



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CRIMINAL NO. 94 OF 2017

ALLAN SOITA ACCUSED

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant, Allan Soita (“Applicant”) faces two counts before the Kikuyu Principal Magistrates’ Court. The first one is trafficking in a person contrary to section 3(1)(b) as read together with section 4 of the Trafficking in Persons Act, No. 8 of 2010. The facts are that on diverse dates between 1st July 2017 and 28th July 2017, in the Kinoo area of Kikuyu sub-county of Kiambu County within Central region with others before the Court, unlawfully abducted an abandoned child aged 2 months and 2 weeks old without proper authorization from the Children’s Department.

2. The second count is abducting with intent to confine contrary to section 259 of the Penal Code. The facts are that on that on diverse dates between 1st July 2017 and 28th July 2017, in the Kinoo area of Kikuyu sub-county of Kiambu County within Central region with others before the Court, with intent to cause an abandoned child aged 2 months and 2 weeks old to be secretly and wrongfully confined.

3. The Applicant was presented before the Kikuyu Principal Magistrate’s Court in Criminal Case No. 796 of 2017 and took plea. He has now moved to this Court seeking the transfer of his case to the Narok Chief Magistrate’s Court.

4. Briefly, the Applicant’s case is that the alleged crime was actually committed in Narok, most of the witnesses are based in Narok and that he will heavily rely on a scene of crime visit for his defence – and that is in Narok. He therefore thinks that it is only fair that the trial should be held in Narok. Additionally, the Applicant says that his family and friends have an interest in the case and they would be unable to travel to Kikuyu every time it comes up for hearing.

5. According to the Applicant, the brief facts of the case are as follows. On 28/05/2018, an infant was found abandoned at the gate of Narok Cottage Hospital. A report was made to Narok Police Station by the Hospital Caretaker, Ezekiel Mbugua on the same day vide OB No. 40/28/05/2017.

6. The Applicant says that he made a report to the Narok Children’s Department and spoke to a Mr. Julius Sinigi about the incident. The Children’s Department proceeded to give the

Applicant temporary custody of the infant since Narok Referral Hospital was closed due to nationwide Nurses’ strike. The temporary custody was given vide a letter which is annexed to the Applicant’s affidavit.

7. The infant remained at Narok Cottage Hospital for 45 days without any follow up by the Children's Department. The Board of Directors of the Hospital, at which the Applicant sits, recommended family care for the baby and the Applicant accepted the request to take care of the baby through his wife. His wife apparently lives in the Kikuyu area and therefore she sent a cousin, a Josephine Gathogo to collect the infant from Narok to bring it to Kikuyu as they awaited further word from the Police or the Children's department. Unfortunately, the infant died due to respiratory failure. Investigations by Kikuyu Police Station unearthed the facts alluded to above but the investigators formed the view that the purpose of removing the child from Narok to Kikuyu was, in fact, trafficking and abduction hence the charges.

8. The Applicant is persuaded that any alleged offence was committed in Narok and not Kikuyu and that in the event he is put on his defence all his ten witnesses are in Narok. He sees little reason other than oppression for the case to be tried in Kikuyu.

9. The Applicant has relied on section 81 of the Criminal Procedure Code to request the Court to transfer the case to Narok. That section reads as follows:

Whenever it is made to appear to the High Court:

- a) That a fair trial cannot be held in any criminal court subordinate thereto; or
- b) That a view of the place in or near which the offence has been committed may be required for the satisfactory trial of the offence; or
- c) That an order under this section will tend to the general convenience of the parties or witnesses; or
- d) That such an order is expedient for the ends of justice or is required by any provisions of this code.

10. The Applicant is persuaded that his rights under Article 50(2)(c) and (k) of the Constitution. These two provisions assure each Accused Person a right to have adequate time and facilities to prepare a defence and a right to adduce and challenge evidence. The Applicant is apprehensive that if put on his defence his right to a fair hearing and to adduce and challenge evidence will be seriously impaired if the case is tried in Kikuyu and not Narok.

11. The Prosecution is persuaded that the offence was committed in Kinoo, Kikuyu and not Narok. The Prosecution argues that the report of a missing child was made in Narok but that "does not translate to the place the offence was committed.

It only begins a series of events that would later lead to offence. The actual offence was made when the Applicant decided to transport the child to transport the child from Narok to Kikuyu without the lawful permission of the Children officer."

12. Secondly, the Prosecution argues that the names of the potential prosecution witnesses have not been disclosed and is apprehensive that this is just a ruse for forum shopping. The Prosecution argues that the Court should require very strong grounds for transferring a case from one judicial officer to another. This should be more so when the allegation is that there will be a fair trial.

13. Having carefully considered the facts of this case, it appears to stretch credulity to make the claim that the offence was definitely committed in Kinoo. The Prosecution does not seem, at least at this point, to dispute the chain of events that led to the transport of the infant to Kinoo. If true, then it cannot be categorical that the offence was committed where the child was found dead. It is not denied that the abandoned child was found in Narok and that the report of the missing child was made in Narok. The account of how the decision to transport the child to Kikuyu is also not disputed. Hence, while the offence of trafficking is more thoughtfully thought of as a process rather than event, it would appear to make little sense to categorically insist that the offence was committed in Kinoo.

14. In cases such as this, as the Applicant correctly points out, aside from the place where the offence was committed, the other more relevant factor is the convenience of the parties – and, especially, the Accused Person, in mounting his defence. The Prosecution mis-apprehends the argument by the Applicant in this regard. The Applicant does not claim that the Magistrate’s Court in Kikuyu is predisposed to be unfair against him for any reason – personal or otherwise. Hence, the reliance on the *Maina Kinyatti v R (1984) eKLR* is inappropriate. Instead, the argument is that the place of trial in the current case and in the present context would make the trial unfair because it would make it unduly burdensome for the Applicant to prepare facilities for his defence and his defence. In my view, this coupled with the ambiguity of where the offence was committed would militate in favour of the case being tried in Narok rather than Kikuyu.

15. For these reasons, I hereby allow the Notice of Motion dated 09/11/2017 and order that Kikuyu Principal Magistrate’s Criminal Case No. 796 of 2017 (Republic v Allan Soita) be transferred from Kikuyu Principal Magistrate’s Court to Narok Chief Magistrate’s Court for hearing and disposal.

Dated and delivered at Kiambu this 9th day of February, 2018.

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JOEL NGUGI

JUDGE