cases from one Magistrate Court to another is governed by Section 79 of the Criminal Procedure Code. Therefore, a Magistrate holding a subordinate Court of a first class may transfer a case of which he has taken cognizance to any Magistrate holding a subordinate Court empowered to try that case within the local limits of the first class subordinate Courts jurisdiction. The logic of the situation is also the same when it comes to part heard cases pending before the subordinate Court as stipulated in Section 80 of the Criminal Procedure Code.

Under the structured provisions pursuant to Section 79 and 80 of the Criminal Procedure Code, the power to transfer of cases is supposedly justified within the local limits of the aforesaid Courts. The legislative objective is sufficiently important for any transfer of cases from one subordinate Court to another outside the local limits shall be vested and determined by the High Court under Section 81 of the Criminal Procedure Code.

It is therefore widely recognized that for reasons of expediency and contingency that the primary first class Courts enjoy a measure of discretionary power to transfer criminal cases within the local limits. This discretionary area limit marks the extent to which the Magistrate may exercise autonomous Judgment depending on the particular facts of each case to move cases from one Court to another for fair, proportionate, expeditious hearing and disposal.

In my view, there is then no room for a first class Magistrate to exercise discretion under Section 79 and 80 of the Criminal Procedure Code to simply transfer a case pending trial from one devolved county to another. It is especially of significance for the Court to bear in mind that in matters of crime the range of courses of action factor in the area where the offence was committed, evaluation of the evidence to show the proximity of the Courts to make it easier for the witnesses to attend the trial.

Its evident from the affidavits that the alleged crime of defilement took place in Kikambala within Kilifi County. The Court is of the opinion that the Director of Public Prosecution should have initiated and commenced the act of prosecution of the applicant before the Kilifi Senior Principal Magistrate Court.

The rationale is that Section 71 of the Criminal Procedure Code provides inter alia that 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 person was apprehended, or is in custody on a charge for the offence.

Although, the Director of Public Prosecution original choice of forum for trial was Shanzu Law Courts, the Court takes judicial notice that it is a parallel decision in contravention of Section 66, 67 and 71 of the Criminal Procedure Code. In reality and in absence of any compelling reasons, Shanzu Law Courts was a forum non-convenience to try the applicant for the offence committed within the local limits of Mtwapa Sub-County in Kilifi County. Despite the clear provisions of the Law, the Court in Shanzu continued to be the forum of non-convenience until on *suo moto* it moved to transfer and change the venue to Malindi Chief Magistrate Court.

In **Lloyd McMahon (1987) AC 625** the Court observed that:

“In particular, it is well established that when a statute has erred on anybody the power to make decisions affecting, individuals, the Courts will not only require the procedure prescribed by the statute to be followed but will readily implying so much and no to be introduced by way of additional procedure safeguards as well ensures the attainment of fairness.”

This question profoundly affected the course taken by the Director of Public Prosecution to initiate a trial of the applicant before Shanzu Law Courts, notwithstanding overwhelming evidence of the local limits of the offence having been committed in Kilifi County. I take the strong view that Shanzu was not an adequate forum to hear the criminal case implicating the accused who is domiciled at Kilifi and the parties to the case including the victim are all residents of the same sub-county.

Closely a kin to the subject under discussion and the foregoing affidavits and submissions by both counsels, Shanzu Court was not within the Director of Public Prosecution to use as a forum for convenience to adjudicate the merit of the case without first determining permissive jurisdictional requirements of the cause of action.

Following the decision by Shanzu Court to transfer the subject matter to Malindi, there was need to inquire as to its adequacy. Essentially what I am saying is that a Court must weigh the respective parties case and conveniens in having a case heard in the prospective forums against factors relative to witnesses, or the offender to attend the Court thereof at the trial. This discretion exercised by the Learned trial Magistrate at Shanzu Law Courts without any extenuating circumstances attempts to vex, harass or oppress the applicant and witnesses to travel a distance of over 60 kilometers to facilitate in the administration of justice.

Apparently, the primary Court at Shanzu would have disagreed with the Director of Public Prosecution based on the forum of non-conveniens and with public interest factors strictly refer the matter to the High Court in Mombasa to invoke Section 81 of the Criminal Procedure Code to transfer the case to any other forum of convenience. The Court largely ignored the fact in the case at bar majorly evidence and witnesses were in Kikambala. That fact to move the place of trial to Malindi sub-county must bear in mind public interest factors which include administrative challenges for expeditious trial, crowded dockets, the Law on the cause of action and scene of crime, local circumstances in localized crimes to be tried within the local district, the fairness of an independent Tribunal to conduct the case in a public hearing for the local community to have an opportunity to participate.

The Courts rationale to transfer the case to Malindi albeit in excess of jurisdiction was certainly presumptuous of the existing provisions on the place where the injury causing incident occurred. Therefore, the alternative forum by itself was inappropriate or unfair to the other actors

in the administration of justice like the witnesses, the applicant on incidental costs to be incurred to access that other Court at Malindi.

Accordingly, given the facts of this case, I find that the right to due process was violated by the trial Magistrate at Shanzu in changing the forum of adjudication to Malindi and to me he acted ultravires the statutory jurisdiction. Thus, the notice of hearing forum of conveniens and an opportunity to be heard must be granted meaningfully to guarantee basic tenets to fair trial rights, in Article 50 of the Constitution. That decision though effectuated is hereby reviewed on grounds of illegality and irregularity by the decision maker.

Issue No. (i)

In order to succeed, the applicant merely requires to establish that the Learned trial Magistrate in executing the transfer of the case in question to Malindi Court committed an illegality or irregularity which rendered the proceedings *void ab initio*.

In answer to that question the fact in the affidavits and annexures on their face did disclose that the alleged offence was committed at Mtwapa sub-county. What therefore is meant in this case, and in all such cases is the application of the test under Section 66, 68, 69 and 71 of the Criminal Procedure Code.

Malindi Court retains the residual jurisdiction over all trans county crimes against any person so suspected and indicted of such crimes.

Nevertheless, the basic offender must be prosecuted within the Court of first instance in which the cause of action and transactions of the offence occurred.

In the present case, the place of trial and forum of conveniens by correctly applying the rule in Section 71 of the Criminal Procedure Code would be Kilifi Senior Principal Magistrate Court. A case in point under Section 6 of the Magistrate Court Act,

“a Magistrate Court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by the Criminal Procedure Code or any other written Law.”

The after forum specified by the Magistrate was deemed for purposes of the criminal proceedings to be wider than the local limits of the jurisdiction of the Court. Substantive protection of the Chief Magistrate Court on assuming jurisdiction involving the criminal trial shall be guided by the Magistrate Court Act and the Criminal Procedure Code generally considered to provide bounds of judicial competence and authority to try the offender. It is however, of essence that the laid down provisions of the local limits place of the cause of action be a fundamental consideration as it is founded on judicial and justice administration orderliness.

At any rate, the frontiers of right to access justice are entrenched in the Constitution and any discretion to change the forum of adjudication ought to be exercised fairly, just as it must also be exercised reasonably.

Due to the importance on the justice delivery, the Courts power to transfer the case already registered at Shanzu to Malindi has to be done by an higher Court according to judicial hierarchy. When it became necessary for the Magistrate Court to transfer the criminal case to Malindi, given the different appellate Courts involved, the petition for transfer has to be made before the High Court, whose jurisdiction lies but the criminal Courts are subordinate to.

As per the records the Learned trial Magistrate in session changed the venue to another Court at Malindi without sufficient notice to the victims. Essentially ignored by the criminal justice system and the Law, victims are now granted range of rights, through the Victims Protection Act. The right to notification and participation in any of the criminal proceedings which he or she has an interest are perhaps the key victim rights.

Subject to the provisions of Section 4, a victim has the right to be informed any information on forum and to present any information that is relevant to the proceedings. He or she has a right to be heard during the pendency of the trial and at the penalty phrase. The right is a right independent of the state or the offender that allows the victim to address the Court. Time has come for Courts to appreciate that the victim *locus standi* acts as an independent participant in the proceedings is notably a constitutional dictate.

Comparative jurisprudence, in so far as it has developed this conceptual framework synthesizes the broad span of victims rights and provides a reference point for perceiving the circumstances of this particular case. The case in **Kenna v United States Dist. Court, 436 F 3d 1011, 1013 9th Circuit (2006)** held as follows:

“the criminal justice system has long functioned on the assumptions that crime victims should behave like good Victorian children, seen but not heard.”

In our case this is the background against which we now have the Victim Protection Act, 2014 recognizing victims as independent participants in the criminal justice process. Among the rights stipulated in that Act is for the Courts at whatever level to enforce the victims' rights. By what is meant to be interpreted within its context of Section 4 of the Act and in its spirit is a contextual analysis for Courts to provide victims due process rights of the Law to protect their interests even though they may not be joined as a party in the on-going prosecution.

Consequently, the logical extension of the Ruling below at the Magistrate Court at Shanzu determined at the outset to transfer the criminal case to Malindi without granting various rights to the victim to be treated with dignity which includes her interest in the finality of the proceedings.

It cannot be overemphasized that legitimate expectations exist under 10 of the Constitution for Courts not to turn a blind eye to such shared interest between the state, the victim and the offender in any criminal proceedings. According to Article 27 of the Constitution, all persons are equal before the Law and are entitled without any discrimination to the equal protection of the Law.

I hold it to be the duty of the Court to enforce the Law of the Land on equal access to Courts and the notion of equality that positions both the victim and the offender are systematically guaranteed those rights. It follows then the Court in hearing submissions on change of venue consider whether such a decision may manifest inequity or prejudice to parties involved in the proceedings. The basic mechanism for regulation on any exercise of discretion by or the judicial authority is that subject to known exemptions justice by proportion espouses the character of the doctrine of equality of arms in the administration of justice.

In the instant case, my approach is that the applicant has shown the cause link between the transfer of the case and the nature of the prejudice suffered in the Director of Public Prosecution initiating a prosecution at Shanzu Law Courts and subsequent transfer by the same Court to Malindi without notice and an opportunity to be heard before the decision was made.

Issue No. B

The Criminal Procedure Code under Section 200 of the Criminal Procedure Code makes specific provision for the effect of observance in the administration of criminal justice. The hallmark of discretionary power is the permissive language which is obligatory to address takeover of part heard proceedings from one Magistrate/Judge to another to give efficacy to the trial.

To borrow a leaf from Section 1 (A) of the CPA that model in Civil Law does applies *mutatis mutandis* to Section 200 (3) of the CPC designed to facilitate the just, expeditious and proportionate affordable resolution of heavy criminal dockets.

Accordingly, in the case of **DPP v Peter Onyango Odongo & 2 others Constitutional Petition No. 2 of 2015 eKLR** held thus:

“Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been marled by his predecessor, without explaining to the accused his rights to re-summon or recall witnesses who had given evidence before the succeeding Magistrate predecessor for cross-examination if need be. The section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable the Court make a just decision. It should be noted Section 200 (3) of the Criminal Procedure Code, gives an accused person an opportunity to demand to have any witnesses recalled. Its Section makes it mandatory, for succeeding Magistrate to inform the accused person of his right to have any of the witnesses recalled for cross-examination as to testify again. It should be noted however that it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this Section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.”

In such a case it seems almost self-evidence that the Court taking over part-heard proceedings has to consider and confirm compliance with Section 200 (3) of the Criminal Procedure Code before moving forward to adjudicate over the trial equally, it is important for Courts to effectively pray their role of protecting the rights and interests of the accused persons, lest they be accused of shirking this statutory responsibility.

A need therefore arises for Courts to interpret and apply the provisions reasonably and effectively without violating the rights of the accused and that of the victims. It therefore becomes necessary under Section 200 (3) of the Criminal Procedure Code the trial Court to respond to the challenges that may be posed by granting the order to recall witnesses without having a meaningful inquiry as to their availability to participate in the fresh or re-opened proceedings.

In addition, any decision taken under Section 200 (3) of the Criminal Procedure Code mandates the Court to give reasons justifying any of the alternative options to ensure protection of the rights of the accused.

In the instant case, the trial Court reasoned that such a decision on compliance with Section 200 (3) of the Criminal Procedure Code shall of essence be made in the next scheduled session. In general, I note that this procedural requirements is to greatly facilitate the fair administration of justice and expeditious disposal of the pending trial.

In this regard, when the question arises which turns solely on the provisions under Section 200 of the Criminal Procedure Code, its obvious that the trial Court was required to determine there and then.

As submitted by the applicant counsel, it was to put them on notice whether on the basis of that case-management directions, the witnesses were a subject of cross-examination or a *denovo* trial. This jurisdiction to entertain Section 200 (3) of the Code was not to be left open for the Court to grant it at a future date of the proceedings. The Law in this regard has been clearly and succinctly stated in **R v Income Tax Special Commissioners ex-parte Capecopper Milling Co (1888) 21 QBD – 313 which stand interalia that:**

“Where a tribunal or body with jurisdiction has the mandate to enforce it, whether at the preliminary state of facts it has to proceed further to do something more in such a case it is an erroneous application of the jurisdictional error if it cannot move to determine the issue.”

In this respect, the existing approaches to due process was for the Learned trial Magistrate to determine in that particular session the criteria applicable under Section 200 (3) of the Criminal Procedure Code to ensure balancing Act of the applicant’s rights and the public interest. There is support for this view in the decision of **DPP v Peter Onyango (supra)**. Further once it became evident that the case before the

Court was part-heard, to assume jurisdiction dependent upon the formulation on directions taken sufficient to achieve the ends of justice. In other words, there must be first a decision on compliance of Section 200 of the Criminal Procedure Code on take-over of part-heard proceedings to meet the demands of fairness. It's not a decision to be made in the future. The inquiry in which the Learned trial Magistrate was entitled to undertake in that statutory scheme was of importance in light of the practical realities to recall witnesses denovo or for cross-examination whichever the accused directs to the court.

Ideally, the Learned trial Magistrate should take into account the views of the prosecution counsel; the victim and the defendant in order to reduce the injustice which flows from the exercise of discretion and the choice taken to contribute to a fair hearing. Unfortunately, I fault the Learned trial Magistrate for he intended to intimate to the parties that the decision under Section 200 of the Criminal Procedure Code in this respect could await the next scheduled session. Further, the applicant submitted that with regard to the application under Section 200 of the Criminal Procedure Code, given the recusal of the initial trial Magistrate, a right to a copy of the previous proceedings was necessary in arriving at a decision to dispense with the provisions. Nowhere was this in the record of the Lower Court where directions had been issued for the certified copy proceedings to be issued within a reasonable time.

Consequently, as a measure of transparency and accountability under Article 10 of the Constitution the learned trial Magistrate was under duty to determine the application from the very onset.

Issue No. C

Ultimately, it seems to me the applicant desire is to have the case transferred from Malindi Chief Magistrate Court to any other Court of equal status preferably Shanzu.

On transfer of Criminal dockets, Section 81 of the Criminal Procedure Code has been invoked by Kenyan Courts on a number of occasions. In the provisions thereto, the High Court has power to transfer any case from one subordinate Court to another or to it on any of the specified grounds therein. The necessity for transfer of a case already filed in a particular registry may arise purely on grounds of jurisdiction or in order to meet the ends of justice.

By virtue of Sections 66, 67, 69 and 71 of the code in giving effect to Section 81 should bear in mind persuasive factors public convenience, the cause of action and the due advantage for witnesses lined up by the state or the defence to attend the trial with the least inconvenience. As already noted elsewhere, determining the admissibility of an application to transfer case docket from one subordinate Court to another, there are key responsive criteria the Court has to consider in namely; whether the trial Magistrate is conflicted in the case either personal or financial or (b) whether the trial Magistrate is connected or is in a friendly relationship with the accused, or whether in the course of the proceedings, the trial Magistrate has knowingly or unknowingly expressed an opinion or adverse comments on the case under inquiry and his or her continued handling of the case would prejudice the accused person or whether substantially, the trial Magistrate has manifested upon be as and ill-will to the applicant and no fair or impartial outcome would be expected from him or her at the end of the trial. Last but not least, there is a reasonable apprehension on the part of the state or the victim or the accused to a case that justice will not be done.

In **Abdul Nazar Madani's v State of Tamilhadu (AIR 2008 SC. P 2293)**: The Supreme Court more likely faced with a similar situation consistent in the instant case observed as follows:

“While no universal or hard and fast rules can be prescribed for deciding a transfer petition, which has always to be decided on the basis of the facts of each case, convenience of parties including the witnesses to be produced at that trial is a relevant consideration and the paramount consideration being the need to meet the ends of justice.”

Further, the Court held:

“The purpose of the Criminal trial is to dispense fair and impartial justice, uninfluenced by extraneous considerations when it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the state or anywhere in the country.” The apprehension of not granting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court or even at any place, the appropriate Court may transfer the case to another Court where it feels that holding it feels that holding of fair and proper trial is conducive. The convenience of the parties including the witnesses to be produced at the trial is a relevant consideration, while transferring a case from one court situated in one state to the other situated in another state.”

Expeditious disposal of the trial is also a facet of fairness of a trial and speedy trial is in fact a fundamental right. (See also **George Mwongera Mendameru v Loise Gakii (2012) eKLR, Abraham Mwangi Wamigwi v Simon Wanjiku (2012) eKLR**)

It is apparent from the facts of the case and the above principles that the authority under which the Lamu trial Magistrate exercised the power to transfer the subject matter in **Criminal Case No. 23 of 2019** formerly Shanzu was tainted with illegality and procedural impropriety.

Why do I say so? Shanzu Law Courts falls within the administrative nit of Mombasa County. The transfer order as an exercise of administrative power of the Court under Section 79 of the Criminal Procedure Code was not strictly adhered to as that jurisdiction was vested to transfers effected within the local limits.

At that point, the power of transfer ought to have been exercised with due care and attention as the session Magistrate with jurisdiction could not possibly transfer the case to the Chief Magistrate at Malindi, which is superior in ranking to his Court.

In furtherance to the order on transfer, its not any first class Magistrate who has the power to withdraw and transfer cases from one County to

another within the Republic of Kenya. The Magistrate Courts have a limited jurisdiction only limited to the shared local limits of the subject matter.

On the face of it, it is strange that the trial Magistrate at Shanzu would regard the powers under Section 79 of the Code as a function of universal application permitted to transfer cases within the inter-county jurisdiction. In principle, the transfer of the case docket by Shanzu Senior Principal Magistrate was in breach of the statutory duty. Though it did not compromise the assumption of jurisdiction by the Chief Magistrate at Malindi.

In effect therefore, the purpose whether the applicant should continue being tried at Malindi or any other forum. One of the common grievances alleged in the application for transfer is the fact on the cause of action, the account on logistics of travelling from Kikambala to Malindi and the likely expenses and costs which may arise to avail witnesses to attend trial in any event. In the present application, both the state and the applicant are in agreement that the witnesses reside in those sides of Kikambala.

Further, in their submissions, the senior prosecution counsel that the trial is at an advanced stage and the remaining stretch is far much shorter, so the process should not be disturbed as it might prejudice a fair trial. In considering both arguments, its germane to reiterate as follows. The right of access to the Courts under Article 48 of the Constitution is a matter that the Courts themselves should guard strictly. The same right applies to the rules and regulations where the power on open justice is entrenched under Article 50 (1) of the Constitution. The right require that justice be done in public. **Lord Diplock in A. G. v Levenson Magazine Ltd (1979)** observed as follows:

“As respects proceedings in the Court itself, it requires that they should be held in open Court to which the press and the public are admitted and that in criminal cases at any rate, all evidence communicated to the Court is communicated publicly. As respects, the publication to a wider public of fair and accurate reports of proceedings that have been in place in Court, the principle requires that nothing should be done to discourage this.”

The Courts in Kenya are accustomed to fulfilling freely this Constitutional and Statutory provisions save in exceptional circumstances involving children or vulnerable witnesses. This duty is by no means always couched by mandatory language.

For the purpose of the indictment against the applicant, there was need for the public at the local sub-county to participate in the administration of justice. In the absence of a single compelling reasons to transfer and change; venue of trial of the applicant, the real dispute ought to have been adjudicated at Kilifi Senior Principal Magistrates Court. It has to be borne in mind that besides the victim, criminal proceedings constitute a kind of benefit to the public or the local community where the cause of action arose. One legal effect of holding the session within the local limits of the subject matter is and in the participation of the public at that trial.

Thus in **R v Socialist Worker Printers and Publishers Ltd Exp – A.G – (1975 Lord Widgery said)**

“The great value of having the public in our Courts is that discipline which the presence of the public impose upon the Court itself when the Court is full of interested members of the public. It is bound to have the effect that everybody is more careful about what they do, everyone tries just that little bit harder and there is disciplinary effect on the Court which would totally lacking if there were no critical members of the public or press present.”

I reiterate that holding the Court hearings constitutes a fundamental principle enshrined in Article 50 (1) of the Constitution. In my view, it was extremely inconvenient to expect the public to participate in the delivery of justice at Malindi Court in an offence which occurred more than sixty kilometers away. One fundamental principle in the administration of justice is for the Courts to ensure that ‘justice’ is done to not only the offender, but the victims and the public at large.

I may also add, that the departure from public hearings is only permitted when its necessary to allow for camera hearings. In absence of the press and the public, inevitably, so, thus is usually considered appropriate to cater of the crime. Despite that the Court is evidently empowered to promote open justice.

In truth, it is not really a defence as such for the prosecution to show that the risk of prejudice to a fair trial was not traceable to the incidental happenings of these proceedings. The key aspect of the application is to answer the question whether the applicant application is within the threshold of Section 81 of the Criminal Procedure Code.

As was previously noted in the context of Section 81 of the Criminal Procedure Code, the Supreme Court of India in which we share the Common Law heritage had this to say in **Maneka Sanjay Gandhi v Rani Jethmalani (1979) 4 SCC 167:**

“Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the Court to consider when a motion for transfer is made is not hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances, something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer.”

This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner’s grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any Court having jurisdiction and the accused cannot dictate when the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle, the Court may weigh the circumstances on the facts of the case, it is clear that the Director of Public Prosecution decision-making process of registration of the charge sheet at Shanzu Law Courts for an offence committed at Kikambala, without any extenuating circumstances was a jurisdiction so exercised in contradiction of Section 71 and 72 of the Criminal Procedure Code.

There was no justification for the Director of Public Prosecution refusal to recognize the Kilifi Law Courts Forum to enforce the proceedings

based on the local limits of the offence and the fundamental factors of convenience for the applicant and witnesses to be summoned on behalf of the state.

In an intimately interconnected foundation of Section 71 and 72 of the Code is the doctrine of comity linked closely with the effective and efficient administration of justice. The Director of Public Prosecution has a statutory obligation to commence or institute any criminal proceedings in terms of Article 157 (6) (a) (b) of the Constitution within the local Courts where the offence was committed, unless there are exceptional circumstances that exist to surrender it.

In considering, change of venue the Director of Public Prosecution is under a legal duty to weigh a number of factors and to look at the totality of the circumstances and peculiar facts of the case. Similarly, any order on transfer of a case by the Court from one forum to another has to be satisfied of that criterion focusing on the litigation and the objective to meet the ends of justice. I have in mind private and public interest factors. i.e. access to the evidence, the availability of compellable witnesses, attendance of unwilling witnesses, the cost of transporting witnesses' attendance, the forum with a quicker or less expensive trial, the localized controversies to be decided at the none sub-county. The potential prejudice to the offender and any collateral hardship.

In the instant case, a strong argument exists to withdrawal Criminal Case Number 23 of 2019 from Malindi and have it transferred to Kilifi Senior Principal Magistrate Court. In the current scheme of things whichever one looks at the matter though part-heard, by the nature that it's a protracted litigation, the game changer is to commence the trial denovo. The rules of evidence by and large are designed to further the truth-seeking end of the criminal justice system. The cross-examination of witnesses further ensures that the trial Court develop an accurate picture of the circumstances of the offence. In essence, under Section 200 of the Criminal Procedure Code, the Court in session which shuts out recall of the star witness(s) in more serious offences should worry in using transcripts to discover the truth. Credibility is the value the trial court places on a witness testimony dependant upon the perceived accuracy and truthfulness of the testimony.

For purposes of a criminal trial credibility includes evaluation of a witness demeanor, perception, memory, narration and sincerity. Broadly speaking, under Section 200 of the Criminal Procedure Code Courts tend to follow one of the two approaches either to receive the witnesses for cross-examination or to have the trial proceed from the initial period. Given the importance of the evaluation of witness testimony and his or her demeanor, it's most surprising how a fair trial would be achieved under Section 200 of the Criminal Procedure Code if the session trial Magistrate has generally no advantage to rule whether or not the witness in the previous proceedings told the truth as to existence or non-existence of the facts in issue as stipulated under Section 107 (1) of the Evidence act.

In my view as a trial Judge of many years' experience, the opportunity to view the demeanor of a witness is of great value in deciding whether that witness is telling the truth. As a threshold question at the preliminary hearings under Section 200 of the Criminal Procedure Code, the broader issue is whether, if take over, by the succeeding session Judge or Magistrates casually cause the case to proceed without due care and attention. The provisions of Section 200 there is a foreseeable challenge on how to deal with the demeanor and veracity of the key witnesses for the state. It is accepted in Law that the demeanor of a witness encompasses:

“the tone of voice in which a witness statement is made, or readiness with which his or her answers are given, the look of the witness, his or her carriage, his or her evidence of surprise, his or her gestures, his or her pitch, the use of his or her eyes, his or her furtive or meaning glances, or his or her shrugs, the pitch or the voice his or herself possession or embarrassment, his or her air of candor or seeming levity.” (See Blacks Law Dictionary 6th Edition 1990 430 citing *Rains v Rains* 8 A 20 715, 717 (1939).

I hold a strong view that when interpreting and construing Section 200 of the Criminal Procedure Code the Judges should strive to ensure that objective is given effect to guarantee an accused person a procedural opportunity to prove his or her case. The barriers on backlog reduction and heavy case dockets should not stand on the way of the Court to allow recall of the star witness being put before the Court in a subsequent proceedings occasioned by the death, transfer, retirement or dismissal from employment of a previous session Judge or Magistrate.

For the above reasons and in my Judgment, there was overwhelming evidence in support of the revision over which the applicant complained the upshot is that the revision succeeds with the following declarations to abide:

a. That the writ of certiorari be and is hereby issued to correct an error of Law manifest on the face of record to the record in which the Director of Public Prosecution instituted and commenced Criminal Proceedings in respect of the applicant at a forum of non-conveniens at Shanzu, in absence of any compelling or extenuating circumstances.

b. That the Learned Senior Principal Magistrate at Shanzu, in the aftermath of a transfer under Section 79 of the Criminal Procedure Code committed an error of acting in excess of jurisdiction to transfer the case docket between inter-county terminal boundaries a purview reserved for the High Court under Section 81 of the Criminal Procedure Code. Thereafter, the pace of delivery of justice has been aggravated on the constant adjournments from both the state and defence counsels in which the trial Court failed to impose procedural sanctions for faster expeditious adjudication of the case.

The Chief Magistrate Court at Malindi drawing its competence from the Constitution, the Magistrate's Court Act assumed jurisdiction on the substantial question of Law and fact in Criminal Case No. 23 of 2019 without first taking cognizance of Section 71, 72 and 73 of the Criminal Procedure Code. The provisions deal primarily with ordinary place of trial where the alleged unlawful act was done and the forum where the accused should be tried. Its apparent that while the Criminal Procedure Code broadly provides a framework for the place and interconnectivity with the cause of action, implying the enforcement of the Law within the local limits, the assumption of jurisdiction ensuring therefrom violated most provisions. Section 71, 72 and 73 create so called subsidiary jurisdiction to the original jurisdiction by the Chief Magistrate over the alleged facts in the present case.

In all respects, the interest of the community, the prosecution witnesses, the victim and collateral costs may not have been mitigated at all by holding the trial at Malindi. Given that fact, the transfer and continued exercise of jurisdiction may have both financial, and logistical

challenges for both parties. Therefore, to increase efficiency and to improve fair administration of justice to this end under Section 81 of the Criminal Procedure Code, the Court must interfere with both decisions at Shanzu and assumption of jurisdiction at Malindi to simply withdraw the Case No. 23 of 2019 and have it transferred to the Senior Principal Magistrate Court at Kilifi. Whether one is applying Section 200 of the CPC on part heard proceedings or transfer on change of venue justice is giving what is deserved and to guarantee the right to a fair trial under article 50 of the Constitution to prevent a miscarriage of justice. It is an essential pillar of a society which believes in the rule of law. In all these, the ends of justice inspite of the delay that may be occasioned would be served best, if the proceedings commence denovo in that other Court.

For all those reasons the application on revision is hereby considered meritorious and allowed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state
2. Mr. Ombeta for the applicant
3. The applicant