



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 27 OF 2018

PROSECUTORREPUBLIC

VERSUS

ISAAC KIPTOO RONO *Alias* MALAKWEN1ST ACCUSED

PIUS KIPKORIR MOSONIK2ND ACCUSED

JULIUS KIPYEGON MENGICH3RD ACCUSED

RULING

The application dated 20th May 2019 was brought by the prosecution, seeking the transfer of this case from Kisumu to Nakuru.

1. The application was premised on **Section 81 (e)** of the **Criminal Procedure Code** and **Article 157 (1)** of the **Constitution of Kenya**.
2. On the face the application it was stated that the reason for seeking the transfer was because;

“..... it is in the interest of justice (as) the director of public prosecutions has an obligation to maintain a high degree of integrity and to avoid any actual, potential appearance of partiality in the prosecution of all cases.”

3. The application is supported by an affidavit sworn by **CPL FREDRICK ODEMBA**, a police officer attached to the Directorate of Criminal Investigations HQ, Serious Crimes Unit, Homicide Section.
4. He deponed that the offence of Murder, with which the accused have been charged, occurred as a result of land disputes along the Nandi – Kisumu boundary.
5. For that reason, he expressed the view that it was important for the trial to be conducted by a court considered to be neutral to both the accused persons and the victims.
6. Cpl. Odemba said that it is only when the court was neutral, in the sense stated above, that any perceptions of partiality would be erased.
7. Secondly, he said that if the further trial of the case proceeded in Kisumu, there was a likelihood that violence would be ignited between the Luo and Nandi communities, who reside within the area where the offence was committed.
8. He added that there had already been attempts to interfere with the case. The alleged attempts at interference are said to be pegged to the fact that some witnesses had failed to turn up for Witness Protection.
9. The police officer said that witnesses have expressed safety concerns about having the trial proceeding in Kisumu, due to the court’s proximity to the place where the offence was committed.
10. It is common ground that, pursuant to **Section 66** of the **Criminal Procedure Code**, accused persons ought to, generally, be tried by courts of competent jurisdiction within Kenya.
11. However, pursuant to **Section 71** of the **Criminal Procedure Code**, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction the offence 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 where the accused has appeared in answer to summons lawfully issued, charging him with the offence.

12. However, **Section 71** is expressly stated to be subject to the provisions of **Section 69** and also to the court's power to transfer cases from court to another.
13. **Section 79** of the **Criminal Procedure** makes provision for the transfer of cases between magistrates.
14. Whilst **Section 81** of the **Criminal Procedure Code** outlines the power of the High Court to change the venue for the hearing of criminal cases.
15. In this case, Mr. Muia, learned State Counsel, submitted that he was relying on **Section 81 (1) (d) and (e)** of the **Criminal Procedure Code**.
16. He invited the court to find that the proposed transfer would tend to the general convenience of the parties and the witnesses.
17. He also said that the transfer of the case would facilitate the expedient disposition of justice.
18. He explained that the continued hearing of the murder case in Kisumu would stifle justice, as there was a real possibility that some youths could attempt to harm the accused persons.
19. If such an attempt were made, the prosecution expressed fear that that could ignite retaliation from the community of the accused persons.
20. Attacks and retaliations between the two communities, from which the accused, on the one hand, and the victim, on the other hand, hail from, could lead to tribal clashes.
21. Therefore, the prosecution believes that the only way to avoid the possibility of clashes taking place, was the transfer of the case from Kisumu to Nakuru.
22. In answer to the application, Mr. Mauwa Advocate pointed out that the transfer of the case would actually be inconsistent with the need to ensure convenience to both the accused persons and the witnesses.
23. Mr. Onsongo Advocate echoed those sentiments.
24. The incident giving rise to this case took place within Kisumu County.
25. It is common ground that the witnesses would come from within the said Kisumu County.
26. Therefore, as the accused persons have pointed out, it would definitely be more expensive and time-consuming for;
 - (a) *The witnesses; and*
 - (b) *The families of the accused persons who may wish to be present in court during the trial.*
27. Meanwhile, as regards the contention that the accused persons might interfere with witnesses or had attempted to do so, the accused denied the same vehemently.
28. It was pointed out that to date the prosecution had not yet revealed to the accused persons, the identities of the witnesses.
29. In any event, some witnesses were said to already be under the State Witness Protection System.
30. I find that the prosecution has not provided the court with any tangible material to show that the accused had either interfered with witnesses or had attempted to interfere with any witnesses.
31. If the prosecution or the investigative arm of the state had obtained reliable information about youths who had planned to harm the accused, it would have been expected that the said youths should already be facing the full impact of the law.
32. Surely, it would not be right for the police to have reliable evidence about persons who had planned to commit crimes, and then the police officers fail to take appropriate action against such persons.
33. In any event, the 2nd accused was already granted Bond pending trial and he is thus not in custody.
34. During the time he has been out of the remand cells, he says that he has gone about his life as normal. He has interacted with members of the Luo community, and there has been no threat to his life.
35. Thus, whilst the prosecution may be placing reliance upon intelligence reports, which suggest probable danger to the accused persons and possibility of clashes, the life that the 2nd accused is continuing to experience is inconsistent with the intelligence reports.

36. The accused persons have explicitly stated that they do not have any doubts about the ability of this court to grant them a fair and impartial trial.

37. In response to that statement, Mr. Muia, learned State Counsel said that the prosecution has every confidence in this court. He added that;

“We know that the court has ability to deliver justice.”

38. It is thus crystal clear that the impartiality of the court is not in doubt. Secondly, the court’s ability to deliver justice has been re-affirmed and recognized by both the prosecution and the accused persons.

39. Nonetheless, the prosecution said that the matter before the court is much broader than the scope of this case. According to the prosecution;

“the matter herein goes to the wider scope of the society. We are not only dealing with the interest of the accused and the witnesses.

The geographical area within which the offence was committed is notoriously known to engage in clashes from time to time.”

40. In the circumstances, it now becomes clear that the prosecution is not simply addressing the issue of the fair trial of the accused persons.

41. The prosecution is concerned about the;

“... need to prevent the possible actualization of clashes.”

42. I take judicial notice of the clashes that have taken place in the geographical area where the offence herein was committed.

43. I share the prosecution’s desire and will take appropriate action to prevent possible actualization of clashes.

44. However, I am not satisfied that there is any demonstrated nexus between the accused persons and the clashes that have taken place. Therefore, I am unable to say that if the case is transferred to Nakuru, the possibility of the clashes would have been banished.

45. I therefore decline the request for the transfer of the case to Nakuru.

46. However, just in case any person is uncomfortable with the fact that a Luo Judge was handling a case in which the victim is from his community, whilst the accused persons were from a community which is occasionally engaged in ethnic clashes with the Luo, I do hereby recuse myself from this case forthwith.

47. The case will henceforth be handled by the Hon. Lady Justice Cherere.

DATED, SIGNED and DELIVERED at KISUMU

This **29th** day of **July** 2019

FRED A. OCHIENG

JUDGE