



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**MISC. CRIMINAL APPLICATION NO 14 OF 2014**

**Ruling in respect of a report made under Section 81 Criminal Procedure Code by the Senior Principal Magistrate (B.J.Ndeda, SPM) in Garissa Chief Magistrate's Criminal Case No. 987 of 2013**

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMED NOOR KASSIM 'ALIA' GAANDO.....ACCUSED

**RULING**

**Introduction**

The accused herein is facing trial in the Chief Magistrate's Court Garissa for two counts of attempted murder contrary to section 220 (a) of the Penal Code in Criminal Case No. 987 of 2013. From the lower court file records, the accused was arraigned in that court on 31<sup>st</sup> July 2013 when the charges were read to him. Following his plea of not guilty, the case was set down for hearing. Amazingly, the hearing has not commenced to date! My reading of the lower court record reveals protracted application upon application and sometimes oral submissions bordering on verbal altercations between the prosecuting and defence counsels on the one part and sometimes between defence counsel and the judicial officer on the other part, which to me is really an unfortunate scenario.

The matter has been referred to this court by the presiding magistrate who has prepared a report. I intent to confine myself to the report presented to the parties on 20<sup>th</sup> February 2014 for obvious reasons that I do not wish to comment on the proceedings of the lower court for fear of prejudicing either party.

**Report of the trial court**

The Senior Principal Magistrate (trial court) has cited Section 81 of the Criminal Procedure Code and has listed five reasons why the decision was made to refer this matter to the High Court, namely:

- a. The accused is never brought to court during the dates given for hearings or mentions for some unexplained reasons.
- b. The court has been misled on more than two occasions to give different hearing dates.
- c. The defence counsel's manner of conducting the defence i.e by getting off record and returning to the record in name of defending his client while in essence overturning the court ruling (*sic*).
- d. The defence counsel remarks, which among other remarks include unnecessary heat which will include defence to question the impartiality of the court (*sic*).
- e. The current dynamics of this trial as per the court proceedings and considering that the court is

required to balance because the accused person's constitutional rights and the witnesses constitutional rights (*sic*).

For the above reasons the trial court is asking this court that to consider transferring this file to another court outside the jurisdiction of Garissa Chief Magistrate's Court. The reason for seeking the transfer is captured in the trial court's sentiments that:

**“Given the underlying its my reading that a fair trial may not be guaranteed at the Garissa Chief Magistrate's court (*sic*)”**

In view of the above statement, the trial court is asking this court to invoke its powers under section 81 and change the venue **“for the ends of justice to be met, in order to guarantee and ensure fair trial.....”**

Section 81 of the CPC gives High Court power to change venue of hearing where it is made to appear to the High Court that:

- i. A fair and impartial trial cannot be had in any criminal court subordinate to it.
- ii. That some question of law of unusual difficulty is likely to arise.
- iii. 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.
- iv. That an order under this section will tend to the general convenience of the parties or witnesses.
- v. That such an order is expedient for the ends of justice or is required by any provision of this Code.

I have addressed my mind to the report of the trial court. I have had time to go over the record of the trial court. I have considered the circumstances of this case and I am perturbed by the delay in this case. The offence is alleged to have been committed within Garissa Town and therefore the witnesses would probably be easily available. My view of this matter, with due respect to the trial magistrate and the two learned counsels on record for both parties, is that each one of them has played a role in the quagmire the lower court finds itself in.

A criminal trial, like any trial before the courts, involves rights of parties. These rights must be balanced to ensure a fair trial to all the parties. By delaying this matter, rights of an accused person and those of the victims of the alleged offence are infringed upon.

For this court to intervene and take action as asked, there have to be solid reasons given to persuade this court and give it justification to invoke the provisions of Section 81 CPC.

Why do I say that each of the three officers contributed to the delay in this matter and necessitated this report?

Firstly, the prosecuting counsel. It is his role to ensure that the officers working under his direction do not scuttle a hearing and delay its conclusion. Witnesses ought to be bonded without delay. Investigations ought to be concluded urgently. Difficulties encountered in bonding witnesses ought to be urgently communicated to the court and the defence so that they too are in the picture. Time has to be spared to prosecute a matter to the conclusion. This is not what happened. Other than the witness under protection, there are other witnesses. Instead of delaying the matter because of the procedure involved in securing protection to that witness, the prosecuting counsel ought to have availed other witnesses to show seriousness in prosecuting this matter.

Secondly, the defence counsel. He, just like the prosecuting counsel, is an officer of this court. Both counsels are crucial stakeholders in this matter whose duty it is to facilitate the trial court to expeditiously hear and determine this case. I have found unnecessary exchanges in open court which ought not to be. The defence counsel has a duty to the court as its officer and to his client. There must be a balance between the two duties and none should be compromised for the other in order for fair trial to be accorded to an accused and in order for the victims to feel that justice has been served.

Lastly, there is the trial magistrate. He is the presiding officer of the court who should never descend to the arena. He ought to be fully in charge of his court and direct the proceedings in a manner that ensures justice is served to all who are before him.

I am rather disturbed to hear the trial magistrate say that fair trial may not be guaranteed to the accused. In the same breath he says he is not recusing himself. The reasons given have nothing to do with his capability as a judicial officer but on extraneous matters which are not of his own making. For instance, the accused person is being held at the Garissa GK Main Prison. There is nothing to stop the trial magistrate in summoning the officer in charge to find out why the accused never attends hearings as claimed. Somebody somewhere must have reasons why this is the case and that person is accountable and bears the responsibility of ensuring that the accused attends court when required.

Secondly, the trial court is the one that gives hearing dates. It is therefore unfortunate when it is stated that the court has been misled to giving different hearing dates. Was this done at the registry or by a different judicial officer? Whichever the case it is a situation that can be resolved.

I do not intend to tell the trial court how to conduct its affairs. This court has no doubt that the trial magistrate is possessed of the necessary skills and capacity to handle this matter. As a judicial officer, we are required to rise above the rest because judicial authority cannot be compromised. If this is allowed to happen, then we compromise the very nature of justice itself and the rights of the parties.

In conclusion, I wish to state that any accused person is desirous that his case is heard and concluded as soon as possible. This goes for any counsel whom he instructs to conduct the case for him. It is expected therefore that such counsel acts in the advancement of the interest of justice.

My considered view after careful consideration of this matter and my reading of the record of the lower court is that this court has not been convinced that it ought to invoke its powers under section 81 CPC and change venue of this trial. The trial magistrate has not recused himself and therefore this court declines to change the venue for hearing this case. The venue shall remain Garissa Chief Magistrate's Court. This matter shall therefore be mentioned before the Chief Magistrate with a view to giving it a fresh hearing date before the same trial court. In the same breath, I urge all the parties to this case to play their roles in a way that facilitates rather than thwarts the expeditious determination of this case. It is so directed.

**Dated, signed and delivered this 8<sup>th</sup> day of April 2014.**

**S.N.MUTUKU**

**JUDGE**