



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPLICATION 150 OF 2018 CONSOLIDATED WITH CRIMINAL APPLICATION NO. 147 OF 2018

SWALEH YUSSUF AHMED

FATUMA AHMED.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Swaleh Yusuf Ahmed on 24th October, 2018 filed an application premised on the provisions of Articles 49 and 50(2)(g) and (j) of the Constitution of Kenya and Sections 66, 72 and 77 of the Criminal Procedure Code and all enabling provisions of the law. He seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable court be pleased to order and direct that criminal case No. 126 of 2018 currently before the SRM JKIA Law Court be transferred to the Chief Magistrate's Court Mombasa for hearing and disposal; and

(iv) That this court be pleased to make any such order that it may deem fit to grant.

2. On 31st October, 2018, Swaleh Yussuf Ahmed and Fatuma Ahmed filed Mombasa High Court Miscellaneous criminal application No. 150 of 2018. It is premised on the same provisions of the law as Mombasa High Court Miscellaneous criminal application No. 147 of 2018. The applicants seek the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable court be pleased to order and direct that the criminal case No. 130 of 2018, Republic vs Swaleh Yussuf Ahmed and Criminal case No. 118 of 2018, Republic vs Fatuma Ahmed, whether consolidated or otherwise currently before SRM JKIA Law court be transferred to the Chief Magistrate's Court Mombasa for hearing and disposal; and

(iv) That this court be pleased to make any order that it may deem fit.

3. The two applications are supported by the grounds outlined thereon and the affidavits of Jared Magolo, Advocate.

4. On the 20th November, 2018 the 1st and 2nd respondents, filed a replying affidavit sworn on 20th November, 2018 by No. 233801, Chief Inspector Martin Ndegwa of DCI Nairobi. The respondents also filed grounds of opposition on the said date.

5. On application by Mr. Ombeta appearing with Mr. Magolo for the 1st applicant, Mombasa High Court criminal application No. 147 of 2018 was consolidated with Mombasa High Court criminal application No. 150 of 2018, with the latter being the lead file.

6. Mr. Magolo submitted that they sought transfer of criminal case No. 118 of 2018 registered at JKIA Senior Principal Magistrate's Court as Republic vs Fatuma Ahmed, criminal case No. 126 of 2018 registered in the said court registered as Republic vs Swaleh Yussuf Ahmed, as well as a third case, criminal case No. 130 of 2018, Republic vs Swaleh Yussuf Ahmed also registered in the said court. They sought transfer

of the said cases to Mombasa Chief Magistrate's Court for hearing and disposal. This court was informed that the cases have not been consolidated.

7. With regard to JKIA SPM Court criminal case No. 118 of 2018, Mr. Magolo submitted that the 2nd applicant herein was charged for an offence that allegedly occurred on 20th September, 2018 at Kikambala, which is in North Coast.

8. In reference to JKIA SPM Court criminal case No. 126 of 2018, Counsel for the 1st applicant stated that his client was charged with the offence of trafficking in narcotic drugs on 16th October, 2018 along the Mombasa-Malindi road.

9. Mr. Magolo further indicated that the 1st applicant was also charged in JKIA SPM Court criminal case No. 130 of 2018 where it is alleged that on 20th September, 2018 at Kikambala, he trafficked in narcotic drugs.

10. It was submitted for the 1st applicant that despite the offences having allegedly occurred at Kikambala and Shanzu, the applicants were spirited 500km away from where the offence is said to have been committed, without any explanation. Mr. Magolo stated that he had deposed to, in his affidavit that the applicants reside in Mombasa and Kikambala and the courts nearest to the place where the offence occurred are Mombasa and Shanzu. He therefore argued that it is the right of the applicants to be charged close to where they reside and they need to be accorded that right.

11. Counsel for the 1st applicant referred to Article 50(1) of the Constitution of Kenya which provides for the right to a fair hearing in a public place and Article 50(2)(d) of the Constitution which provides for hearing of a public trial. Reference was made to Mombasa High Court criminal application No. 153 of 1992, **Khalid Salim Ahmed Balala vs Republic** (unreported), where Judge R.S.C Omolo (as he then was) on 4th December, 1992 held that unless the parties to a dispute themselves wish to, or unless the court so directs, criminal trials are to be held in open court. The court therein transferred a case that had been filed in Voi to Mombasa for convenience of the applicants and their witnesses and their sympathisers.

12. In Mr. Magolo's view, the charging of the applicants herein 500 km from Mombasa will deny them a right to public hearing as their friends and relatives will not afford to travel that far.

13. It was submitted that no valid explanation had been given as to why the applicants were charged in Nairobi, as all that was said is that some prosecution witnesses reside in Nairobi. Mr. Magolo stated that if the Police were finding it difficult to bring witnesses to Mombasa as a result of which they charged the applicants in Nairobi, then the converse is also true that the applicant's relatives and friends would find it difficult to travel to Nairobi for hearing of the cases. He cited the decision of Mativo J in **Nyeri High Court Criminal Appeal No. 50 of 2012** where the court stated that an accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of whether he has taken a plea.

14. Mr. Kangahi, Learned Counsel for the 2nd applicant, submitted that this court is clothed with powers to transfer matters under Section 81(1)(c) of the Criminal Procedure Code. He suggested that instances can arise whereby a court would be required to visit the scene of crime such as in this case. Counsel therefore submitted that it would be expensive and inconvenient to all parties when such a situation would arise. He further submitted that the 2nd applicant stands to lose greatly if the case she has been charged with is heard in Nairobi. It was his view that the convenience of the parties calls for JKIA SPM Court criminal case No. 118 of 2018 to be transferred to where the offence occurred.

15. Mr. E. Okello for the respondents stated that the reasons advanced by the applicants in Mombasa High Court criminal application No. 150 of 2018 with regard to JKIA SPM Court criminal case No. 118 of 2018 and JKIA SPM Court criminal case No. 130 of 2018 is for their convenience and their families due to the long distance from Mombasa to Nairobi; and having the right of representation by Advocates of their choice.

16. Counsel for the respondents submitted that the applicants should have sworn affidavits to demonstrate that they make meagre resources but the affidavits filed were sworn by Mr. Magolo instead of them. It was indicated that contrary to the deposition in paragraph 3 of the said affidavit, sworn on 31st October, 2018, the 2nd applicant was arrested in Nairobi, not in Shanzu, Mombasa. Mr. Okello further submitted that there is an intention to consolidate the 3 cases in the JKIA Senior Principal Magistrate's court that form the subject of this application.

17. Counsel for the respondents posited that the law does not have mandatory provisions to the effect that a person must be charged within the jurisdiction where an offence was committed. He cited the provisions of Section 66 of the Criminal Procedure Code (CPC) and stated that an accused person can be charged in any jurisdiction. He argued that the import of the provisions of the Section 72 of the CPC is that an accused person may be charged within the local limits of the jurisdiction where the offence was committed. Mr. Okello made reference to the case of **Shabbir Ali Jusab and Another vs Republic** [2009] eKLR where the court stated that the provisions of section 72 of the Criminal Procedure Act are not in mandatory terms but are discretionary.

18. He also cited the case of **Stephen Gikonyo Kirugumi vs William Omwonga and Another** [2017] eKLR, where the court allowed transfer of a case for purposes of consolidating a case that was pending in Nanyuki with another that was in Isiolo.

19. The court was informed that the 2nd applicant had been arrested earlier and when the 1st applicant was arrested, he was taken to Nairobi. It was indicated that the applicants' Counsel had not submitted that the Senior Principal Magistrate's Court at JKIA had no jurisdiction to try the charges the applicants have been charged with.

20. Counsel for the respondents contended that a court should be asked to transfer a case if a party is apprehensive of getting a fair trial in the court which is seized with the hearing of the case. He supported his argument by making reference to the case of **John Brown Shilenje vs Republic** [1980] eKLR, where the case was transferred because the applicant expressed apprehension of fairness by the trial court.

21. With regard to the case of **Khalid Salim Ahmed Balala vs Republic** (supra) it was submitted that it was untenable as the lack of relatives in court during a hearing cannot lead to an unfair trial. In his view, an unfair trial is one that is tainted with impropriety.

22. Mr. Okello pointed out that the 1st applicant is facing 2 other cases in Shanzu law courts and there is a like likelihood of bias arising if the fresh cases he is facing are heard in the said court, as all the cases relate to drugs.

23. It was submitted that Mr. Magolo will not be denied an opportunity to represent the 1st applicant as he traveled to Nairobi for plea taking in the cases facing his client and furthermore, the 1st applicant has a choice of other Advocates.

24. Counsel for the respondents submitted that the issue of the *locus in quo* being visited will be an issue for the trial court. He also stated that the applications herein should have been anchored on the provisions of Section 81 of the Criminal Procedure Code.

25. Mr. Magolo admitted that the 1st applicant has 2 drug related cases in Shanzu Law Courts and if there is to be apprehension, it should be from the Hon. Magistrate at the said court who is hearing the cases. He stated that the Prosecution should not submit on matters that have not actually happened as no third charge had been lodged against the 1st applicant at Shanzu Law Courts.

26. With regard to the authorities relied on by Counsel for the respondents, Mr. Magolo submitted that a question of the distance between the *locus in quo* and the jurisdiction where an accused person was charged did not arise. He submitted that the court declined to transfer the case referred to in **Stephen Gikonyo Kirugumi vs William Omwonga and Another** (supra). It was argued that since the 1st applicant was arrested in Shanzu, he should have been charged in Mombasa, and that the 2nd applicant who was in Nairobi should have been brought to Mombasa to be charged.

27. He stated that the ODPP should not determine the 1st applicant's right of choice of Advocate. In concluding he submitted that fair trial encompasses even the place of trial and that they had given adequate reasons why the cases should be transferred from JKIA Senior Principal Magistrate's Court.

ANALYSIS AND DETERMINATION

28. The issues of determination are:-

- (i) If the charging of the applicants herein in JKIA Senior Principal Magistrate's Court encompasses a fair trial; and
- (ii) If the 3 cases the subject of the present applications herein should be transferred from JKIA Senior Principal Magistrate's Court to either Mombasa Chief Magistrate's Court or Shanzu Senior Principal Magistrate's Court.

29. I do agree with Mr. E. Okello for the respondents that in addition to the provisions of Articles 49 and 50 (2)(g) and (j) of the Constitution of Kenya and Sections 66, 72 and 77 of the Criminal Procedure Code (CPC), the applicants ought to have anchored their applications on the provisions of Section 81 of the CPC as well.

30. The said provisions state as follows:-

Whenever it is made to appear to the High Court-

- “1. (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 subordinate to its authority of equal or superior jurisdiction;***
 - (iii) that an accused person be committed for trial to itself.***
- (2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.”***

31. It is however my finding that the failure by the applicants to anchor their applications on the above provisions of the law is not fatal to the present applications. The provisions of Article 159(2)(d) of the Constitution of Kenya come to the benefit of the applicants in that justice shall be administered without undue regard to technicalities.

32. Having perused the provisions of Article 49 of the Constitution of Kenya as against the submissions made herein, there is nothing to show that the said provisions were contravened by the respondents. The applicants also relied on the provisions of Article 50(2)(g) and (j) of the Constitution of Kenya. The said provisions state as follows:-

“ (2) Every accused person has the right to a fair trial, which includes the right-

(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

33. In this instance, the applicants rely on the provisions of article 50(2)(g) and (j) of the Constitution of Kenya contend that being charged in JKIA Senior Principal Magistrate’s court will curtail their rights to a fair trial and more specifically, that they will be denied of a public trial as their friends and relatives will not afford to travel 500km way to follow the proceedings against the appellants.

34. The case cited by Mr. Magolo of **Khalid Salim Balala vs Republic (supra)** was heard during the previous constitutional dispensation and it is obvious from a reading of the said authority that the charging of the said accused person in Voi Court was aimed at curtailing his freedom of speech and association. It was by virtue of the foregoing that the court ordered for the case in Voi to be transferred to Mombasa for hearing.

35. On what constitutes a public trial, I do support Mr. Okello’s argument that a public hearing does not only entail friends and relatives but does include any member of the public who may be in court. In my considered view, charging the applicants so far away from the jurisdiction where the offences were allegedly committed would however lead to a costly trial which would be punitive to the applicants. This would curtail the right to fair hearing especially if the applicants will be released on bond pending trial and have to meet the costs of travel from Mombasa to Nairobi and accommodation expenses. Fair trial, in my view transcends a broad spectrum of factors and cannot be looked at just from the lens of impropriety on the part of the trial court.

36. The importance attached to having relatives and friends present when an accused person is charged with a criminal case is however not lost to this court.

37. It was argued that the 1st applicant will be denied the right to having an Advocate of his choice, Mr. Magolo, representing him if this court allows the cases in JKIA Senior Principal Magistrate’s Court to proceed therein. It is common ground that the 1st applicant was represented by both Messers Magolo and Ombeta. Mr. Magolo’s office is in Mombasa. On the day of hearing of the applications herein, Mr. Ombeta had traveled from Nairobi to Mombasa to represent the 1st applicant. It therefore follows and as Mr. E. Okello for the respondents submitted that the issue of legal representation is not a pertinent issue. If the applicant could afford to meet the costs of Mr. Ombeta’s travel and subsistence in Mombasa, he can as well meet the costs of Mr. Magolo’s expenses in Nairobi. I therefore find that the argument advanced by Mr. Magolo on the issue of legal representation not to be well grounded based on the facts available to this court.

38. The High Court is empowered by the provisions of Section 76 of the CPC to decide the place of trial and under the provisions of Section 81 of the said Act to transfer a case on the basis of the convenience of witnesses and parties, where it appears that a fair trial cannot be held, or where such order is expedient for the ends of justice or is necessary.

39. In the present instance, it was admitted by the respondents that the 1st applicant was arrested in Mombasa and the 2nd applicant in Nairobi. The 2nd applicant was arrested on 21st September, 2018 and charged in JKIA Senior Principal Magistrate’s Court criminal case No. 118 of 2018. The 1st applicant was arrested in Shanzu, in Mombasa, on 16th October, 2018 and transported to Nairobi where he was charged in JKIA Senior Principal Magistrate’s Court criminal case No. 126 of 2018. The foregoing is discernible from the depositions contained in the replying affidavit of No. 233801 Chief Inspector Martin Ndegwa.

40. The supporting affidavit of Mr. Magolo sworn on 31st October, 2018 is to the effect that when the ruling of this court in Mombasa High Court criminal application No. 147 of 2018 was being awaited, in respect to JKIA SPM Court criminal case No. 126 of 2018, the applicant Swaleh Yussuf Ahmed had another charge registered as JKIA SPM Court criminal case No. 130 of 2018. I do agree that such a move on the part of the Prosecution was aimed at defeating the orders issued by this Court with regard to JKIA SPM Court criminal case No. 126 of 2018. In this court’s view, the foregoing was an abuse of the court process.

41. In the replying affidavit by the respondents, the explanation given for not charging the 1st applicant in Shanzu law courts is that he is facing two other drug related charges in the said court. That being the case, nothing stopped the respondents from charging the 1st applicant in Mombasa Chief Magistrate’s Court. Nothing also stopped the Prosecution from making arrangements to transport the 2nd applicant from Nairobi to Mombasa to charge her with the offence she is now facing in Nairobi. The respondents had the capacity to transport the 1st applicant to Nairobi to charge him, in similar vein, they had the capacity to bring the 2nd applicant to Mombasa to charge her in Mombasa Chief Magistrate’s Court.

42. It is apparent that by charging the applicants in Nairobi, the Prosecution went forum shopping as the reasons advanced in their affidavit for not charging the applicants in either Shanzu Senior Principal Magistrate’s Court or Mombasa Chief Magistrate’s Court are not satisfactory. Much as the Director of Public Prosecutions has the leeway to charge an accused person within the jurisdiction where an offence is committed or where he/she is arrested, once a court is moved to decide on the matter, the Prosecution has the onus of laying a sound basis

for the decision that was arrived at on the jurisdiction where an accused person was charged. Such a basis must be reasonable, with a good backing of the facts, the law and the Constitution.

43. In the case of **David Kiagano Mbisi vs Republic** [2012] eKLR, the Prosecution charged an accused person in Machakos Law Courts instead of Kitui Law courts for reasons that were extraneous to the matter at hand. Judge J. Ngugi held as follows:-

“22. The state must not be allowed to forum-shop in criminal cases in the guise of “safeguarding” judicial integrity. The overall impact in my view, is worse than the feared injury to the Judiciary itself. Even accepting the state’s actions as benign or well intentioned as I do, this is a case of the medicine being worse than the ailment.

23. The view of the court is that it is both expedient for the ends of justice as well as appropriate for the convenience of the parties and their witnesses that this case be heard in Kitui. The provisions of the Criminal Procedure Code also require that it be tried there and the court has heard no good reasons to it to be tried elsewhere. On the contrary, trying this case in Machakos only serves to impugn the integrity of the Judiciary at Kitui Law Courts on account of flimsy and unsubstantiated claims.”

44. In paragraphs 10 and 11 of the replying affidavit, the deponent states as follows:- *“since the 1st applicant is facing charges under the Narcotics and Psychotropic Substances Control Act No. 4 of 1994, before the Shanzu Court in criminal case Nos. 209 of 2017 and 988 of 2017, the investigation and prosecution teams were apprehensive that the minds of the said courts may not entirely be freed from the evidence and facts already advanced before the said court against the 1st applicant and thereby a real possibility of occasioning prejudice against either of the parties if another case was mounted before the same courts for trial.”*

45. In my considered view, the deposition is unsubstantiated as the element of bias and/or prejudice cannot be determined before the 1st applicant is charged before the Shanzu Law courts and the element of bias or prejudice kicks in, if at all. I find the explanation advanced by the respondents quite weak and unconvincing.

46. Having taken into account the submissions made by Counsel for the parties herein, the authorities cited and the applicable provisions of the law, it is my finding that for the general convenience of the parties and witnesses and for expediency of the fresh cases, the 3 cases filed in JKIA SPM Court should be transferred to Mombasa Chief Magistrate’s Court. This court notes that since Shanzu Law Courts is seized of two cases facing the 1st applicant, the 3 cases filed against the applicants should be heard and determined in Mombasa Law Courts which has a larger pool of Magistrates who can hear the said cases. Mombasa Chief Magistrate’s Court is close to Kikambala where the offence is said to have been committed. The affidavit of the respondents’ deponent shows that some of witnesses reside in Nairobi and others in Mombasa and as such Mombasa Law Courts will be a convenient place for hearing of the said cases.

47. The final orders I hereby make are that:-

(i) JKIA Senior Principal Magistrate’s Court criminal case No 118 of 2018, Republic vs Fatuma Ahmed, JKIA Senior Principal Magistrate’s court criminal case No. 126 of 2018, Republic vs Swaleh Yussuf Ahmed and JKIA Senior Principal Magistrate’s Court criminal case No. 130 of 2018, Republic vs Swaleh Yussuf Ahmed shall be transferred to Mombasa Chief Magistrate’s Court within 14 days of delivery of this ruling, for hearing and final determination of the said cases.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of December, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Magolo for the 1st applicant

Mr. Kangahu for the 2nd applicant

Mr. Jami holding brief for Mr. E. Okello for the respondents

Mr. Oliver Musundi - Court Assistant