



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISCELLANEOUS APPLICATION NO.78 OF 2015**

**WATER MULEKO OKWAKE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

WALTER MULEKO OKWAKE, (the applicant) has moved this court by way of a Notice of motion dated 13<sup>th</sup> December, 2015 and said to be premised on *section 67* of the Criminal Procedure Code, The Constitution of Kenya, 2010, and any other enabling provision of the law, seeking one principle order, that this Court be pleased to order that *Siaya Criminal Case Number 865 of 2015* be transferred to Kakamega Principal Magistrate's court for hearing and disposal.

The grounds upon which the order for transfer is pegged as they appear on the body of the motion are that the offence, the subject of the criminal case now pending before the Siaya Magistrate's Court was allegedly committed within Kakamega County; that there is fear that the complainant may have shopped for the matter to be initiated in Siaya County, and that for that matter there is no reason why the case should not be transferred to Kakamega.

The motion is also supported by an affidavit by the applicant sworn on the same date with that of the motion namely 13<sup>th</sup> December, 2015. The affidavit has some 19 paragraphs but the gist of the affidavit can be summarised as follows; that the applicant is charged with the offence of defilement contrary to *section 8(1)(2)* of the Sexual Offences Act (No.3) of 2006, with an alternative charge of committing an indecent act with a child contrary to *section 11(1)* of the same Act. The offence is alleged to have taken place at Khushiku Sub-location, Muluanda Location of Khwisero Division which is within Kakamega County that the offence was initially reported at Khushiku AP camp within Kakamega County after which it was again reported at Siaya Police Station.

The applicant says that he works for gain at Khushiku where he has a medical facility, and that by having his trial proceeding at the Principle Magistrate's court at Siaya will subject him to suffering since he has to cover a longer distance to reach the court. He also says that his witnesses whom he may call during his trial are within Kakamega County. The appellant further says that he believes a case should be tried where the offence took place.

During the hearing of this application, Mr Amadi appeared for the applicant and Mr Oroni for the State. Mr Amadi learned counsel for the applicant, moved the motion and urged the court to grant the application relying principally on the grounds on the face of the motion and the supporting affidavit. He submitted that this court has jurisdiction to transfer a case from one court to another which has jurisdiction to try such a case. Counsel also relied on *Article 50* of the Constitution in urging his

application and prayed that the motion be allowed to ensure that the applicant has a fair trial.

Mr Oroni, the learned prosecution counsel did not oppose the application. Counsel submitted in support of Mr Amadi's position, that he had perused the charge sheet and noted that it clearly shows that the offence was committed within Khwisero Division which is in Kakamega County and for that reason, conceded the application.

The application seeks to have Criminal Case No.865 of 2015 transferred from the Principal Magistrate's court at Siaya to the Chief Magistrate's court at Kakamega for hearing and determination. The principle ground relied on is that the offence was committed within Kakamega County and that hardship will be caused to the applicant if his trial proceeds in Siaya both in terms of travel and expenses for himself and his witnesses.

This court has power to order transfer of a criminal case pending in one court under its authority to another court of competent jurisdiction to try that case. Although the applicant has cited *section 67* of the Criminal Procedure Code, the appropriate Provision is *section 81* of the Code, which provides as follows:-

*S.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) 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 lend to the general convenience of the parties and witnesses, or*
- e) that such order is expedient for the ends of justice or is required by any provision of this Code;*

It may order

- i) .....*
- 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." (emphasis).*

The applicant has cited reasons of his convenience and that of his witnesses during the trial of this case as a basis for seeking transfer of this case. Although he has also alleged that the complainant may have shopped for the Siaya court, there is no evidence that that was the case and in any case, a complainant has a right to report an offence at any police station and it is upto the police officers to file charges in the appropriate court. There is no evidence that the complainant influenced the choice of Siaya Law courts and for that reason, I do not think there is a serious allegation that the applicant will not get a fair and impartial trial in that court.

I have perused the charge sheet which is annexed to the applicant's affidavit, and the particulars of the offence are clear that the offence was committed at Khushiku which is within Kakamega County. That would mean that the place of trial be within Kakamega County for a fair and convenient trial and therefore the applicant has himself sought to have his case tried at the Chief Magistrate's Court at Kakamega.

This court is aware that there are other magistrate's courts which may be near Khwisero than Kakamega. The court sought to know from counsel on both sides why they would prefer the case tried at Kakamega and not at say, Mumias Law Courts or Butere Law Courts, which in my view, would be nearer Khwisero than Kakamega is. No convincing explanation was offered.

The applicant is entitled to have his trial conducted in a fair manner and to seek to have his case transferred on the grounds is not a mistake. Fair trial is the cornerstone in criminal cases and it involves both sides of the divide, the accused as well as the complainant. In making an order for transfer, the court must ensure that the object of a trial is not lost in the process of ordering that transfer as sought by the applicant, the complainant and his/her witnesses should not also be unduly inconvenienced. Whereas I am satisfied that the applicant has made a case for transfer of his case from the Siaya Principal Magistrate's Court, I do not find it justifiable to transfer that case to Kakamega.

In the circumstances, I allow the application dated 13<sup>th</sup> December, 2015 and make the following orders:

1) *Criminal Case No.865 of 2015, Republic vs Walter Muleko Omwakwe pending before the Principal Magistrate's Court at Siaya is hereby transferred to the principal Magistrate's Court at Butere for hearing and disposal.*

2) *THAT this order be served on the office of the Director of Public Prosecutions at Siaya and Kakamega Counties for information and action.*

**Dated at Kakamega this 25<sup>th</sup> day of February, 2016.**

**E. C. MWITA**

**JUDGE**