

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.153 OF 2020

JULIUS OMONDI OKOMBO1ST APPLICANT

PHILIP OTENYO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

On 25th May 2020, the Applicants made an application before this court seeking several orders which arose from their arrest and subsequent arraignment before the magistrate's court to answer certain criminal charges. The parties to the application agreed that the majority of the prayers sought in the application had been overtaken by events when the Applicants were presented before the Vihiga Magistrates Court. They have already taken plea in respect of, *inter alia*, the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The Applicants, however, insisted on canvassing one of their prayers in the application which was to the effect that the trial should be held in Nairobi Chief Magistrate's Court and not before the Vihiga Magistrate's Court. The reasons the Applicants advanced for this request is that they are apprehensive of their lives, specifically, they state that their lives will be in danger if they appear for trial before that court. The Applicants submitted that they were injured by the complainant's family who reside in Luanda. It would therefore serve the interest of justice if the trial is transferred from Vihiga Law Courts to Nairobi Magistrate Court. The Applicants invoked the provisions of **Section 81(c)** of the **Criminal Procedure Code** in support of their application.

The application is opposed. Mr. Momanyi for the State submitted that the crime that resulted in the charge being laid against the Applicants occurred in Luanda. The complainant and the witnesses reside in Luanda. It would only be fair and just that the trial be held in a court nearest where the prosecution witnesses reside. He posited if the venue of the trial is transferred from where the Applicants have taken plea to Nairobi, it would result in a miscarriage of justice because it may ultimately frustrate the trial. There was no legal reason to accede to the request made by the Applicants.

This court has carefully considered the grounds put forward by the Applicants in support of their application. **Section 81** of the **Criminal Procedure Code** grants this court jurisdiction to transfer a criminal case from one magistrate's court to another provided that the interest of justice is served. Specifically, **Section 81(1)** of the **Criminal Procedure Code** sets out the grounds upon which the court may order such transfer or change of venue for trial. It includes where the court formed the opinion that a fair and impartial trial may not be possible in the particular magistrate's court and where it would be expedient for the ends of justice to be met.

In the present application, the Applicants assert that if the trial is held at Vihiga Law Courts, they are unlikely to get justice. They are apprehensive that if the trial magistrate's court releases them on bail pending trial, they will be harmed by the complainant's family. They are in fear for their lives. The prosecution does not agree with this risk assessment put forward by the Applicants. They have correctly argued that in ideal situation, trial should be held near where the prosecution witnesses reside or near where the offence is alleged to have occurred.

Knowing the geography of the region where the offence is alleged to have occurred and the location of the court, this court does not agree with the Applicants that the fact that they are charged before the Vihiga Law Courts, their lives would be in danger. The distance between Vihiga Law Courts and Luanda is such that it cannot be said to be so proximate that should the Applicants be released on bail pending trial, and they attend trial, their lives would be in danger. Furthermore, no evidence was placed before this court to support the assertion by the Applicants that they would be attacked by the complainant's family members if trial is held before the Vihiga Magistrate's Court. The Applicants are at liberty to report such threats to their lives to any police station other than Luanda Police Station if they are of the view that they will not get audience before that police station.

For the above reasons, this court finds no reason to accede the request made by the Applicants to have the venue of the trial changed. The application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JUNE 2020

L. KIMARU

JUDGE