



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL MISC. NO. 23 OF 2017**

**SAMWEL KITEIYET.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT NGONG.....2<sup>ND</sup> RESPONDENT**

**RULING**

Samwel Kiteiyet the applicant through Ms Agina learned counsel filed an amended notice of motion in court on 30<sup>th</sup> November, 2017 pursuant to Article 22, 50 of the constitution and Section 81 of the Criminal Procedure Code seeking the following relief.

- 1. That pending the hearing of and determination of this motion the hearing of Chief Magistrate Court Kibera Cr. Case No. 3040 of 2017 be and is hereby stayed.**
- 2. That the Kibera Chief Magistrate Court of Kenya in Criminal case No. 3040 of 2017 be transferred to a court within Kajiado County to be heard and determined.**

The facts giving rise to the application are straight forward as contained in the affidavit of the applicant. The applicant was arrested on 2<sup>nd</sup> January, 2017 in Kiserian within Kajiado County. The initial indictment was before the Chief Magistrate Ngong in Criminal reference Cr. No. 20 of 2017. The applicant further deposes that on 23<sup>rd</sup> February 2017 the chief Magistrate allocated the case to court No. 2. However the case was never determined before the same chief Magistrate. Under the direction of Mr. Achoki, he caused it to be transferred to Kibera law courts. According to the applicant the chief Magistrate Ngong lacked the jurisdiction to transfer the case out of his jurisdiction.

In opposition to the application the respondent through Mr. Alex Akula filed a replying affidavit. In the affidavit the respondent deposes that the intended transfer lacks merit. Mr. Akula further submitted as to the proximity of the court for the witnesses whom the respondent intends to summon in support of the case.

From the application it is plain that this court has jurisdiction under Section 81 of the Criminal Procedure Code to grant the kind of orders sought by the applicant. Section 81 of the Criminal Procedure Code deals with transfer of cases from a Criminal court subordinate to another subordinate court.

The High Court may act under this section where it has received a report from the lower court or on application of a party interested, or on its own motion. Every application shall be made by motion which shall except when the applicant is the Director of Public Prosecutions be supported by affidavits. An accused person making any such application shall give to the director of public prosecutions notice in writing of the application together. The applicant being aggrieved of the order on transfer filed this notice of motion to have the matter heard and determined at Ngong Court Chief Magistrates Court.

As laid down in Section 81 the transfer of cases is exercised within the scope of the following grounds.

- a. That a fair and impartial trial cannot be heard in any criminal court subordinate thereof or**
- b. That same 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 find 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 provisions of this code.**

There is no doubt from these provisions this court has wide discretion to transfer cases on the ground of expediency or for the ends of justice.

I have considered the rival arguments as set out in the respective affidavit evidence. What emerges from the application is that the applicant (accused) was arrested at Kiserian which is within Kajiado County. After recording witness statements he was arraigned before Chief Magistrate Ngong for plea. In circumstances it is not clear from the affidavit why learned Magistrate Hon. Mbungi caused the file to be transferred to Kibera law courts.

In cases of this nature we are not told that the hearing and determination of the case is not possible before any of the judicial officers at Ngong Court. The applicant has not alleged bias or partiality against the trial Magistrate at the court. When the Chief Magistrate made an order for transfer he should have taken into account the convenience of the parties, including witnesses identified by the state to testify at the trial. Concerning the allegations of language in which the trial court will use to depose off the case it has not been shown that Ngong court had no such services of an interpreter.

From the record Hon. Mbungi presiding Magistrate caused a transfer of the case to Kibera Law Courts purportedly invoking Section 79 and 80 of the criminal procedure code. ***“The jurisdiction to transfer cases between Magistrates is vested in the 1<sup>st</sup> class subordinate court like the one held by the Chief Magistrate at Ngong. However in exercising that jurisdiction there is a rider and the catch words are within the local limits of the 1<sup>st</sup> class subordinate court’s jurisdiction.”***

Based on this Kibera Chief Magistrate within Nairobi County geographically is not under Kajiado County. A decision of the trial court to transfer the case to Kibera Law court lacked requisite jurisdiction. The record discloses the Magistrate acted in excess of his jurisdiction.

As a result I invoke the powers of revision under Section 362 of the Criminal Procedure Code Cap. 75 of the laws of Kenya to set aside the order on transfer.

As a result the transfer motion dated 5<sup>th</sup> September, 2017 is hereby allowed. The Chief Magistrate Criminal case No. 20 of 2017 be and is hereby re-transferred back from Kibera Law Courts to Ngong to be heard and determined by Hon. Ogombe, SRM on priority basis. That the Deputy Registrar do forward the lower court record to Chief Magistrate Ngong on or before 1<sup>st</sup> February, 2018.

Dated, signed and delivered in open court at Kajiado this 30<sup>th</sup> day of January, 2018.

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**R. NYAKUNDI**

**JUDGE**

**In presence of:**

Mr. Agina for the applicant

Mr. Akula for the respondent