



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 179 OF 2020**

**ABDALLA SALIM**

**SHEIKH ALI YASIR**

**JOSEPH MUNYAU....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. On 29<sup>th</sup> July, 2020 Mr. J.O. Magolo wrote to the High Court through the Deputy Registrar, seeking revision of an order made by Hon. Odhiambo, Resident Magistrate (RM), on 29<sup>th</sup> July, 2020.
2. The letter stated that the said order relates to the place of hearing and jurisdiction of the court in Shanzu Senior Principal Magistrate's Court Criminal Case No. 141 of 2020. Mr. Magolo explained that the accused persons (applicants) were charged with the offence of stealing and that the offence allegedly happened in Bungoma County. The said letter further indicated that the applicants were arrested in Nairobi, hence in terms of the provisions of Section 71 of the Criminal Procedure Code, the place of trial ought to have been in either Malaba or Nairobi.
3. Mr. Magolo prayed for this court to resolve whether the Shanzu Senior Principal Magistrate's Court has jurisdiction to hear the case in issue and whether it is legal and correct to proceed with a trial in Shanzu Law Courts.
4. The Director of Public Prosecutions through Ms Mwangeka filed grounds of opposition on 25<sup>th</sup> August, 2020 to the effect that-
  - i. The application was an abuse of the court process and intended to embarrass this Honourable court;
  - ii. The applicant was guilty of material non-disclosure of the fact that there existed petition No. 50 of 2020, between the same parties which sought similar orders as those pleaded in the revision herein which was pending hearing on 21<sup>st</sup> September, 2020 before Hon. Justice E. Ogola; and
  - iii. The multiplicity of actions by the applicant amounted to forum shopping and gross abuse of the legal process.
5. This court directed the Counsel for the parties to make oral submissions. Mr. Magolo admitted that they had indeed filed High Court Constitutional Petition No. 50 of 2020 before Judge E. Ogola and that it was dismissed. He stated that the order which forms the subject of the present application arose from Shanzu Senior Principal Magistrate's Court Criminal Case No. 141 of 2020, where the applicants herein, are the accused persons. He submitted that they appeared before Hon. Odhiambo, RM, on 29th July, 2020 and applied for the discharge of the accused persons, on 2 grounds. Firstly, on the basis of the charge being defective, yet neither the prosecution nor the court amended it. He indicated that as per the charge sheet, the applicants were charged with the offence of stealing by agent and that the offence occurred at Nyalu Sub-County within Mombasa County.
6. Mr. Magolo referred to the evidence of PW1 who stated in his evidence that the offence occurred at Malaba and that the applicants switched off their phones thereafter. He therefore asserted that on 30<sup>th</sup> June, 2020 when the said witness testified and disclosed the place where the offence took place, the Director of Public Prosecutions (DPP) had a duty to make an amendment to the charge. He stated that the statement of PW1 was recorded on 6th January, 2020 and it was disclosed thereon that the offence occurred at Malaba. He also stated that the Trial Magistrate did not know where the offence occurred before PW1 testified. He submitted that the error on the charge sheet was done

deliberately so that the case could be heard in Shanzu Law Courts.

7. In Mr. Magolo's view, the filing of the case in Shanzu Law Courts was done fraudulently as the Trial Magistrate could not have admitted the charge, if the particulars disclosed that the offence occurred at Malaba. He took the position that after PW1 testified, the court could have made an order *suo moto* for the charge to be amended.

8. He submitted that since the particulars of the charge and the evidence did not agree, the applicants should be discharged. He also submitted that when a charge has been wrongly drafted, an accused person can be discharged. He also said that in the lower court case, no attempt had been made to amend the charge. He prayed for revision of the ruling made by Hon. Odhiambo, RM, directing the case to proceed to hearing.

9. The second issue raised by Mr. Magolo on the reason as to why the ruling of 29th July, 2020 made by Hon. Odhiambo, RM, should be revised was that his court lacked jurisdiction to hear the case, since the offence was committed elsewhere. He cited the provisions of Section 71 as read with Section 81 of the Criminal Procedure Code (CPC) and said that they demonstrate that matters relating to the charge and place of trial must be raised at the earliest opportunity. He indicated that in the lower court case, an objection was raised after PW1 adduced evidence.

10. It was submitted by the applicants' Counsel that although Section 380 of the CPC provides that no trial shall be set aside because it took place in a place which was outside the local limits of jurisdiction of where the offence was allegedly committed, the respondent chose to go to the wrong jurisdiction. He was of the view that what the DPP had shown was pure impunity and that if any correction was to be made, it should be done before the trial proceeded any further.

11. With regard to Mombasa High Court Constitutional Petition No. 50 of 2020, Mr. Magolo indicated that the issues raised therein included the illegal detention of the applicants and the jurisdiction of the Shanzu Law Courts as a place of trial. He indicated that the said petition was mentioned on 28<sup>th</sup> July, 2020 before Judge E. Ogola and he declined to give any interim orders. It was also stated that directions were given on how they were to proceed on with the said petition but they later withdrew it.

12. On the claim by Mr. Masila that the applicants were forum shopping, as per paragraph 3 of the DPP's grounds of opposition, Mr. Magolo contended that the DPP also forum shopped when it brought charges against the applicants at Shanzu Law Courts, for an offence which allegedly happened in Malaba. He prayed for the charge at Shanzu Law Courts to be struck out. He was of the view that an order for transfer of the case would not serve the purpose expected because the DPP was determined to pursue the prosecution of the lower court case in Shanzu Law Courts.

13. Mr. Masila, Prosecution Counsel, relied on the grounds of opposition filed by the DPP's Office. In making reference to Constitutional Petition No. 50 of 2020, he indicated that it came up for hearing on 28th July, 2020 before Judge E. Ogola and one of the orders sought was on the jurisdiction of Shanzu Law Courts to hear the lower court case No. 114 of 2020. He indicated that the said Judge did not grant any orders for stay of the lower court proceedings but stated that the case should be heard at Shanzu Law Courts as the said court had heard witnesses. It was submitted that the lower court case came up for hearing on 29<sup>th</sup> July, 2020 but Mr. Magolo made an application seeking the discharge of the applicants and also raised the issue of jurisdiction in having the case heard before the said court.

14. It was pointed out that the application on jurisdiction was made before the Trial Court when there was a similar application pending determination before the High Court. It was stated that in the lower court, Mr. Magolo never disclosed that he had filed a Constitutional Petition before the High Court but the Counsel for the respondent brought it to the Trial Court's attention. He made reference to Judge E. Ogola's ruling in the said petition on page 11 at paragraph 21, where he captured the issue raised in the present application. Mr. Masila indicated that the matter before Judge E. Ogola was about the jurisdiction of Shanzu Law Courts to hear the lower court case but the application for revision includes the said issue and about the charge being defective. Mr. Masila submitted that under Section 214 of the (CPC), amendment of a charge can be made at any time before the closure of the prosecution case. He further stated that under the said Section, the court may make an order for alteration of the charge. He further stated that Trial Magistrates have jurisdiction over the matters in their courts as long as they are done legally. He urged this court not to micro-manage the proceedings before the Trial Court.

15. It was submitted that only 1 witness had testified as to where the offence was committed and that this court was being asked to look at the evidence of the witness and not the charge sheet. The respondent's Counsel stated that the complaint in issue was made at Nyali Police Station, investigations were carried out in Mombasa and the police then arrested the applicants. He indicated that the applicants' place of residence is Mombasa. Mr. Masila pointed out that the applicants' Advocates have their practices in Mombasa and that the complainant resides in Mombasa. He cited the provisions of Section 81(1)(d) of the CPC which address the general convenience of the parties with regard to the place of trial. He opined that in the lower court case, the general convenience of the parties was for the case to be heard in Shanzu Law Courts.

16. The respondent's Counsel referred to Section 72 of the CPC which provides for the place of trial. He indicated that a trial can be done by a court within the local limits of jurisdiction where the offence was committed or the consequences have ensued. He indicated that the money the applicants were to be given was to be delivered in Mombasa, but it never was.

17. He asserted that jurisdiction is conferred by the Constitution or statutes or both and that in the case before the lower court, Shanzu Law Courts had jurisdiction to hear the case. He cited the provisions of Sections 66 and 67 of the Magistrate's Courts Act which empower the said courts to hear criminal cases.

18. Mr. Masila indicated that the plea was taken on 20th January, 2020 and only one witness had testified as at the month of November, 2020 whereas there were over 20 witnesses to be called.

19. In making reference to Article 50 of the Constitution, he submitted that a trial should begin and end without undue delay. Further, that delay in having the lower court case heard was being caused by the applicants; who filed a multiplicity of applications which they withdrew

after the prosecution found out about the existence of the same.

20. It was pointed out that when the application for revision was filed, this court was not informed of Constitutional Petition No. 50 of 2020. He was of the view that such a scenario can cause an embarrassment to the courts through issuance of conflicting orders, but the DPP's office informed Judge E. Ogola of the application filed herein when the Constitutional Petition was pending before him. Mr. Masila urged this court to vacate the orders made at *ex parte* stage, as Shanzu Law Courts had jurisdiction to hear the case before Hon. Odhiambo. RM.

21. Ms Oboga who was watching brief or the victim of the offence submitted on the issue of failure on the part of the applicants to disclose material information that there was a Constitutional Petition which had been filed before the High Court in Mombasa. She stated that it was necessary for the applicant to have disclosed about the said petition as the *ex parte* orders may not have been granted. She submitted that it was immaterial that the applicants withdrew Constitutional Petition No. 50 of 2020. She prayed for the *ex parte* orders granted to be vacated and for dismissal of the application for revision.

22. Mr. Magolo responded by stating that there was confirmation by Mr. Masila that some witnesses come from Malaba. He submitted that although a charge can be amended at any time before the close of the prosecution's case, an accused person has the right to raise an objection at the earliest stage. He pointed out that the DPP could only rely on the provisions of Section 81 of the Criminal Procedure Code in order to move the High Court to have the trial held at Mombasa. Mr. Magolo indicated that they were challenging territorial jurisdiction. He also stated that an accused person should be charged where an offence was committed, and where the offence causes a ripple effect, he should be tried in another jurisdiction.

23. He indicated that the latter presupposes that the truth shall be told to the Trial Court about where an offence occurred. He stated that although they had been accused of non-disclosure of material information, Judge E. Ogola declined to issue an order staying the lower court proceedings and that on 29th July, 2020 the lower court issued a ruling which forms the subject of this application. He further pointed out that jurisdiction was one of the grounds for determination before Judge E. Ogola

24. Mr. Magolo indicated that they failed to disclose to this court about High Court Constitutional Petition No. 50 of 2020 but it had no bearing to the application before this court, as this application was made pursuant to the ruling by Hon. Odhiambo, RM, made on 29th July, 2020.

#### **ANALYSIS AND DETERMINATION**

The issue for determination whether Shanzu Law Courts has jurisdiction to hear and determine Shanzu Senior Principal Magistrate's Court Criminal Case No. 141 of 2020.

25. The lower court proceedings reveal that on 28<sup>th</sup> January, 2020 the plea against the applicants was taken in Shanzu Law Courts. The hearing of the case commenced on 30<sup>th</sup> June, 2020, with Mohamed Amir testifying as the 1<sup>st</sup> witness. The case was then scheduled for further hearing on 29th July, 2020. Come the said date, Mr. Magolo made an oral application for the applicants to be discharged from the proceedings due to what he referred to as a defective charge sheet and lack of jurisdiction by the Trial Magistrate to hear the case before him, as the offence was committed in Malaba.

26. The issue that this court has been called to adjudicate upon is on the jurisdiction of the Shanzu Law Courts to hear the lower court case. The issue of the charge being defective was not raised in the application for revision and therefore though submitted on, this court will not address a matter which it is not seized of, through the application dated 29<sup>th</sup> July, 2020. I have noted that the present application was filed on 30th July, 2020 when Constitutional Petition No. 50 of 2020 was pending hearing and determination before Judge E. Ogola. One of the issues that the petitioners sought to be determined in the said petition was whether Shanzu Law Courts had jurisdiction to hear Shanzu Senior Principal Magistrate's Court Criminal case No. 140 of 2020 (lower court case).

27. I have read the ruling of Judge E. Ogola dated 22<sup>nd</sup> September, 2020. His finding was that institution of the present application for revision when Constitutional Petition No. 50 of 2020 was subsisting was an abuse of the court process. Further, he found that the institution of multiple actions in different courts of the same jurisdiction on the same subject matter against the same opponents, and without disclosing the same to this court was an abuse of the court process. Judge E. Ogola allowed the petitioners in Constitutional Petition No. 50 of 2020 to withdraw the petition.

28. This court holds a similar opinion as that of Judge E. Ogola to the effect that a litigant should decide where to file his/her case and pursue is to the end. It is however bad practice for a litigant to file several cases in different courts seeking similar orders. Filing of the revision application when the Constitutional Petition was pending was indeed forum shopping and in bad taste. Such conduct is not only unprofessional but is frowned upon by this court because it reeks of mischief and downgrades litigation to the level of playing a game of chess, as was stated in the case of **Kiambu County Tenants Welfare Association v The Attorney General and Another** [2017] eKLR, cited by Judge E. Ogola in Mombasa High Court Constitutional Petition No. 50 of 2020.

29. In the matter before this court, the provisions of Section 81 of the CPC which were cited by Mr. Masila are not applicable. The said Section is explicit on the procedure to be followed when a change of venue is sought by an accused person. Mr. Magolo did not move this court under the said provisions as he did not file an application by way of Notice of motion supported by affidavit but opted to apply for revision. The issue of having the case heard at Shanzu Law Courts for the general convenience of the parties under Section 81 of the CPC, does not arise in this case.

30. This court has been called upon to look into the correctness, propriety and legality of the decision of Hon. Odhiambo, RM, to have the lower court case heard at Shanzu Law Courts.

31. Section 71 of the CPC provides as follows with regard to the ordinary place of inquiry and trial –

**“subject to the provisions of Section 69, and of the powers of transfer conferred by Sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to the summons lawfully issued charging the offence.”**

32. In the copy of the typed proceedings attached to the application for revision, PW1 in his evidence stated that he made a report about the theft of the US Dollars 50,000 to Nyali Police Station. He also stated that the applicants were arrested in Nairobi. He also said that the cash in issue was handed over to the 1<sup>st</sup> and 2<sup>nd</sup> applicants at Malaba and they were to bring it to him in Mombasa, which never happened. Going by the said facts, if the alleged offence was committed, it is not known where the conversion of the cash happened, since the applicants were brought to Mombasa after being arrested. The said evidence was adduced on 30<sup>th</sup> June, 2020. Counsel for the applicants relied on the evidence of PW1 and the contents of the statements of the prosecution witnesses to make an application for discharge of the applicants by the lower court. Their contention in the lower court was that the applicants were charged before a court with no jurisdiction. It was Mr. Magolo’s view that the alleged offence was committed at Malaba and it was the proper place for trial.

33. Section 72 of the CPC makes provision for trials at the place the act was done or where the consequences of the offence ensues. It states as follows:-

**“When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.”** (emphasis added).

34. In the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others** [2012] eKLR, the Supreme Court stated thus -

**“[68A] A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”**

35. Bearing in mind the provisions of Section 72 of the CPC and the above authority, although the alleged theft of the cash in issue is said to have happened either in Malaba or Nairobi, the consequences of the said theft ensued in Mombasa where the 1<sup>st</sup> and 2<sup>nd</sup> applicants were to deliver the US dollars 50,000. For the said reasons, Shanzu Law Courts has jurisdiction to hear the case before it touching on this application. Section 72 of the CPC confers jurisdiction on the said court.

36. Further, the provisions of Section 380 of Criminal Procedure Code provide as follows-

**“no finding, sentence or order of a criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong area, unless it appears that the error has occasioned a failure of justice.”**

37. In the present application, the applicants have fallen short of demonstrating how the hearing of the lower court case in Shanzu Law Courts will occasion a failure of justice for them.

38. Although Mr. Masila submitted that Judge E. Ogola directed that criminal case No. 114 of 2020 should proceed in Shanzu Law Courts which had heard witnesses, having read through the ruling of Constitutional Petition No. 50 of 2020, it is clear to me that the said Judge did not determine the issue of jurisdiction as he allowed the applicants to withdraw the petition and to pay the costs to the respondent. In essence, Judge E. Ogola left this court to determine the issue of jurisdiction through the revision application. Having surmised my findings above, I hold that the ruling by Hon. Odhiambo, RM, dated 29<sup>th</sup> July, 2020 was well thought out and determined the issue of jurisdiction properly. I hold that the said ruling was not tainted with impropriety, incorrectness or illegality.

39. I therefore find that the application for revision dated 29th July, 2020 is devoid of any merit and is hereby dismissed. The *ex parte* orders granted on 30<sup>th</sup> July, 2020 staying the lower court proceedings are automatically vacated by the dismissal of the application.

40. The lower court case file shall be returned to Shanzu Law Courts for mention of the case on 22nd January, 2021 for fixing a hearing date before Hon. D. Odhiambo, RM.

**DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of December, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Messrs Magolo and Adala for the Applicants

Mr. Masila, Prosecution Counsel for the DPP

Mr. Oliver Musundi- Court Assistant.