



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL REVISION NO. 40 OF 2019**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**ABUBAKAR MOHAMED SWALEH.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Igonga for the state**

**Mr. Magolo and Abubakar for the accused person**

**RULING**

**Background**

1. The Applicant/prosecution approached this Court vide a letter dated 16<sup>th</sup> September 2019 pursuant to 80 and 81 of the Criminal Procedure Code. The matter concerns the determination on the question of transfer of two cases, to wit, Criminal Case No. 820/19 and SO Number 23/19 from Malindi to Lamu which cases are said to have generated a lot of publicity. It is also grounded upon Article 165(3)(a) of the Constitution of Kenya wherein this Court has unlimited original jurisdiction in criminal and civil matters and further pursuant to Article 165(6) which bestows upon the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function.
2. This case emanates from **Lamu Resident Magistrate Criminal Case No. 233 of 2014 (*Republic -vs- Abdulswamad Swaleh Mohamed, Mohamed Salim Mohamed, Dennis Mwangi Ndegwa, John Karisa Karume and Athman Omar Mohammed*)** in which the Respondent's brother *Abdulswamad Swaleh Mohamed* among others with similar offences being faced by the Respondent therein.
3. The record of proceedings shows that during the hearing the abovementioned matter the Applicant herein sought to introduce a confession made by Denis Mwangi Ndegwa. In the said confession, Dennis Ndegwa claims that *Abdulswamad Abu* and their employee Bady of Already Company approached him and gave him the work to set on fire the complainant store. The trial court at Lamu proceeded to convict the accused persons who preferred an appeal in the High court at Garsen save for the Dennis Ndegwa.
4. According to the Counsel for the Respondent the after being granted bail *Abdulswamad* engaged the services of a private investigator to find out the circumstances of the alleged confession and he obtained a report. (*herein marked as YMA-6*). *Abdulswamad* proceeded to launch a complain with police at the police Headquarters in Mombasa.
5. The Record shows that when Dennis Ndegwa was released from prison, he made a complaint to the police at the Headquarters in Mombasa after which he was advised to swear an affidavit. In the said affidavit, Denis Mwangi Ndegwa confirms that the confession he made during trial was a plan hatched by the complainant's brother, Salim Auni, in cahoots with the with a C.I.D. officer who was also the Investigating Officer by the name Obure, the then Magistrate Monguti and the prosecutor handling the matter.

**The Applicant's Submissions**

6. The applicant filed submissions on the 24<sup>th</sup> of September 2019 in support of its application. It is indicated therein that this Court's jurisdiction to transfer the matters in question is derived from the abovementioned Articles 165(3)(a) and 165(6) of the Constitution as well as Section 80 and 81 of the Criminal Procedure Code. It is averred that this court directed that the Applicant supply a copy of the letter to the Respondent to the Respondent's Counsels but they did not bother to collect the same from the Applicant's chambers.

7. According to the Applicant, the genesis of this matter was initiated by Petition Number 8/19 of the High Court at Mombasa by the Respondent with the sole purpose of defeating justice since he had been on the run since 2014. It is stated that the said petition was not canvassed by all parties and did not touch on the issue of the availability of witnesses during trial but the parties only consented on the trial court being in Malindi to the total exclusion of the investigating officer and the Complainant and the office of the Director of Public Prosecution.

8. The Applicant says that its office was never comfortable with the said consent and that is why it never pursued the Respondent to take plea immediately after the order was made, that is on the 30<sup>th</sup> may 2019. When the Respondent appeared before Mombasa High Court the Court directed that the Respondent takes plea on 21<sup>st</sup> August 2019 without fail. According to the Applicant this was after the accused went on the run in Criminal Case Number 308/2015 which was with withdrawn at the behest of the judicial officer and fresh Criminal Case Number 272/2017 where warrants have been pending since 2017.

9. It is averred that the respondent was never arrested and brought to court on 21<sup>st</sup> August 2019 as alleged by the defence counsel but he voluntarily did so in compliance of the order of the High court in Mombasa. The Applicant explained that it only goes to show that the Applicant was still weighing its options on how the Respondent would be arraigned in Lamu were it not for the Court order.

10. The Applicant claims that the Respondent admitted in his Petition No. 8/19 at Mombasa (para 2) that he was running away from a warrant of arrest issued by the Lamu Principal Magistrate's Court in criminal Case Number 272/17. In the Applicant's view, this goes to show that the Respondent was forum shopping for a court that would be convenient to him but not justice. It is further indicated that the said Petition did not disclose anything unfair or unjust with the Lamu Courts.

11. It is also averred that this matter has come up before the subordinate court twice but we have been unable to proceed due to the unavailability of witnesses. The Applicant stated that this has been occasioned by the ambush and change of hearing date from 10<sup>th</sup> December 2019 without notice, and the long distance between Lamu and Malindi. In its view, the same is likely to cause miscarriage of justice.

12. The Applicant also claims that the Counsel for the Respondent's assertion that he was with a star witness by the name Dennis Mwangi whom he said was ready to testify only goes to show that the said witness had been compromised and he is under control of the defence. The Applicant denied ever meeting with the said witness and neither have they done a pretrial with him. In the applicant's view the defence have already manipulated the case.

13. The Applicant claims that after the manipulation by the defence counsel, the said witness claims to be threatened and yet there is no report at any Police Station but to the contrary he had reported threats by the Respondent at Lamu Police Station on 22<sup>nd</sup> July 2018 under OB No. 36-22-2018. The Applicant questioned how a complainant would have threatened his main witness.

14. On change of jurisdiction of the trial court, the Applicant argues that Section 71 of Criminal Procedure Code as cited by the Respondent does not confer jurisdiction to Malindi Court as the Respondent was never arrested in Malindi hence the same ought to be transferred to Lamu for the reasons that:

***(a). The case originated from lamu;***

***(b). There has been no determination why the court in Lamu or Judicial Officers in Lamu should not proceed with the case neither has the aspect of bias by the judicial officers in Lamu been demonstrated and or evidenced in the pleadings.***

***(c). The general convenience of the victim and witnesses ordinarily reside in Lamu.***

***(d). The need for the trial court to visit the scene prior to final determination of the case so that the ends of justice can be served.***

***(e). That the foregoing application is written the remit of the court vide section 71 of the Criminal Procedure Code as regards the jurisdiction and, in any event, there are pending summons and warrants before the court in Lamu to which to which he ought to answer rather that ignore in criminal case number 272/17.***

#### **The Respondent's Case**

15. The Counsel for the Respondent swore a replying affidavit on behalf of the Respondent on the 18<sup>th</sup> of September, 2019. The Respondent indicates that for the High Court to transfer the said case to Lamu from Malindi, the Applicant needs to prove that the Magistrate court in Malindi cannot be fair and impartial, the general convenience of the parties or witnesses and expedient for the ends of justice, among other reasons.

16. The Counsel for the Respondent is of the view that the manner in which the Malindi Subordinate Court has handled the matter in question so far has demonstrated that it is not conducting this matter fairly and impartially. It is contended by the Respondent that by taking into account the affidavit made by Dennis Mwangi Ndegwa, it is clear that the Complainants have great influence over the judiciary in Lamu, the police and the prosecution. Further that this application is a way of forum shopping after they have realized they cannot manipulate the judiciary in Malindi.

17. The Respondent avers that it is apparent from the contends of the said affidavit that the witness is scared about his safety in Lamu and not trust the judiciary and the police in Lamu. And for the general convenience of all the parties in the matter, the Counsel for the Respondent requests that the case proceeds in Malindi.

18. It is indicated that this Application is made after the Respondent was arrested in Malindi when he was attending a mention of this matter and when he had been granted order staying his arrest. After having been arrested, he was arraigned in court on 23<sup>rd</sup> August, 2019 and took plea to which he pleaded not guilty. Further that the Respondent was therefore granted bond after the Applicant had vehemently opposed the same.

19. It is alleged that the Applicant was not happy with the granting of bail to the Respondent and applied for revision in *HC CR REVISION NO. 37 of 2019* which was heard at Mombasa on 29<sup>th</sup> August, 2019. On the 3<sup>rd</sup> September, 2019 *Justice Thande* upheld the trial Court ruling and suspended the processing of the bond until the said Denis Mwangi Ndegwa testified expeditiously.

20. When Learned Counsel for the Respondent appeared for mention of the matter on the 6<sup>th</sup> September, 2019, the filed could not be traced and the court directed by the trial magistrate to appear on 10<sup>th</sup> September, 2019. On the 10<sup>th</sup> September, 2019 the trial court directed that the said Denis Mwangi Ndegwa do testify on 13<sup>th</sup> September, 2019. It is alleged that on that date, the Applicant did not present the witness and despite the Court not convicted by the reasons given, it directed that Denis Mwangi Ndegwa do testify on 17<sup>th</sup> September, 2019 September failure to which the Respondent would be released on bail.

21. According to the Respondent, when the Applicant realized that the Respondent would be released on bail, they made this application. In Learned Counsel's view, the application is not only incompetent as under Section 81 of the Criminal Procedure Code as the same must be made by motion not latter, that the same is abuse of court process and that the application was made in bad faith in order to frustrate the Respondents release on bail.

22. It is further contended that the Application violates the Respondents right to access to justice under article 48 of the Constitution, his right to be released on bond under Article 49 of the Constitution, his right to a fair hearing under Article 50 of the Constitution and the judicial principles under Article 159(2)(c) for proceeding without delay.

23. Learned Counsel was also of the view that when an application is made in terms of section 81 of the CPC, it is not based jurisdiction but rather it pre-supposes that the court from which the matter is to be transferred has jurisdiction as well. In addition, Section 71 of the Criminal Procedure Code gives Malindi Court jurisdiction to proceed with this matter as the Respondent was apprehended in Malindi and he is in custody in Malindi prison.

## **Analysis**

**Clarence Darrow (American Lawyer, Speaker and Writer, 1857 - 1938 as he then was)** stated that:

*“justice has nothing to do with what goes on in a courtroom, justice is what comes out of a courtroom.”*

24. In terms of Article 50 of our Constitution every one charged with a criminal offence as the following minimum rights. “to be presumed innocent until the contrary is proved, to be informed promptly in a language which he understands and in detail the nature of the offence and accusation by witnesses, to have adequate time and facilities for the preparation of his defence, to have a right to legal counsel of his own choice or to be given by the state where substantial injustice is likely to occur, to examine and challenge evidence against him, to remain silent, to have assistance of an interpreter provided by the state, to have evidence unlawfully obtained, excluded from being admitted for purposes of securing his conviction.

25. The examination of right to a fair trial must be taken as a whole and be accorded the accused person at all stages of proceedings. The applicability of Section 80 and 81 of the CPC must therefore be construed in a substantive rather than procedural.

26. The law as regards the powers of the High Court to change venue of a matter is found in Section 81 of the Criminal Procedure which provides as follows:

*“81(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.”*

27. The power of the High Court to transfer any specific case from one subordinate court to another under this provisions is aimed at to meet the ends of justice and satisfy the principles of fair trial.

28. The logical interpretation of Section 80 and 81 of the CPC can be drawn from **R. H. Shivaramun** and **Mrs. V. Udayavani** in their article published in the **International Journal of Pure and Applied Mathematics (Volume 120 No. 5 2018, 2743 – 2761)** on **A critical analysis on the power of High Court in transfer of cases and appeals** when considering Section 407 of the Indian CPC which has similar provisions with Section 81 of our code.

29. The questions which the court must satisfy itself on the various occasions it is confronted with an application for transfer include the following grounds.

*1. To meet the ends of justice:- It is the utmost duty of the court to take all such measures to meet up the ends of justice and to pronounce the Judgment which should also send a good message in the society that justice was not only done it was done with an impact that it appears that justice is done. The court is the most trusted and sacred institution. And every person holds a very high relative position and respect for court and its decisions. So the courts have extra moral obligation to keep the spirit of trust and confidence alive within this machinery. This ground to meet the ends of justice have a wide connotations it could be easily understood that this authority would have high degrees of discretionary powers. Which could be used in accordance with the factual quantum to provide justice to all the subject litigants. The factual matrix of every trail whether civil or criminal proceedings is quite different so in order to ascertain a premanaged situation for dealing may not ensure a fair trial or may even end up causing irreparable loss of the interest of the litigants. Therefore, the court has been vested with such discretionary authority to determine such question regarding transfer of court.*

*2. As per the inquiry report of any superior judicial officer such as any Chief judicial magistrate or any sessions judge the trail must not be controlled by a particular magistrate or any other officer such a report shall also be deemed to be a valid ground for such transfer of a case from one court to another.*

*3. The trail court deems it fit to be transferred from its purview or the determination of the trail may involve such substantial question of law. Determining substantial question of law far above its jurisdiction would render the complete trail fruitless.*

*4. The court has a limited jurisdiction over the subject matter of the dispute in such limited or shared juridical issue the court trying the matter will have a liberty to transfer the case to the court which have competent jurisdiction to try that matter conclusively so that the complete trail could not be failed because of lack of complete jurisdiction.*

*5. Mutual collision between the party and other judicial officer. The possibility of corruption is no stranger to the judicial fraternity. In such cases to avoid the failure of interest of the actual aggrieved party between the litigants the court provides reasonable opportunity to the party which may have such apprehension.*

*6. The judicial officer being engaged or involved in the litigation by some or the other. In such scenario the litigant parties have complete freedom to approach the authorities for avoiding any collision of interest when capitalized through any characterized persons.*

*7. The judicial officer may be made as witness. If any judicial person has been made as a witness to any trail this surfaces the end of the ability of that person to conduct the trail. Such actions may append breach of ordinary prudence of fair trial and may impeach the interest of justice.*

*8. When the court or any judicial authority is working in contravention to the principles of natural justice. Any if such breach when reported to the authority continues to happen the aggrieved party would be free to take shelter for preferring transfer of case.*

*9. Any mutual disturbance or unethical relationship between the lawyer or the judicial office may also prefer an application of transfer of case from one court to another.*

The said grounds in my view are a clear in their purport in stressing the importance of ensuring the principle of equality of arms.

30. The principles upon which change of venue may be granted has been crystalized in the leading case of **Shelenje v Republic (1980) KLR 132** which lays down the principle that the for the High Court to transfer a matter from one venue to another, there should be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be given before the Magistrate whether one takes the incidences individually or collectively. At the same time, there ought to be something before court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made. In **Maina Kinyatti v Republic [1984] eKLR** the Court of Appeal considered the test under Section 81 of the CPC to satisfy the following criteria. **“Where the apprehension in the mind of the accused that he may not have a 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.”**

31. In the instant application this Court notes that the witness by the name Dennis Ndegwa has raised a genuine concern regarding threats that allegedly have been made against him pursuant to the affidavit that he swore at Mombasa Police Headquarters after his release from prison. I have taken into account the Applicant's position that the allegations made by the Counsel for the Applicant that the said witness was threatened only goes to show that the witness was manipulated by the Counsel for the Respondent.

32. Be that as it may, my view is that threats pertaining to the life of a human being are not to be taken lightly. This Court is duty bound to balance the rights of all the parties with an interest in this matter if just justice is to be delivered. In doing so the court also needs to protect the integrity of the criminal process, to preserve the integrity of the prosecution evidence, the safety of the witness, victims and other interested persons whose lives may be in jeopardy and that includes the accused person.

33. The witness in question is a critical one. If protection is not accorded to such a potential and critical witness he may not be comfortable to testify in certain geographical areas. In this case, Lamu has been identified as a risk area without state protection for him to submit himself to the jurisdiction of the court. To my mind, that is ample reason to cause witness to have genuine fear, ambivalence and anxiety. The inability of the state to ensure the protection and security of witnesses will eventually lead to the failure of rendering meaningful fair trial.

34. In such a situation, the prosecuting authority has the responsibility to safeguard the risks which may arise in the preservation of the right to life under Article 26 of the Constitution of the said key witness. It is however a well known fact in certain criminal proceedings there may be threats to life or intimidation of key witnesses whom the state will be compelled to offer witness protection services.

35. How could witnesses best contribute to the strengthening of administration of justice and the rule of Law where there are no adequate facilities for their safety and security. The hallmarks of a fair trial include the right to see and have a witness testify without any fear of reprisal, intimidation or threat to his/her security.

36. As this case shows the applicant has not demonstrated the quality of legal safeguards given to the star witness that has been summoned to testify against the accused. The very real security risk to which witnesses are exposed to on account of the nature of the crime in particular where it involves violence like in the instant case is a feature which the prosecution cannot just wish away. In this regard an expeditious trial is both beneficial to both the accused and victims of crime. It is the duty of this court to see to it that justice is appropriately administered in a manner that inspires confidence in the criminal justice system and advances rights to a fair trial. On this ground alone this court finds that preservation of Duncan Ndegwa's evidence will be for the interest of justice.

37. I have come to the conclusion that there is strong and compelling reasons why the witness in question should be protected and his evidence be preserved so as to guarantee progress of this case to its finality without undue delay.

38. This court therefore, finds that the said witness ought to be heard at Malindi on a priority basis. The primary file should be forwarded to the Chief Magistrate on the 30<sup>th</sup> of September to take directions and fix a hearing date to receive and admit the evidence of the said witness.

39. However, it is important to consider whether a fair trial will be impaired in Lamu given the back ground information and circumstances which establishes a prima facie case for want to accede for transfer of the trial. My answer is in the affirmative. This Court is in this respect guided by the often-cited decision of the Isiolo Chief Magistrate's Court in the case **Graham Rioba Sagwe & 2 Others v Fina Bank Ltd & 5 Others [2017] eKLR** as follows:

***“Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism. And again decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.”***

40. In the instant case, some of the witnesses that are to be called by the prosecution have previously testified in another case which are within the knowledge of the applicant. Hence, to comply with Section 81 and other enabling laws which prescribe the principle that an accused person should be charged where the cause of action arose or where the alleged offence was perpetrated. I have also considered the convenience of the witnesses who ordinarily reside in Lamu where the cause of action arose. Thus, this court finds that to avoid long delays and prohibitive costs of transporting witnesses to Malindi the second phase of the trial could be scheduled before Lamu Court. However, this is subject to the applicant paying particular attention to challenges to access to justice that may be aggravated due to lack of sufficient capacity to provide effective facilities to ensure a fair trial takes place.

41. One other thing which requires mentioned by this court is the procedural defect by the applicant who filed a request for consideration by way of a letter instead of notice of motion. However, due to the urgency of this case, and the fact that there would be no prejudice to the respondent I agrees to determine the issue on transfer of the suit brought pursuant to Section 81 of the CPC.

42. Lastly under Article 49 (1) (h) the respondent had been released on bail pending trial. At the same time an application for review was filed before the high court in which Hon. Lady Justice Thande issued an interim interdict against the respondent on account that a key state witness be permitted to testify in accordance with the law and thereafter the respondent be released from prison custody. Having examined the order and look at the right to be admitted to bail, I am of the view that no reasonable and justifiable cause should for me to exercise discretion to limit that right any longer. The circumstances that evolved from the analysis of this application failed to persuade this court to pre-review change of venue for not providing sufficient evidence, that the nature and the gravity of the offence, the relative prominence of the respondent, the local community, pre-trial publicity are of a nature to occasion reasonable prejudice to the respondent. I say so because the respondent right to a fair and impartial trial in our courts is guaranteed by the constitution.

43. Based on the foregoing, the applicant request partially succeed and the following orders shall abide.

***a. That the evidence of a key witness of the prosecution as earlier ordered by Hon. Lady Justice Thande be preserved on a***

*priority basis by having it adduced and admitted before the Chief Magistrate, Malindi.*

*b. Thereafter, the accused person be at liberty to enjoy his bond granted under Article 49(1) (h) of Constitution.*

*c. As a consequence of the above, the criminal file No. 820 of 2019 be and is hereby forwarded to the Chief Magistrate, Hon. Chepseba for directions scheduled to take place on the 30<sup>th</sup> September 2019. The implication of the above Constitutional provisions combined demand that application of Section 80 and 81 of the CPC do apply by having the rest of the witnesses testify before the Principal Magistrate at Lamu.*

*d. Based on Order 3 it is worthy of mention from the prima facie evidence on record that the state ensures that the rights of the accused and the witnesses lined up to testify on behalf of the state are in the circumstances of the facilities at Lamu Court safeguarded and protected.*

*e. That the accused is entitled to the fundamental rights entrenched in terms of Article 49 and 50 on fair pre-trial and trial rights.*

*f. The attendance of all parties before the Chief Magistrate is indispensable.*

**GIVEN UNDER MY HAND AND SEAL OF THE COURT ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2019**

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**R. NYAKUNDI**

**JUDGE**