



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 332 OF 2017

ALPHONCE OCHIENG Omoth.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Alphonce Ochieng Omoth made an application pursuant to the provisions of **Sections 78(1) and 81** of the **Criminal Procedure Code** and **Article 50(2)** of the **Constitution** seeking to have **Nairobi Chief Magistrate's Court Criminal Case No.1671 of 2017 (Milimani) Republic –vs- Alphonce Ochieng Omoth** transferred from the said court to Makueni Law Courts for trial and final disposal of the case. The Applicant avers that the offence that is the subject of the trial occurred at Wote in Makueni County. Majority of the witnesses come from Makueni County. The Applicant is a residence of Makueni County. It is the Applicant's case that the prosecution's decision to charge him in Nairobi instead of Makueni Law Courts has caused him great burden and hardship due to the expenses that he has had to incur in travelling from Makueni to Nairobi to attend trial. The Applicant therefore urged the court to invoke its jurisdiction and order that the case be transferred to Makueni for trial. If this was done, the Applicant is of the view that the ends of justice would be served. The application is supported by the annexed affidavit of the Applicant.

The application is opposed. Corporal Gerald Kamwaro attached to the Flying Squad Headquarters in Nairobi swore a replying affidavit in opposition to the application. He deponed that the complainant in the case was based in Nairobi. The majority of the witnesses were employees of the complainant based in Nairobi. The case was investigated by the police based in Nairobi. He swore that there was no basis upon which the court could exercise its discretion and transfer the case from Nairobi to Makueni. It was the officer's belief that the Applicant was essentially seeking to forum shop to defeat and frustrate the cause of justice. He urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Makori for the Applicant and by Ms. Atina for the State. Apart from citing authorities, learned counsel essentially reiterated the contents of the application and the response thereto. This court has carefully considered the said submission. It has also had the benefit of reading the application and the response made thereto. The issue for determination by this court is whether the Applicant made a case for this court to invoke its jurisdiction and transfer the above case from Nairobi to Makueni. **Section 72** of the **Criminal Procedure Code** designates the place where a criminal trial shall be conducted. It provides thus:

***“When a person is accused of the commission of an offence by reason of anything which has been done or 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.”***

Whereas it is the Applicant's assertion that the alleged offence that is the subject of the trial occurred within the jurisdiction of Makueni Law Courts, it is the prosecution's case that the alleged offence was committed in Nairobi within the jurisdiction where the charge against the Applicant was lodged.

This court's evaluation of the facts of the case leads it to the conclusion that the consequence of the alleged offence ensued in Nairobi. Although the Applicant was employed by the complainant in Makueni, the complainant is based in Nairobi, its witnesses are based in Nairobi, the case was investigated in Nairobi and therefore the charges were properly laid against the Applicant in Nairobi. The two decisions cited by the Applicant being **David Kiagano Mbisi v Republic [2012] eKLR** and **Galgalo Abgudo Wario & 2 Others v Republic [2015] eKLR** are not of assistance to the Applicant's case. The main issue in the two cases was whether the Applicants in the two cases would be prejudiced by the alleged impartiality of the courts that the said applicants sought to have the cases transferred from. In the present application, the Applicant has not alleged that he would be prejudiced by virtue of the fact that the court that will try him will be biased. Far from it. The Applicant's main reasons for seeking the transfer of the case is on account of the expenses that he will allegedly incur during the hearing of the case by travelling from Makueni to Nairobi.

The upshot of the above reasons is that the application lacks merit and is hereby dismissed. The trial shall proceed to its conclusion before the Chief Magistrate's Court Nairobi (Milimani). It is so ordered.

DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL 2018

L. KIMARU

JUDGE