



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA  
CRIMINAL MISC NO. 9 OF 2004**

**MBERWA MUYA MBERWA ..... APPLICANT**

**VS**

**REPUBLIC ..... RESPONDENT**

**RULING**

The applicant took out a Notice of Motion Pursuant to the Provisions of Section 81 of the Criminal Procedure Code in which he sought for Lodwar S.R.M. criminal case No. 186 of 2004 to be transferred to Kitale Senior Principal's Magistrate's court for hearing and determination. The motion is supported by the affidavit sworn by the applicant.

The thrust of his argument is that there is no resident magistrate in Lodwar hence it is difficult to have his case heard and disposed of within the shortest time possible. The applicant avers that the Resident Magistrate who used to visit Lodwar was retired during what was duped the 'radical surgery' at the Judiciary. It is in his view that the continued delay to finalise his case will occasion him injustice and hardship.

It is further submitted that if the orders are not granted he will lose his right to be represented by a counsel of his choice because his current advocate has indicated that she will not be in the position to travel to Lodwar in view of the security risks involved in the process of travelling.

The learned Senior State Counsel opposed the application basically on two grounds. The first ground is that the state will find it difficult to secure permission for the state witnesses to travel out of their area of Jurisdiction. This argument was dismissed by the applicant's advocate on ground that refugees with a U.N. mandate are automatically granted passes to travel within the country with ease.

The second reason advanced by Mr. Onderi for the state is that the state is likely to incur a lot in transporting state witnesses. On this score the applicant offered to meet the expenses by executing a bond to pay costs of the prosecutor and those of the witnesses.

Section 81 of the Criminal Procedure code sets the conditions in which this may exercise its discretion to transfer a criminal case from a criminal court subordinate to its authority to any other court of equal or superior jurisdiction as follows:

*(i) That a fair and impartial trial cannot be heard or*

*(ii) That some question of law of unusual difficulty is likely to arise or*

*(iii) That a view of the place in or near which any offence has been committed may require for the satisfactory trial of the offence or*

(iv) That an order under this section will tend to the general convenience of the parties or witnesses or

(v) That such an order is expedient for the ends of justice.

As far as I can see, the applicant's application falls within the category that it is expedient for the ends of justice and that it is in favour of the general convenience of the parties or witnesses.

The applicant has raised a matter of common notoriety that there is a shortage of judicial staff particularly magistrates to hear and determine his case at Lodwar. The learned senior state counsel is of the view that if this application is allowed it is likely to open a floodgate of similar applications. With due respect to the learned Senior State counsel I think that is not a plausible reason to deny an applicant what is prescribed by the law. It is not enough to say that this court will be flooded by such applications. This court has the capacity to determine each case on its own merit and circumstances.

I have already stated that the learned senior state counsel is also worried of the expense in which the state is likely to incur in availing witnesses and the difficult in obtaining leave for the witnesses who are refugees under the United Nation Mandate. However the applicant has averred that since they are under the U.N. Mandate they have the freedom to move up and around the country with ease.

On the issue of expense, the applicant has promised to meet the expenses which are likely to be incurred by the state in respect of the prosecutor and the witnesses.

I refer to the provisions of Section 81(5) of the criminal procedure code which reads:

*“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 pro secutor.”*

I have considered the submissions of Mrs Aburili who appeared for the applicant and those of Mr. Onderi the learned Senior state counsel. I have also considered the application and the supporting affidavit. I am satisfied it will be to the interest of justice to have Lodwar Criminal case No. 186 of 2004 transferred to Kitale Senior Principal magistrate to be heard and determined. It is so ordered.

The applicant is also ordered to sign a personal bond conditioned that he will be, if convicted, pay the costs of the prosecutor.

Consequently the aforesaid criminal case be mentioned before the Senior Principal Magistrate, Kitale for purposes of executing the bond as ordered herein and to further set hearing dates on a priority basis.

**DATED AND DELIVERED THIS 14th DAY OF May 2004**

**J.K. SERGON**

**JUDGE**