



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC CRIMINAL CONSOLIDATED

APPLICATION S NO.(S): 225, 226 227 AND 228 OF 2021

REPUBLIC.....APPLICANT

VERSUS

MUKTAR IBRAHIM ALI & OTHERS.....RESPONDENTS

RULING CUM DIRECTIONS

1. By a letter dated 7th April 2021, the Office the Director of Public Prosecution (herein “the ODPP”), requested the Chief Magistrate, Milimani Law Courts, Criminal Division to mention fresh counter terrorism cases in Milimani.
2. The ODPP indicated that, by a Gazette Notice No. 375 of 24th January, 2020, Kahawa Law Court was gazetted to handle counter terrorism and related high risk cases. That, as a result thereof, the ODPP has started filing such fresh matters in that court and therefore requested that, all fresh matters and matters partly heard and where not more than three (3) witnesses had testified be mentioned on 15th April 2021, before the Chief Magistrate Hon. F Andayi, for directions pursuant to the provisions of section 81(2) of the Criminal Procedure Code, (cap 75) Laws of Kenya. Attached to that letter was a list of ten (10) cases inclusive of the cases herein.
3. Pursuant to that letter, the Chief Magistrate, Milimani Law Courts, wrote to the Presiding Judge, Criminal Division of the High Court a letter dated, 8th July 2021, forwarding a report, pursuant to; section 81(2) of the Criminal Procedure Code, indicating that pursuant to the letter from the ODPP dated 7th April, 2021, the prosecution and the court have identified a number of cases under Prevention of Terrorism Act, (POTA), registered at Chief Magistrates Court at Milimani Law Courts, where no evidence has been taken or few witnesses have testified, and earmarked them for transfer.
4. Kahawa Law Court typed and proof read, and therefore, there will be no delay in starting the hearings once the matters are transferred.
5. However, that Advocates representing the accuseds have sought to address the High Court on the issue of transfer hence the hearing of these matters.
6. Upon receipt of the report, and the record of the lower court, in all the four (4) files, the Respondents were allowed to address the court and they filed their respective responses vide grounds of opposition and/or replying affidavit. To avoid duplicity of the averments in the respective responses that are similar, I shall condense the various grounds of opposition as follows;

a) The prosecution should have filed an application in the High Court other than initiating this matter suo moto. That transfer of the case is not an administrative issue and even if it was, it must be done fairly as stipulated under article 47 of the Constitution of Kenya. Further by the prosecution initiating the transfer process as it did, and the court siding with it, it lost impartiality;

b) That the matters are properly before the court and in fact, it is the prosecution that has caused the delay therein; in that, they did not supply all documents on time and caused the hearing scheduled for; 3rd September, 21st November, 2020 and 9th and 10th March, 2021 to collapse. Further, the hearing scheduled for 3rd to 5th May, 2021 was frustrated by the prosecution letter of 7th April, 2021. Therefore, to allege that they will be heard expeditiously, is a fallacy;

c) There are no allegations of bias against the Chief Magistrates Law Courts that is handling these matters; and no reasons have been advanced why there is confidence laid on the Kahawa Law Court;

d) That, the cases herein were registered in the month of March 2019, the accused having been arrested in the month of January, 2021, and the court at Kahawa was established on 24th January 2020, thereafter, it should hear matters registered after that date;

e) That, if there is any appeal from the application pending review of the decision on bond and bail, it will be heard at Nairobi High Court and not Kiambu High Court, yet the Kahawa Law Court falls under the jurisdiction of Kiambu Law Court;

f) That, the accused on bond will be prejudiced in terms of time, costs and/or expenses if the matter is transferred;

g) That the transfer will infringe on the accused constitutional rights under articles; 19, 20, 21, 25, 27, 28, 48, 50 (1) (2), (a), (e) and 157 of the Constitution of Kenya, 2010;

h) The counsels' diaries can accommodate matters at Milimani Law courts and it is impossible to get dates at Kahawa Law Court;

i) That the prosecution are forum shopping; and that the accused are set up in a trial that is destined to result in a conviction;

j) That the High Court has no jurisdiction to transfer the cases;

k) The cases have been handled by three (3) different Magistrates and it is easy to lose the history thereof;

l) The accused in matter HCCR Miscellaneous application 227 Of 2021 has mysteriously disappeared and therefore the decision herein should be stayed;

m) The applicant in the matter 228 of 2021 has filed a Preliminary Objection to be heard and similarly he has a pending petition which should be considered.

7. The application was disposed of vide the filing of submissions. The applicant's submissions in all applications were the same to the effect that, the court has jurisdiction under section 81 (2) of the Criminal Procedure Code, to transfer the subject matters herein. That the transfer is not an abuse of the court process, but was made in good faith and is not forum shopping.

8. The submissions in matter 225 of 2021 were filed on behalf of the 2nd 4th and 6th Respondents. The 1st Respondent has conceded to the request for transfer. The three aforesaid Respondents submitted that, the delay in the matter is evident from the lower court proceedings, where the prosecution took too long to decide on the issue of transfer and the proceedings thereof reflects the frustrations of the defence and the court.

9. That all the reasons given in the letter of the Hon Chief Magistrate referring the matter to the High Court are not factual, and neither are they a reflection of the history of the case. Further the gazette notice establishing the Kahawa Law Court does not refer to it as a specialized court, and neither does the POTA provide for any specialised court.

10. The Respondent submitted that, the application be dismissed for lack of precedent in the manner of initiating the matter and violation of the law and laid down procedure.

11. The respondent in application number 226 of 2021, submitted that, the creation of a new specialised court per se is not sufficient reason for the transfer, and that there ought to be other additional facts or otherwise, a reasonable apprehension that the trial court is less suitable to determine the matter.

12. Further, the application is tainted with illegality for failure to adhere to the provisions of section 81 (1) of the Criminal Procedure Code, due to the manner in which it was initiated. That the proceedings before the Chief Magistrate is tainted with impartiality.

13. The 1st Respondent in the application number 227 of 2021 reiterated that; there is a pending Petition and a Preliminary Objection filed that ought to be heard before the decision herein is determined. Further there is no jurisdiction for one subordinate court to transfer a case before it to another. The 2nd Respondent's submissions therein were similar to those articulated in the criminal application 225 Of 2021 in relation to the 2nd and 4th Respondent, save to add that there is a pending petition filed by the 1st Respondent that needs to be heard first.

14. Finally, as regards the application number 228 of 2021, the submissions therein mirrored those filed in relation the 2nd 3rd and 4th Respondents in application number 225 Of 2021 and 2nd Respondent in application number 227 Of 2021.

15. I have considered the arguments advanced by the respective parties herein and I find that, the main issue to consider is; whether this court has been properly, legally and procedurally moved to grant the request for the transfer of the subject matters herein.

16. In that regard, the prosecution relies on the provisions of; section 81 (2) of the Criminal Procedure Code, which states as follows: -

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

(a) that a fair and impartial 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; or

(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 (emphasis added).

17. It is therefore clear from the aforesaid provisions that, in a matter, the High Court can be moved in three ways; upon receipt of a report from the lower court, on an application by an interested party, or on its own motion.

18. In the instant matter, the Hon Chief Magistrate vide a letter dated 8th July, 2021, described as a report moved the court to consider the matters herein. Therefore, it suffices to note from the outset that, there is no formal application before this Honourable court for determination and neither did this Honourable court move on its own initiative.

19. That being the case, the question that begs consideration is whether, the Chief Magistrate's letter and/or report was properly and procedurally presented to the High Court. In that regard, it is noteworthy that, the provisions of section 81 of the Criminal Procedure Code do not give guidance on the manner in which the report has to be initiated before the Subordinate court or even presented to the High Court.

20. To the contrary, it gives directions under sub sections; (3) (4) and (5) on what procedure should be adopted in case a party moves the court through a formal application. These provisions state as follows: -

(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.

21. It therefore follows from the aforesaid that, the argument by the Respondents that, the only way to move the court was by the ODPP filing an application or the court moving suo moto, per se, is not factually correct.

22. Thus the reference of the matter to the High Court by the Chief Magistrate vide a letter dated 8th July, 2021, referred to as a report is envisaged under section; 81(2) of the Criminal Procedure Code and therefore it was not illegal, improper and/or irregular as argument by the Respondents. In deed section 81 above refers to a lower court and not the trial court and for sure, the Chief Magistrate court, is a lower court to the High Court.

23. However, the Respondents have raised several other issues in relation to the manner in which the Chief Magistrate's court was moved by the letter dated, 7th April, 2021, to request the matter be transferred. I have read that letter in its entirety and I do not find any content where the ODPP has expressly directed the court to seek for the transfer of the cases to Kahawa Law Court. The letter reads in part as follows:

“For this reason the Office of the Director of Public Prosecutions requests that all fresh and/or part-heards (where not more than 3 witnesses have testified) counter-terrorism cases be mentioned on 15th April 2021, before the Honourable Chief Magistrate, Francis Andayi for purposes of giving directions/report in accordance with section 81(2) of the Criminal Procedure Code, Cap 75 laws of Kenya”

24. The Hon Chief Magistrate was at liberty to choose to either give directions, or make a report referring the matter to the High Court. The ODPP did not therefore have control on the option the Chief Magistrate opted for, and cannot be faulted for the same. It also suffices to note that, section 81 of the Criminal Procedure Code does not state how a Chief Magistrate may initiate the report. Unlike the High Court's position, where it can move suo moto, there is no provision thereunder for the lower court to move suo moto.

25. The Respondents further argues that, as a result of the procedure adopted in referring the matter to the High Court, they were denied an opportunity to be heard before the lower court. However, I find no provision under section 81 (2) of the Criminal Procedure Code where any party has a right of audience before the lower court when the lower court elects to make a report to the High Court. The right to be heard is provided for where; either party applies for the transfer of the matter. Be that as it were, the Respondents have not suffered any prejudice as

this Honourable Court allowed them to address it and will make a finding on the issues raised.

26. To revert back to the main issue as to whether, the matters herein should be transferred or not, I find that, from the two letters written by the ODPP and the Chief Magistrate, the main reason for the transfer is that, a specialised court has been set up at Kahawa Law Court to hear the matter. This Honourable court has been referred to the gazette notice establishing the court and I find that, it establishes the court as a magistrate's court with supervisory jurisdiction of; Kiambu High Court with effect from 1st April, 2021. The gazette notice does not state the jurisdiction of the court.

27. In that regard article **169 of the constitution of Kenya, 2010** establishes subordinate courts and states as follows; -

(1) *The subordinate courts are—*

(a) *the Magistrates courts;*

(b) *the Kadhis' courts;*

(c) *the Courts Martial; and*

(d) *any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).*

(2) *Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).*

28. Pursuant to the aforesaid, the Magistrates' Act No. 26 of 2015, states in its preamble that, it is an "Act of; Parliament to give effect to Articles; 23(2) and 169(1)(a) and (2) of the Constitution of Kenya; to confer jurisdiction, functions and powers on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and connected". Therefore, the jurisdiction of, Kahawa Law court could not have been provided for under the gazette notice.

29. Be that as it were, I take judicial notice of the report in the press, by UNODC East Africa News in Nairobi, on 11 December 2020 which stated inter alia as follows: -

"The Chief Justice of Kenya, Hon David Maraga, presided over the official opening of the Kahawa Law Court which was constructed with support from the Global Maritime Crime Programme (GMCP).

The project was funded by the Government of the United States of America with support from the Government of the United Kingdom.

Situated in Kiambu County within the precincts of Kamiti Maximum Prison on the outskirts of Nairobi, this new court is the first and largest court in Kenya dedicated to counter-terrorism cases and related high-risk cases.

The launch of Kahawa Law Court was graced by senior government officials and representatives from the United States Government and the United Kingdom.

Speaking at the function, Hon David Maraga noted in his keynote address: "In any country that respects the rule of law, a fair trial is fundamental. I am very grateful to the partners who have made this possible. We appreciate the financial support from the development partners led by the United States and United Kingdom and the excellent coordination provided by the United Nations Office on Drugs and Crime who managed the implementation of this project".

30. It is therefore a matter of public notoriety that the Kahawa Law court is designed to handle counter terrorism cases. In that regard, it is noteworthy that, all the respondents herein have been charged in the lower court with terrorism related crimes. On that ground per se, Kahawa Law Court is the appropriate court to hear and determine the counter terrorism crimes. I therefore do not share the views and/or arguments that, the ODPP is on forum shopping spree.

31. Be that as it were, several issues have been raised by the Respondents, inter alia; delay in the hearing of the matter in the lower court, the resources; in terms of time and/or costs that the Respondents may incur, the unavailability of the defence counsels due to their busy diaries and violation of the Respondents human rights provided for under the Constitution of Kenya.

32. In my considered opinion, in view of the fact that, Kahawa Law Court is newly established, and will be handling the terrorist related matters per se, the matters herein should be heard more expeditiously than in the Chief Magistrate courts in Milimani, Nairobi. The record of the lower court should guide the trial court on the history of delay and enable the trial court act accordingly in the interest of justice. As regards the resources that, the Respondents may incur, I find that, taking into account the distance between Kahawa Law Court and Chief Magistrate Courts, Milimani, Nairobi, the expenses are negligible. To the contrary, it is favourable for the Respondents detained at Kamiti Maximum Prison in terms of travel logistics.

33. On the issue of the application for bail that are pending, I believe the same can be determined at Kiambu High Court or referred to the High Court, Nairobi for decision if they have been fully heard.

34. Finally, there is the issue of the Preliminary Objection filed Application Number 227 of 2021, it was not prosecuted before the parties

were heard herein and therefore I shall not delve therein, in the same vein, I note that, there is indeed a Petition pending in the High Court but the 1st Respondent should have sought to stay this matter before it was heard. In fact, there is no evidence that, the High Court has stayed the proceeding in the lower court.

35. By the 1st Respondent filing grounds of opposition, in the subject matter, he has conceded to the hearing and determination thereof. It is noteworthy, that, the 2nd Respondent has not filed any petition or preliminary objection, and therefore, is entitled to have his case heard. Be that as it were, it is in the interest of justice to allow the court hearing the petition an opportunity to hear the matter without prejudice, that may be occasioned by a decision herein that touches on similar matters in both cases. I shall defer the decision relating to Application Number 227 of 2021, in regard to the 1st Respondent until the petition is heard and determined. Indeed, the determination of the petition will determine the issue herein.

36. Finally, I note that, the Respondent in matter number 228 of 2021 is not in court and it will not be in the interest of justice to deliver a decision in respect to a party whose whereabouts is unknown. In that case I shall defer the decision in relation to that particular matter in application number 228 of 2021.

37. The upshot is; I dismiss the objection raised in relation to the transfer of cases in application numbers 225 and 226 of 2021 and direct that, the same be transferred to Kahawa Law Courts forthwith, and be determined on priority basis, due to the age of the matter.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 29TH DAY OF NOVEMBER, 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Kiarie for the State

Mr Bashir for the 1st Respondent

Mr Kariuki holding brief Mr Chacha Mwita for 2nd, 3rd & 4th Respondents

Mr Muiruri holding brief for Mr Anyona for 3rd Respondent

Mr Ongoto for the 5th Respondent

Edwin Ombuna – Court Assistant