



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT MISCELLANEOUS CRIMINAL APPLICATION NO. E149 OF 2021**

**OMARI MWINYI MWAPITA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. By a notice of motion application dated; 27<sup>th</sup> April, 2021, the applicant is seeking for orders that; the Honourable Court be pleased to transfer Chief Magistrate's Criminal Case No. E440 of 2021, Republic vs. Omar Mwinyi Mwapita, at Nairobi to the Chief Magistrate Law Courts at Mombasa.
2. The application is based on the provisions of; sections 71, 72, 74 and 81(2) of the Criminal Procedure Code, (cap.75) Laws of Kenya and Articles 48 and 50 of the Constitution of Kenya, 2010. It is supported by the grounds thereto and an affidavit of even date sworn by the applicant.
3. The applicant avers that; he has been charged with the offence of; stealing by servant contrary to; section 281 of the Penal Code vide the aforesaid Chief Magistrate's criminal case at Milimani Nairobi. That, the particulars of the charge sheet, state that; the offence was committed, "on diverse dates between; 1<sup>st</sup> November, 2015 to 31<sup>st</sup> December, 2018, at unknown place within the Republic of Kenya, the applicant who was an employee of; Changamwe Service Station of Brook Shield Crescent Group, being employed as an accountant and administrator of the company Quick Books Accounting Soft Ware stole Kshs.80, 013, 369, which came into his possession by virtue of his employment".
4. That, Changamwe Petrol Service Station is within Mombasa County and therefore the matter herein; falls within the jurisdiction of the Chief Magistrate's Court at Mombasa. Further, the applicant and other witnesses as stated in the charge sheet, resides within Mombasa County.
5. However, on 25<sup>th</sup> March, 2021, Police officers arrested the applicant when he presented himself to the Regional DCI Headquarters at Mombasa, upon being informed that, police were looking for him. That, he was then escorted to Nairobi DCI Headquarters and booked at a Police station the same day. On 29<sup>th</sup> March, 2021 he was arraigned before the court, which was in any case outside the 24 hours' rule and charged as aforesaid.
6. The applicant further avers that, the hearing of case outside the Chief Magistrate's Law Courts at Mombasa, will occasion him prejudice and/or hardship in terms of; logistics costs such as travel and accommodation costs for himself, his legal counsel, witnesses and family members who will be attending the proceedings. Further, it is unsafe to travel frequently from Mombasa to Nairobi during the Covid -19 pandemic.
7. To the contrary, the Respondent has a resident office at Mombasa, and similarly the Prosecutor resides in Mombasa. Additionally, the State has resources to facilitate the witnesses' attendance to court proceedings. He alleges that, the choice to charge him in Nairobi is influenced by malice, amounts to forum shopping influenced by the complainant and is in contravention of the powers bestowed upon the ODPP under Article 157(11) of the Constitution of Kenya, 2010.
8. However, the application was opposed based on the undated replying affidavit sworn by; PC Peter Orwa, a Police officer attached to; Regional DCI, Nairobi as an Investigator. He avers that, he is the Investigating officer in the lower court criminal case against the applicant. That, the complainant, in the said case, one Abdulsalaam Noordin of Changamwe Service Station, vide letter Reference; BO/DCI/NA-01, dated 22<sup>nd</sup> March, 2021, reported at the Regional DCI Office at Nairobi, on the occurrence of the offence of; stealing by servant contrary to; section 281 of the Penal Code.
9. That, investigations commenced on 25<sup>th</sup> March, 2021, when the applicant surrendered himself to Regional DCI office at Mombasa and was informed of the reason of his arrest. He was then transferred to the Police station where the report was made. He arrived in Nairobi on

Friday and was arraigned in court on Monday, 29<sup>th</sup> March, 2021. That at the time of taking plea, he did not raise any complaint against any Police officer nor raised an issue with the filing of the case at Chief Magistrate Court in Nairobi.

10. He further avers that, the applicant is a licensed firearm holder and the Police are apprehensive that, he might intimidate the complainant and witnesses if the case is transferred to the Chief Magistrate Court at Mombasa. Furthermore, there are witnesses domiciled in Nairobi and that the commission of the offence has nexus with Safaricom records.

11. Be that as it were, the application was canvassed both orally and vide submissions filed by the Respondent. I have thus considered the application in the light of the materials placed before the court and I find that, the only issue to determine is whether; the applicant has met the threshold required for the transfer of the subject matter to the Chief Magistrate Courts at Mombasa.

12. However, before I deal with that issues, there are several issues I wish to address. First and foremost, I note from the record that, Abdulsalaam Noordin, swore a replying affidavit dated; 30<sup>th</sup> April, 2021, filed in court on; 3<sup>rd</sup> May, 2021. However, I have not considered that affidavit as the deponent is not a party to this matter herein and therefore cannot respond to the application. Even then, his interest is catered for by the Respondent.

13. The 2<sup>nd</sup> issue concerns the various matters that, the parties have averred to herein, which in my considered opinion, and with utmost respect, are not supportive of the prayers in the application. The subject matters include but are not limited to; the arrest and arraignment of the applicant in court after the expiry of; 24 hours; the conduct of the police officers during the arrest of the applicant and/or the continued harassment of the applicant after he was arraigned in court. These are issues which should be raised with the relevant agencies for action. As such, they cannot be canvassed in this matter. In the same vein, the alleged or perceived misuse of the firearm by the applicant should be addressed outside this matter.

14. However, to revert back to the subject matter herein, I note that the law governing the place of hearing of a case, is well stated under the provisions of, section 72 of the Criminal Procedure Code which states that, a person accused of; committing of an offence; may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.

15. Similarly, the provisions of; sections 78 to 81 of the Criminal Procedure Code, relates to transfer of a cases. In particular, section 78 states that, if upon hearing a complaint it appears that, the cause of the complaint arose outside the limits of the jurisdiction of the court before which the complaint has been brought, the court may, on being satisfied that it has no jurisdiction direct the case be transferred to the court having jurisdiction where the cause of complaint arose.

16. The power of the High Court to change venue is provided for under Section 81 of the Code. It states that, the High court may order such change inter alia; where it appears to the court that: -

- a) A view of the place in or near which an offence has been committed may be required for the satisfactory trial of the offence; or*
- b) That an order under the section will tend to the general convenience of the parties or witnesses; or*
- c) That such an order is expedient for the ends of justice; or is required by any provisions of the Code.*

17. The High Court may then order 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 authority. In making the aforesaid order, the High Court may act on the report of the lower court or on the application of a party interested in the matter or on its own initiative.

18. In the instant matter, the particulars of the charge clearly state that, the applicant was an employee of; Changamwe Service Station, which is situate within Mombasa County. Further, he is charged with the offence of; stealing by servant allegedly, committed while employed at Changamwe Service Station in Mombasa.

19. In fact, the further particulars states that, he was employed as an accountant and administrator of the company as such the complainant is actually the company situate in Mombasa. Indeed. none of the particulars in the charge sheet place the commission of the offence in Nairobi.

20. In addition, the applicant has provided evidence that, the initial report of the offence was made at the Regional DCI Office at Mombasa. Similarly, the complainants' replying affidavit though not considered had an annexure of the report of the complaint made at Nyali Police Station, within Mombasa County.

21. In the same vein, the applicant has filed further affidavit dated 16<sup>th</sup> August, 2021, to which he has annexed inter alia; witness statements which reveal that, the complainant Abdulsalaam Noordin, resides within Mombasa District, Island location, Old Town location and Makupa sub-location and his postal address is P.O. Box 87898, Mombasa.

22. The other witness Hanin Hussein Marjan also resides within Mombasa County, Majengo Location, Island Division and Kingorani sub-location. The remaining two witnesses are expert witnesses from Nairobi and then the Investigating officer. Similarly, the applicant also resides in Mombasa, and therefore most of the witnesses reside within the jurisdiction of the Chief Magistrate Courts in Mombasa.

23. I have also considered the reasons advanced by the Respondent for filing the case at Nairobi and I find that, they are neither supported by the law nor are they satisfactory and/or adequate. First and foremost, the Respondent have not showed any, OB entry where a formal complaint was made by the complainant; herein; Changamwe Service Station in Mombasa. Secondly, the alleged letter which the Respondent acted to investigate the matter has not even been produced.

24. Thirdly, the Respondent acknowledges the initial report of the matter was made at the Regional Office of DCI at Mombasa. It is indeed at this office that; the applicant was arrested. Further, the fact argument that, the case has been filed in a court that has jurisdiction over the whole country does not negate, the provisions of the law that govern where a case should be filed and/or tried. Finally, the fact that, none of the witnesses has complained of expenses, if the matter is heard in Nairobi is neither here nor there. In the given circumstances, I find that, the response to the application lacks merit.

25. However, before I issue the final orders, I have considered the submissions by the Respondent and with most respect, I find that, they are rather misdirected. This matter does not involve transfer of the case from one Magistrate to another and/or disqualification of a court from hearing the matter on the grounds of bias and/or lack of partiality on the part of the court or judicial officer hearing the matter. It is about transfer of the case.

26. Finally, I note that, there is applications pending in the lower court similar to the one herein. This court has entertained the application herein on the strength of; section 81 of the Criminal Procedure Code, which empowers it to hear the application, purely in the interest of justice and expeditious disposal of the matter. In that, case I order that, the application pending in the lower court must be withdrawn before the orders granted herein take effect.

27. Be that as it were, the application herein is granted in terms of prayer (2) thereof. The lower court file herein shall be transferred forthwith to the Chief Magistrate court. The applicant shall remain released on bond terms already granted until the matter is transferred.

It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF DECEMBER, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Wangila for the Applicant

Ms Chege for the Respondent

Edwin Ombuna: - Court Assistant