



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.16 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN LELEI.....1ST ACCUSED

FREDRICK LELIMAN.....2ND ACCUSED

RULING

1. Miss Njeru learned for the state on 15.7.2020 made an oral application that seeks to invoke the provisions of what she stated as section 81(1)(2) (3) of the Criminal Procedure Code and in which she stated that the DPP wishes to have this court order that this matter be transferred from Machakos High Court to Milimani Law courts.

2. Counsel submitted orally that the DPP was exempted by the cited provision from filing a notice of motion but can make the application orally. It was submitted that the DPP is of the view that by moving the matter to Milimani Court, it would be convenient and meet the ends of justice. It was pointed out that **HCR 57 of 2016** is being heard in **Milimani High Court** involving the 2nd accused herein and it was the view of the DPP that the monitoring of the cases will be managed from one court and also from the same homicide division. According to counsel, the 2nd accused was not present in court at the time of the application as he had been taken to Milimani High Court, hence the need for the matter to be transferred to Milimani High Court. It was submitted by counsel that both defence counsels for the accused are based in Nairobi; that the issue of witnesses inconveniences that IPOA had to present in the respective courts would be eased. Counsel stated that the 1st accused is based in Athi River which is not far from Nairobi hence he could attend court with ease; that it was necessary for quick delivery of justice in the instant matter that the same be transferred to Milimani. Counsel for the state on 21.9.2020 added that the purpose of the transfer was for convenience purposes and not for lack of faith in the court.

3. Counsel Kamwendwa for the 1st accused submitted that the justice system was not at the beck and call of the DPP or IPOA; that the right to fair administrative action is enshrined in Article 47 of the Constitution and that again under Article 50(2)(e) of the Constitution, a trial is to be conducted without undue delay. It was submitted by counsel that an application under S.81 involved the exercise of discretion that ought to be exercised judiciously. It was posited by counsel that section 81 did not contemplate the transfer of a matter from one High Court to another; that the DPP had not brought itself within the ambit of section 81(1) of the CPC but brought an omnibus application. Further that better management was not one of the reasons provided for under section 81. Counsel submitted that the test to be considered was set out in the case of **Maina Kinyatti v R (1984) eKLR** where the court stated that it was a reasonable apprehension that the accused would not get justice; that the accused also had a right to manage himself. Counsel submitted that the Milimani case number 57 of 2016 was registered four years ago and has a hearing date in October, 2020 whereas the instant case equally has a hearing date for October, 2020. Counsel stated that Milimani court was congested and a transfer of the case would delay the matter; that there was no nexus shown between the instant case and the Milimani case. Counsel placed reliance on the case of **Pauline Maisy Chesang v R (2019) eKLR** and submitted that the intention of the instant application was to delay the case; that a murder case could be handled by this court that has original unlimited jurisdiction by dint of Article 165(3) of the Constitution.

4. Miss Kalii for the 2nd accused associated herself with the submissions of Mr. Kamwendwa and added that the Milimani Case was at an advanced stage; that the instant application amounted to forum shopping and the court ought not to allow the same.

5. In rejoinder, Miss Njeru submitted that section 81 applied to all parties and that the DPP had a right to apply for transfer of cases to any court. It was submitted that the hearing of the matter had not started and there would be no delay if the matter gets to the other court. She finally submitted that there was no malice on the part of the DPP.

6. Having considered the submissions of respective counsel, the averments contained in the charge sheet, I have addressed my mind to the law regarding personal and geographical jurisdiction of the High Court, the transfer of criminal cases and the powers and jurisdiction of the High Court.

7. The applicant wants this court to believe that there is another convenient court to handle the matter and not the trial court. In considering the evidence before me consisted in the oral submissions for and against the application, I am required to make a call as to whether or not it is apparent that the call for transfer is well founded. Other than the submissions of counsel I see nothing else that brings to my mind any issue of inconvenience in having this matter heard in this court.

8. The position of the law is that if it appears that the dispensation of criminal justice is not possible, impartially, objectively and without any bias, at any place, the appropriate court may transfer the case to another court, where it feels that holding of fair and proper trial is conducive. When it is shown that public confidence in the fairness of a trial would be seriously undermined, the court at its own motion or any of the parties may seek the transfer of a case. That power is contained in section 81 of *The Criminal Procedure Code* which provides thus;

81. Power of High Court to change venue.

(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.

9. This provision enumerates, although not exhaustively, the extraordinary circumstances which would justify a departure from the stipulation that the place where the offence is committed is where the, inquiry into, prosecution and trial of a case has to be conducted. A motion to transfer is allowed on the ground that prosecution was commenced within the right jurisdiction, but for exceptional reasons, the case should be transferred to another venue outside jurisdiction, subject to any equitable terms and conditions that may be prescribed.

10. In **Joseph Korir alias David arap Chonjo v Republic [2018] eKLR** that relied on **Kamande & 3 Others vs. Republic [2014] eKLR** held thus:

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them. If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”

11. It would therefore necessitate that before invoking section 81 of the CPC, the matter be looked at wholesomely for a change of venue ought not to be granted whimsically, so as not to put into question the independence and integrity of the judiciary. I have not seen the court

file in the Milimani case and am unable to speak about witnesses or the nature of evidence that has been presented; I also have not seen the witnesses or nature of evidence to be presented before the that court. The right to a fair trial as stated by counsel for the 1st accused is guaranteed by article 50 (1) of *The Constitution of Kenya* and it requires "a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. As analyzed earlier, there is nothing to show what steps had been taken in the Milimani case and there is nothing to convince me that there would be any affront to a right to a fair trial if the application is allowed.

12. On the other hand, "Forum shopping" that was mentioned by Miss Kalii typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour. Such an action would be a subversion of justice with the result that the principle of equal protection of the law is undermined. In **McShannon v. Rockware Glass Ltd. [1978] A.C. 795**, Lord Diplock rejected existence of *forum non conveniens* (the non-convenience doctrine positing the discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case) in common law stating that for the interests of all the parties and for the ends of justice, the jurisdiction must be exercised - however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts.

13. Having evaluated the material placed before me, I am not satisfied that it discloses sufficient justification for change of venue of the hearing in a court other than this court. A mere allegation without substantiation is not enough. See **John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980** where Trevelyan J., stated that the test is that of, "*Reasonable apprehension in the applicants or any right thinking person's mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations.*"

14. A careful perusal of section 81 of *The Criminal Procedure Code*, shows that the provision clearly enunciates that the paramount norms of transfer of venue are "expediency" and "the interests of justice." The plea in this matter was taken on 18.6.2020 and that pre-trial directions have already been taken with the matter being allocated a hearing date on the 12.10.2020. Granted that the prosecution requires to manage the case from Nairobi region so as to accommodate the concerns of the 2nd accused who is currently remanded at Kamiti prison as he is involved in the **Milimani High Court Cr. No. 57 of 2016**, the circumstances obtaining currently appear to be different. It is noted that the 2nd accused together with his counsel have always participated in these proceedings on-line via Skype and that there has not been any problem. The police and prison authorities do not have to worry themselves on the logistics of presenting him in court for the trial in view of the on-line appearances. Again, the incident took place within Mlolongo area in Machakos County meaning that witnesses are within reach and can be reached easily. The 1st accused is also reported to reside in Athi River area within the jurisdiction of the court. Further, it has been indicated that the Milimani case is at an advanced stage whereby all witnesses except the investigating officer have testified and thus any consolidation of that case and this one might not be meaningful and will not serve the course of justice and expediency. Looking at all the issues I find that the prosecution in liaison with its homicide section in Nairobi can comfortably handle this matter effectively at Machakos. Suffice here to add that the prosecution has indicated that it has no problem with the court as it has faith in it. That being the case, then the prosecution's request for a change of venue has no merit.

15. In view of the foregoing observations, the prosecution's application to transfer this matter to Milimani lacks merit. The same is dismissed. Parties are now directed to prepare for the trial on 12.10.2020.

It is so ordered.

Dated and delivered at Machakos this 30th day of September 2020.

D. K. Kemei

Judge