



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPLICATION NO. 45 OF 2019

PAUL GACHIRI WAGENI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, has brought the application under a Certificate of Urgency under the provisions of Order 40 Rule 1 of the Civil Procedure Rules and the inherent powers of the court; the Applicant prayed for the following orders;

(a) Spent

(b) An order be issued transferring the file to be heard and determined by another court of competent jurisdiction; at a safer and convenient county/location and in the interest of justice;

(c) The Honourable Court is free to make any and all such orders in furtherance of the above as it deems fit.

2. At the hearing hereof the parties made oral presentations; the applicant was represented by learned counsel Mr. Ndichu and relied on the grounds on the face of the application; which was opposed by prosecuting counsel for the State Ms. Gicheha and Mr. Onsareacting on behalf of the respondent; hereunder are the rival submissions;

APPLICANT'S SUBMISSIONS

3. Counsel submitted that the case be transferred from Othaya Law Court to Kiambu or Nairobi Law Courts for hearing and determination; that there were two (2) related criminal cases one where the applicant was the accused person and in the other the applicant was the complainant and the Assistant Chief Iria-ini is the accused person;

4. In Criminal Case No. 230 of 2019 which is the subject of this application the applicant is the complainant and the assistant chief the accused person; the applicant avers in the instant application that the accused person upon his release on bail has continued to harass his family with continued threats on life and property which threats are within the knowledge of the police;

5. That his attendance at the court in the Othaya court places his life in danger as the accused has hired gangs which present a clear threat to his life; and that the accused has the full backing of the Local Administration and of the Deputy County Commissioner Nyeri South;

6. He contended that some of the proceedings had been plucked from the court record in Othaya Criminal Case No.230 of 2019 which act was duly noted by the court on 4/10/2019; the matter was still under investigation;

7. In the current conditions justice cannot be served as witnesses were fearful and afraid to attending court to testify as the armed youth hired to attack him and his family have also been in attendance in court; and the applicant fear that he shall suffer injury and irreparable harm;

8. Counsel submitted that in the interest of justice the case be transferred to either Nairobi, Kiambu or the Isiolo Law Courts; where the gangs will not be able to threaten the complainant and the witnesses or interfere with the case;

9. The applicant prayed that this court do exercise its discretion by allowing the application to ensure that justice was done.

RESPONDENT'S SUBMISSIONS

10. The application was opposed by the respondent and it relied on the Replying Affidavit of the Investigating Officer ('IO') Corporal Philip

Mutisya stationed in Othaya;

11. The Investigating Officer deponed that after investigations were carried out he found that the allegations made by the applicant were unfounded and were after thoughts; and that there were no threats issued by the accused;

12. That when the applicant made a report to the police he never recorded any statement to demonstrate the manner of the threats being issued against him;

13. That the allegations that the local administration were sympathetic towards the accused was completely unfounded;

14. Prosecuting Counsel for the State concluded by stating that there were no sufficient grounds for transfer and that the court was competent to proceed with the case and that the transfer would lead to further delays.

ISSUES FOR DETERMINATION

15. Taking into consideration the above submissions this court has framed only one issue for determination; which is;

(i) Whether the application for transfer is merited;

ANALYSIS

16. The respondent in its response submitted that when the applicant made a report to the police he never recorded any statement to demonstrate the manner of the threats being issued against; the same notwithstanding the Investigating Officer proceeded to carry out investigations; after investigations were carried out it was found that the allegations made by the applicant were unfounded and were after thoughts; and that there were no threats issued by the accused;

17. This court notes that the applicant did not invoke the provisions of Section 81 of the Criminal Procedure Code; which reads as follows;

“81. (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.

(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.”

18. In the case of **Maina Kinyatti .v. Republic [1984] eKLR** the Court of Appeal held that the test to be applied in an application under section 81 of the CPC is whether an applicant has made a clear case by discharging on a balance of probabilities the burden of showing that the apprehension in his mind that there will be no fair trial is reasonable;

19. It is this court's considered view that the issue of the leaflets and alleged threats to life and property do not touch on the trial court's

conduct of the case before it; this court must be satisfied that the trial court is implicated in such conduct; this court also notes that the applicant did not state that he was apprehensive that he would not receive a fair trial; if the applicant had established the above and his apprehension was found to be reasonable then he would have a merited case for transfer;

20. This court is satisfied that the applicant's application does not meet the criteria set down in the provisions of Section 81 of the Criminal Procedure Code;

21. This court has taken into consideration that the matter before the trial court has proceeded substantially and it would not be in the best interest of justice to have the matter transferred to another jurisdiction.

FINDINGS AND DETERMINATION

22. For the forgoing reasons this court finds that there is no basis for the transfer of Othaya Criminal Case No 230 of 2019;

23. The application for the transfer of the Criminal Case No. 230 of 2019 is found to be lacking in merit and it is hereby disallowed.

24. This court directs the file for Othaya Criminal Case No 230 of 2019 be transferred back to Othaya Law courts for hearing and determination.

Orders accordingly.

Dated and Signed at Nyeri this 20th day of February, 2020.

HON.A.MSHILA

JUDGE