



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 355 of 2007

MATHEW MATHEKA MUSAU.....APPLICANT

VERUS

REPUBLIC.....RESPONDENT

RULING

Before me is an application by way of Notice of Motion dated 18th May 2007 filed by M/S A.M. Mbindyo & Company advocates on behalf of the applicant MATHEW MATHEKA MUSAU. The application is brought under section 8(1)(d), (e), (3) and (5) of the Criminal Procedure Code (Cap. 75 of the Laws of Kenya). It was brought under certificate of urgency. The substantive order sought in the application is that the criminal cases numbers 1942 of 2007; 1943 of 2007; 1944 of 2007; and 1945 of 2007 before the Chief Magistrate

Court in Thika, in which the applicant is the accused, be transferred for hearing before Chief Magistrate's Court at Machakos or any other subordinate court. The application has grounds on the face of the Notice of Motion and is supported by the affidavit of the applicant sworn on 21st May 2007. The grounds of the application are that the applicant had been arraigned before the subordinate court in Thika and charged in Criminal case number 1942 of 2007 with 12 counts of personation and obtaining money by false pretence, that there are 12 similar counts in criminal case No. 1943 of 2007, and that there are 8 similar counts in criminal case number 1945 if 2007. The second ground is that criminal case No. 1942 of 2007 had been fixed for hearing on 6/6/2007; criminal case No. 1943 of 2007 fixed for hearing on 5/6/2007. The third ground is that the applicant had to relocate his residence at Thika to his rural home in Machakos District for fear of his life as he had received threats of bodily harm as a result of the charges he was facing. Lastly, that it was only fair and just that the cases be transferred to the Nairobi subordinate court or Machakos subordinate court for hearing.

At the hearing of the application on 18/6/2007, Mr. Mbidyo, Counsel for the applicant, submitted that the cases in the subordinate court had not been heard and that the same were put for mention pending the determination of this application. Counsel submitted that the applicant was seeking transfer of the subject cases because he had received threats which had forced him to vacate from his house in Thika and move to his rural home in Machakos District. In counsel's view, it was necessary transfer the cases if the applicant is to be tried without any form of prejudice. Currently, the applicant felt insecure in Thika and therefore there was justification that the cases be transferred to give him a chance for a fair trial.

Ms. Gateru, the learned State Counsel, opposed the application. It was counsel's contention that no facts had been provided which indicated that a fair and impartial trial would not be had at the Thika court. Counsel submitted that the apprehended danger to the life of the applicant should be reported to the police, who would avail him protection. Counsel further submitted that an order for transfer of the case

would not be convenient to the parties as the offences were committed at Thika and there were about 43 prosecution witnesses. Counsel urged me to dismiss the application.

This application was brought under section 81 of the Criminal Procedure Code (Cap. 75), which confers on the High Court Powers to transfer criminal cases. The relevant parts of the section provide –

“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 provisions 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 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)

(4)

(5)”

In accordance with the provisions of section 71 of the Criminal

Procedure Code (Cap. 75), accused persons are ordinarily required to be tried by a court within the local limits of which the offence was committed; or the accused was apprehended; or is in custody or has appeared to answer summons for the offence. The offences with which the appellant was charged were committed at Thika and he was correctly charged in the Chief Magistrate’s Court at Thika. However, the applicant has now applied under section 81 of the Act that the cases be transferred either to Machakos or Nairobi for hearing, citing threats which have forced him to move from Thika to Machakos.

This application will not succeed. The reasons are as follows. Firstly, though the provisions for the transfer of cases under section 81 of the Criminal Procedure Code (Cap. 75) are quite wide, the applicant has not given any particulars of the threats he alleges. He does not disclose what type of threats they were, other than stating in paragraph 5 of his supporting affidavit that they were threat of death and bodily harm. In particular he does not state whether the threats are verbal, or from persons he knows, or on phone, or by letter and how many threats they are. He also did not disclose any information as to the nature of any of those alleged threats. Secondly, the applicant did not disclose, nor did his counsel even submit that such threats were reported to the police. I cannot be overemphasized that when an applicant makes an application in court, it is for him to provide facts before the court to persuade the court to grant the orders sought. In short, the burden is on the applicant to prove his cause. The applicant has not

discharged his burden. The application will fail on that account.

I must also state that the criminal process was not meant primarily to be for the convenience of an accused person as such. The interests of justice have to be considered on both sides. Transporting witnesses from one place to another can be quite expensive and inconvenient to the prosecution. This court cannot allow the transfer of cases on flimsy and unsubstantiated grounds like in this present application.

For the above reasons, I dismiss the application and decline to transfer the cases.

It is so ordered.

Dated and delivered at Nairobi this 15th day of October 2007.

George Dulu

Judge

In the presence of –

Mr. Mbindyo for applicant - Mr. Ruto holding brief.

Ms. Gateru for State - absent

Eric – court clerk