



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CR. APPL. NO.26 OF 2015**

**ABDULREHAHMAN M. AMANA.....APPLICANT/ACCUSED**

**VRS**

**REPUBLIC.....RESPONDENT/PROSECUTION**

**RULING**

The application dated 28/5/2015 seeks to have Cr. Case No.451 of 2010 pending before the Lamu Magistrate's Court to be transferred to the Malindi Law Courts for hearing and determination. It is supported by the applicant's affidavit sworn on the same date.

Ms Chepkwony, counsel for the applicant submitted that the suit before the Lamu court has been pending since 2010. The case has been adjourned several times due to security reasons and absence of witnesses. Transfer of magistrates and lack of witness statements have also caused the delay. 7 witnesses have testified. Only 2 witnesses are remaining including Dr. Swazuri, the chairman of the National Land Commission. At one time, Dr. Swazuri was in court but he could not testify because he had not recorded a statement. It is further submitted that all the remaining witnesses are based in Nairobi and the prosecution will not be prejudiced. All the witnesses who come from Lamu have testified. The applicant feels that there has been violation of his rights as there has been delay in justice. The prosecution has kept on seeking adjournments.

Mr. Nyongesa, prosecution counsel, opposed the application. Counsel submitted that the application does not satisfy any of the grounds under section 81 of the Criminal Procedure Code. Adjournment of a case cannot be a ground to transfer it. There is no indication that the applicant opposed the adjournments. There are two accused persons and one is in custody. It is not clear whether the co-accused supports the application. There is no guarantee that when the matter is transferred to Malindi, an application to have it start *denovo* will not be made. The applicant could have applied for the dismissal of the case instead of the current application.

The application is made under section 81 of the Criminal Procedure Code. Under that section the High Court is empowered to change the venue of a criminal trial. Several reasons or grounds are stated in section 81 giving the situations when the court can change the venue of a trial. The applicant herein is not protesting against the trial magistrate. It is alleged that the magistrate hearing the case has been transferred. There is no evidence that the magistrate has been transferred to Malindi. In essence therefore, any new magistrate either in Malindi or Lamu can handle the matter. There is no allegation that the trial has not been fair or impartial. There is also no allegation that the Lamu Court is unable to handle the legal issues involving the case.

The charge sheet shows that there applicant is charged with two counts of malicious damage to property contrary to section 339 and forcible detainer contrary to section 91 of the Penal Code. The charges were referred in May 2010. It is admitted that 7 witnesses have already testified. This shows that the Court in Lamu had done its best in handling the matter. This is not the only case before that court. All those who were charged before the Lamu Court have undergone the same circumstances as the applicant. All of them have been affected by the issue of security. The applicant can not be treated differently. He is out on bond and it seems he comes from Lamu. There is no financial inconvenience in the form of transport to the applicant. Under section 81 the expedience for ends of justice and general convenience of the

parties or witnesses can make the court transfer the venue of a criminal case. Although the remaining witnesses are alleged to be from Nairobi, the prosecution has not indicated that there are no witnesses from Lamu. The trial court can decide to visit the scene and it will be easy for such an exercise to be conducted by the court in Lamu. There is no guarantee that if the matter is heard in Malindi, the magistrate hearing the matter will not be transferred.

In the end, I do find that transferring the case to Malindi will cause more delays than having it heard in Lamu. There is air transport to Lamu and the witnesses from Nairobi can access the court. Indeed it is admitted that Dr. Swazuri, one of the remaining witnesses, was in court at one time and ready to testify but was stood down as he had not recorded a statement. The applicant does not satisfied the circumstances under which the High Court can change the venue of a criminal case. The application lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 23<sup>rd</sup> day of July, 2015.

**SAID J. CHITEMBWE**

**JUDGE**