



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
MISC. CRIMINAL APP. NO 6 OF 2017

In the Matter of:-

S. 362,364,365,366 and 367 of the Criminal Procedure Code Chapter 75 Laws of Kenya

AND

Application for Review of Ruling in MAUA CMCRC NO 32 OF 2016

BETWEEN

GERVASIO KITHURE MWENDA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

RULING

Transfer of criminal case

[1] The significant order sought in the application dated 17th February 2017 is:-

(a) Review of the ruling delivered by Hon. S.M.S. Soita, SPM (as he then was) on 26th October 2016 in MAUA CMCRC (GARBATULA) NO 32 OF 2016 and direction that the said case be heard at Maua court.

The application is grounded upon the affidavit of the Applicant and the grounds set out in the application. The major quarrel the applicant has with the ruling is that, despite the accused's apprehension of threat to his life and security, the trial magistrate directed the criminal case to be heard at Garbatula. Mr Thangicia argued the same grounds he argued before the trial court. At the centre of his case was that the complainant and the accused in the criminal case come from Borana and Ameru Communities respectively; and that, it is common knowledge that there exists tribal animosity between these two communities which arises from cattle rustling and politics. He emphasized that the two communities are armed and the Borana Community is known to kill suspected cattle rustlers even in the presence of the police. In addition, Mr Thangicia stated that, other than being far-flunked area with untarmacked and bad roads, there is no resident legal counsel in Garbatula; and this will prejudice the accused. On those reasons, he urged the court to direct the criminal case to be heard at Maua.

[2] The prosecuting counsel Mr Namiti filed a Replying Affidavit in opposition to the application before me. His main argument is that the applicant is using the general notion that there is animosity between

these two communities to seek transfer of the criminal case herein to Maua whereas the offence took place at Kina within the jurisdiction of Garbatula court. He stated that there are Probox vehicles which ply the Garbatula route and it is therefore not true that only LandRovers or Lorries can access the place. He asked the court to dismiss the revision request.

DETERMINATION

[3] The application before me is essentially for revision of a decision by a subordinate court under section 362 of the Criminal Procedure Code (hereafter the CPC). Section 362 of the CPC provides that:-

362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

I should state, however, that the supervisory jurisdiction of this court draws from article 165(6) and (7) of the Constitution. And, importantly, the jurisdiction as granted by the Constitution gives this court wide powers to ‘*make any order or give direction it considers appropriate to ensure the fair administration of justice*’. Therefore, the phraseology in section 362 of the CPC which is produced below merely provides the hemming of the said jurisdiction, to be;

‘...for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

[4] Applying the test, is there anything which makes the decision by the subordinate court illegal or improper or irregular as to justify revision by this court? Notably, this application is a twinning of revision and transfer of a criminal case. Therefore, Section 81 of the CPC is an important guide here. The section 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.

(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.

(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney-General, be supported by affidavit.

(4) An accused person making any such application shall give to the Attorney-General notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.

(5) When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.

[5] There is no doubt that the offence herein was committed at Kina within the local limits of the jurisdiction of Garbatula court. The distances being given by the accused from Kina to Garbatula, and from Kina to Maua are not of a magnitude which would warrant a change of venue of hearing of the case. Accordingly, there is no necessity created that Maua would be convenient for the satisfactory trial of the offence herein. Or that the order sought will tend to the general convenience of the parties or witnesses herein.

[6] I move to the next issues. From the arguments presented, the accused person has attempted to show that a fair and impartial trial cannot be had in Garbatula. His basis for holding that belief is that there is tribal animosity between the Borana and Ameru Communities to the extent that the Borana has even killed suspected cattle rustlers from the Ameru in the presence of the police. This to him portends threat to his security as well as life. But, I should state that, whereas there have been tribal fighting amongst these two communities in the past; there is no basis to make a general assertion that the Ameru or Borana cannot be tried in either the courts situated within the area where one or other of the communities is predominantly majority. Certainly, that would be a dangerous proposition to make. Accordingly, that reason is not sufficient to order change of venue for hearing of the criminal case in question. If an accused person was to be allowed to choose venue for his trial that would be an act of forum shopping and death knell to the administration of criminal justice. In addition, the witnesses who come from Borana Community may also use the same reason to reject Maua, for it is predominantly occupied by the Ameru people. It is for this reason and to avoid the apparent dilemma that the law has delineated territorial jurisdiction of courts in trying criminal offences. It has also set out where a criminal charge should be instituted. On this see section 72 of the CPC, that:-

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

Accordingly, I do not think the order sought is expedient for the ends of justice. In the upshot, I find no sufficient reason to transfer the case in question from Garbatula to Maua. And I dismiss the application dated 17th February 2017. Except, however, I direct the police to ensure the safety and security of the accused and his legal counsel in all the occasions they will attend the hearing. I will not consider the argument that the roads are in pathetic state, for there are people who live in Garbatula and we must appreciate that fact. It is the work of the national and county governments concerned to pick on these arguments and deliver on its pledges to the people of Kenya including those at Garbatula. It is so ordered.

Dated, signed and delivered in open court at Meru this 27th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Ngunjiri advocate for applicant

Mr. Mungai advocate for respondent

F. GIKONYO

JUDGE