



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CRIMINAL APPL. NO.E.017 OF 2021

SULEIMAN FARAH DAUD &

NASTEH DAUDI ABDI

HOLWADAG CONSTRUCTION

COMPANY LIMITED.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application is brought under the provisions of Article 165(3)(a) and 165(6) of the Constitution 2010 and Section 81 of the Criminal Procedure Code and all other enabling provisions of the law; the application is premised on the grounds on the face of the application and is supported by a Supporting Affidavit made by **SULEIMAN FARAH DAUD** and is dated 28th of May, 2021; the deponent sought the following orders;

(i) Spent

(ii) THAT this Hon. Court be pleased to order the transfer and /or change the trial venue of Criminal Case No.2566 of 2019 at the Nyeri Magistrates Court to the Magistrates Court at Garissa;

(iii) THAT this Hon. Court be pleased to order the stay of the proceedings in Criminal Case No. 2566 of 2019 pending the hearing and determination of this application.

(iv) THAT this Hon. court grants any other orders as it may deem fit.

2. At the hearing hereof the applicant was represented by learned counsel Mr Wanjohi who made oral submissions; hereunder is a summary of the applicant's case;

APPLICANT'S CASE

1. The applicant

2. A brief outline of the case was that the applicant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code; the applicant being aggrieved by the manner in which the trial court addressed his complaint against the Investigating Officer filed the instant application seeking a retrial of his case before a different trial magistrate;

3. In his letter under reference the applicant contends that the complainant may not have been able to identify him since two (2) years had lapsed from the date of the alleged incident and the Investigating Officer being aware of this fact, on a date set for the hearing specifically made utterances to that effect in Kiswahili and then proceeded to point out and identify the accused to the complainant; when the applicant raised this incident with the trial magistrate he was advised to seek redress from the High Court;

ISSUES FOR DETERMINATION

3. After hearing the submissions of the learned counsel and upon reading the affidavits this court has framed only one issue for determination; which is as follows;

(i) Whether the applicant has made out a case to be granted the orders sought for the transfer of the case to a magistrates court in Garissa or elsewhere for hearing and determination.

ANALYSIS

4. The applicant contend that the offence is alleged to have been committed in Garissa Town within Garissa County and the applicants hail from that county and also carry on business there; one of the applicants stated that travelling the long distance to Nyeri would subject him to suffering due to his underlying medical condition; their witnesses also resided in Garissa and the cost ferrying them to Nyeri to attend court would be a financial burden and would also subject them to great suffering; hence the applicants sought the transfer of the case to a magistrates court in that county for hearing and determination;

5. The respondent opposed the application and submitted that the Regional Office for KRA for the Garissa Region is based in Nyeri; the respondent also relied on Section 106 of the Tax Procedure Act which provides that a tax offence **may** be prosecuted in any place where the person is held in custody;

6. The applicable law is found at Section 81 of the Criminal Procedure Code which reads as follows;

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7. This court has perused the medical documents that the applicant has attached which indicate that he attends a Gastroenterology Clinic at the Aga Khan University Hospital which hospital is situated in Nairobi; the documents demonstrate that he travels to Nairobi for medical care and his next appointment is scheduled for the 6/08/2021; this court also notes that the applicants advocate carries on business in Nairobi; the issue of travelling long distances is only unfavourable when it is not to the applicants advantage;

8. From the forgoing material placed before it this court is disinclined to allow the application to transfer the case to Garissa as it will also greatly prejudice the respondents' witnesses who likewise would be financially burdened with the cost of travelling and accommodation;

9. But with a view to balancing the interests of both sides and to also completely deal with the applicant's complaints this court will exercise its inherent discretionary powers and will allow the application and hereby directs the transfer of this case to a magistrate's court that is centrally placed between Nyeri and Garissa; and in the circumstances finds Thika Law Court to be the most suitable venue;

FINDINGS & DETERMINATION

10. In the light of the forgoing this court makes the following finding and determination;

11. The application is hereby allowed and this case is hereby transferred to a magistrates court with competent jurisdiction at Thika Law Courts for hearing and determination.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 30th day of June, 2021.

HON. A. MSHILA

JUDGE