



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CRIMINAL APPLICATION NO. E004 OF 2020

CORAM: HON. R.E. ABURILI J

ROBERT SERAPHINE OGALLE.....1ST APPLICANT

MICHAEL WESONGA.....2ND APPLICANT

HENRY LAWI.....3RD APPLICANT

VERSUS

REPUBLICRESPONDENT

(Application for transfer of criminal case from Siaya Law Courts to Busia Law Courts)

RULING

1. By an Application filed in court on 25/10/2020, the Applicants herein **Robert Seraphine Ogalle, Michael Wesonga and Henry Lawi** who are remanded at Busia Main G.K. Prison and who are suspects/accused persons in Siaya PM Cr. Case No.1194 of 2019 facing Robbery with violence charges pray that the said case be transferred to Busia Chief Magistrate's court for hearing and final determination.
2. The grounds upon which the joint application are predicated are that the Applicants have 3 other pending criminal cases in Busia Law Courts and that sometimes the said cases come up for hearing on dates that are concurrent with the case in Siaya Law Courts.
3. That they are remanded at Busia Main K. Prison hence the transfer of the case to Busia Law Courts will ease their movement to courts and necessitate their attendance and hearings and that the said Siaya case has majority witnesses from Busia which will ease the trial process.
4. The cases pending Busia Law Courts are listed as Cr. 3370/2019, Cr. 337/2019 and Cr. 3365/2019.
5. In their oral submissions to canvass the application, the applicants fronted by **Robert Seraphine Ogalle** submitted that in the PM's court at Siaya, they were denied Bond simply because they have 3 other cases pending in Busia Court yet in the Busia cases, they were released on bond.
6. They also submitted that some witnesses in the Siaya Case file are in Busia and hence it will ease the trial if they are heard by Busia court. In addition, it was submitted that it is expensive to hire an advocate and send him to Siaya law Courts from Busia.
7. Opposing the application by the applicants herein, Mr. Ngetich Prosecution Counsel submitted that the offence took place in Siaya, that witnesses and exhibits are in Siaya and that if it is an issue of bond, the applications can appeal. Further, that no prejudice was demonstrated if the case is heard at Siaya Law Courts.
8. In a rejoinder, the 1st applicant **Robert Seraphine Ogalle** on behalf of his co-applicants submitted that in Siaya Cr. 1194/2019 they complained of torture by police at Siaya Police Station but that no decision has been made on the same.
9. In addition, they claim that they have not received statements of witnesses yet it is almost a year since their case was initiated in court. They maintained that witnesses and the Rifle Exhibit is in Busia Police Station. They named the witnesses saying they are police officers based at Busia and added that being moved from Busia to Siaya is difficult due to corona pandemic.

DETERMINATION

10. I have carefully considered the application by the applicants/suspects herein who are remanded in Busia Main G.K. Prison and who are

facing 3 criminal cases before Busia Law Courts and one case Cr. 1194/2019 at Siaya PM's court where they are charged with Robbery with violence.

11. The issue for determination in this application is whether this court should transfer Siaya PM Cr. 1194/2019 to Busia Law Courts for hearing and determination.

12. It is not in dispute that the offence for which the applicants were charged was allegedly committed at Siaya and therefore the question is whether the case should leave Siaya Law Courts to be heard by another court of competent jurisdiction being Busia Law Courts and which is also closer to where the accused persons /applicants herein are remanded, as they have 3 other criminal cases pending before Busia Law Courts, although they claim that in the Busia cases, they are on bond unlike in the Siaya case.

13. Section 81 of the Criminal Procedure Code provides that:

“81(1) whenever it is made to appear to the High court:

(a) That a fair and impartial trial cannot be heard 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 or 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 require by any provision of this code.

It may order:

(i) that an offence be tried by a court not empowered under the preceding Section of this Part but in other respects competent to try the offence;

(ii) that a particular criminal case of 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.”

14. Under Article 165(3) of the Constitution, as read with Section 66 of the Criminal Procedure Code, every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law, may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.

15. Under Section 67 of the Criminal Procedure Code, where a person accused of committing an offence has escaped from where such offence took place, on apprehension, he should be surrendered to the court in whose jurisdiction to the offence is alleged to have taken place to answer the charge and to be dealt with in accordance with the law. This is also echoed in Section 72 of the Criminal Procedure Code.

16. From the above provisions of the law, this court has jurisdiction and authority to grant the prayers sought if it finds, on merit, that they are deserved.

17. However, there is no evidence that the Siaya offence is connected to the 3 Busia Criminal cases and albeit the applicants claim that the Rifle which was allegedly used in the commission of the offence in Siaya is an exhibit in Busia cases, this court has not been shown any prejudice that the applicants will suffer if they are tried in the court in whose local jurisdiction the offence allegedly took place.

18. In **Maina Kinyati V R [1984] eKLR** the Court of Appeal stated that where the apprehension in the mind of the accused that they may not have fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.

19. In this case the applicants claim that they have 3 other cases in Busia Law Courts in which they are on bond but that Siaya Law Courts denied them bond. They also claim that witnesses and exhibits are in Busia hence the convenience in the trial. They also claim that being moved to Siaya Court is a challenge during this Covid-19 pandemic period. Other than being denied bond, the applicants have also said that they complained to the trial court of torture by Siaya Police officers but that no action has been taken.

20. In my humble view, the fact that the Siaya Court denied the applicants bond whereas the Busia Court granted them bond, under very dissimilar circumstances is not evidence of likelihood of prejudice or unfair trial. This court observes that the offence was allegedly committed at Siaya and that albeit the applicants claim that they were denied bond and that witnesses are in Busia, it is clear that the accused were only arrested within the jurisdiction of Busia and brought to Siaya hence the presence of witnesses who are police officers in Busia.

21. In addition, it is clear that albeit the accused claim that they were denied bond in Siaya, it emerges that they were on bond in the 3 cases in Busia and that the criminal activities allegedly committed in Siaya were perpetrated when the applicants were on bond in the Busia cases.

22. The Applicants claim that they complained of torture by Siaya Police officers but the record is clear that they were transferred to Busia Main G.K. Prison because of that complaint as the offence in Siaya involved a police officer who is a key prosecution witness.

23. In my humble view, the accused persons are forum shopping. The fact that there are 3 other cases in Busia, which cases are unrelated to the Siaya case save for their similar in nature does not in itself shift the jurisdiction of the court trying the case in Siaya as the offence allegedly took place in Siaya and being remanded in Busia is a safeguard to the rights of the accused persons who claimed to be tortured by Siaya Police officers.

24. On the alleged convenience and the covid-19 pandemic, there is no evidence that the applicants have failed to appear before any of the two courts because of covid-19 as cases are being heard online and even this application was ably argued online without any hindrance. The applicants can always be given hearing dates in coordination and where their Busia cases are due, they would not be given the same dates in the Siaya matter.

25. The allegations that they have not been supplied with witness statements should be made to the trial magistrate who can direct the Prosecution to supply them without dragging this court into matters of the trial process before the subordinate court.

26. I find no sufficient material to warrant grant of the prayers for transfer of the case Cr. 1194/2019 from Siaya PM's court to Busia Law Courts. In my humble view, the interests of all the parties and for the ends of justice, jurisdiction of courts to try cases must be respected.

27. There is no material to demonstrate that the applicants will not get a fair trial in Siaya Law Courts, especially noting that the fact that the Applicants are on bond in the Busia cases, those cases are still pending and there is no evidence that it is the Siaya case that has caused the delay in the expedition or determination of the 3 Busia cases. Selection of venue cannot be granted to the accused persons who are facing serious charges before a court of competent jurisdiction where the alleged offence was committed.

28. For the above reasons, I find the Applicants' application filed on 25/10/2020 not merited. I dismiss it.

29. File closed.

30. Orders accordingly.

Dated, signed and Delivered in open court at Siaya, this 24th Day of November, 2020

R.E. ABURILI

JUDGE

In the Presence of:

Applicants virtually present in court from Busia Min G.K. Prison

Mr. Ngetich, Prosecution Counsel for State

Court Assistant: Brenda and Modestar