



**Nganga v Director of Public Prosecutions & 3 others (Miscellaneous Criminal Application E190 of 2024) [2025] KEHC 307 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E190 OF 2024**

**AC BETT, J  
JANUARY 21, 2025**

**BETWEEN**

**JAMES NDIRANGU NGANGA ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS & 3 OTHERS & 3  
OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS  
& 3 OTHERS & 3 OTHERS ..... RESPONDENT**

**RULING**

1. The Applicant herein filed an application dated 1<sup>st</sup> November 2024 pursuant to Article 10, 22, 23, 25, 17, 18, 19, 47, 48, 49(1) & h, 150, 165(6) and 259 of the *Constitution* of Kenya 2010 and Sections 71, 72, 74, 78(1), 67 & 81 of the *Criminal Procedure code* seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That Kakamega Magistrate Court Criminal case number E1943 of 2024 be transferred from Kakamega Chief Magistrates Courts to Busia Chief Magistrates Courts for trial and determination.
  - d. That the Honourable court do issue such further orders or other orders that in its discretion may deem fair and just in the circumstances.
2. The Applicant swore an affidavit in support of the application dated 1<sup>st</sup> November 2024 where he avers that the criminal allegations and cause of action arose at Busia County within the local limits of the jurisdiction of the Busia law courts. He further states that the case should be transferred to ensure his effective participation in the matter since he and his witnesses are based in Busia County. He avers that various applications made previously have attracted public interest of Busia residents and the tenants



of the company who are based in Busia and are interested in following the proceedings which will be difficult for them to do so over 60 kilometers away.

3. The application was opposed by the state who filed a replying affidavit sworn by C.I Nicholas Waringa, the Investigations Officer on 16<sup>th</sup> December 2024 in which he deponed that this case began with a report which was made at Kakamega Central police station *vide* O.B Number 71/02/08/2024. He asserts that it was established during investigations that ODPP Busia offices are tenants of the family in BENNA PLAZA building and that they may be required to execute some orders that will be putting them in a complex situation. He further avers that the information was shared with ODPP regional office who considered the matter and made a deliberate decision to prosecute the matter in Kakamega and not Busia. He states that the place of commission of the alleged offences is unknown as per the charge sheets. He contends that a person can travel across the country for a case anywhere within the Republic since people are not charged in their convenience but as per facts of the case. He avers that the courts currently admit witnesses and advocates to be heard online and that in the case where the Applicant and his advocates are unable to travel, they can be heard online. He posits that the current case has already been fixed for hearing and transferring the matter will result in unnecessary delay since they are not sure of the Busia court calendar and whether this matter will be fixed on priority basis.
4. The Applicant filed a supplementary affidavit dated 18<sup>th</sup> December 2024 where he avers that the DPP at Busia have never sworn any Affidavit to confirm that they are indeed unable or hindered in any way in prosecuting the matter herein. He asserts that the DCI or ODPP are misleading the court by indicating that they have capacity to determine suo moto on where a criminal matter can be filed subject to their own judgement. He states that the issues of jurisdiction or police command are legal issues and the same cannot be left to be determined at the whims of the ODPP or DCI. He avers that the process of investigation is unlawful and susceptible to forum shopping as the said complainants, despite being residents of Busia town within the jurisdiction of Busia police command, have never lodged a complaint at Busia Police station but chose to report to a police officer with great influence at Kakamega. He contends that there is no report or complaint that has been dealt with emanating from the complainants in the criminal case which was placed before ODPP Busia in order to make an inference that the ODPP at Busia is conflicted. He further states that the company associated to fraud and all properties thereto are all situated in Busia within the jurisdiction of Busia Law Courts.
5. Mary Wangoi Nganga, an Interested party, swore a replying affidavit dated 13<sup>th</sup> December 2024 where she asserts that the application herein is forum shopping and in violation of Article 157 of the [Constitution](#) which provides that the DPP can institute criminal proceedings against any person before any court. She avers that the Applicant's application seeks to direct the DPP on where to institute proceedings, which is absolutely unconstitutional. She states that the reason that the DPP opted to charge the Applicant in Kakamega and not Busia is because the DPP Busia are her anchor tenants in an estate property where she is an administrator, and which is the subject matter of the criminal case wherein she is the principal complainant. She states that there is a conflict of interest on the part of the DPP and that they cannot objectively and fairly prosecute the Applicant herein. She prays that the application be dismissed with costs.

### **Submissions**

6. The application was canvassed by way of written submissions. The Applicant did not file any submissions.
7. The ODPP filed their submissions dated 16<sup>th</sup> December 2024 where they submitted that from the charge sheet, the offences the Applicant has been charged with show that the place of commission of the said offences is unknown. They relied on Section 74 of the [Criminal Procedure Code](#) that provides



for instances of trial where the place of offence is uncertain and Section 81 of the [Criminal Procedure Code](#) that grants power to the High Court to transfer cases.

8. They further submitted that there is a possibility of bias if the matter is prosecuted in Busia since it was established in the Investigations Officer's affidavit that ODPP Busia are tenants to the disputing parties and that it is the Applicant who manages the said building. They contended that this scenario in the mind of a fair-minded person creates an impression of bias which might render a trial conducted in Busia a mistrial. They averred that bias is the impression created on the mind of a reasonable person and not in the mind of the judicial officer. They relied on the case of *Tumaini v Republic* 1972 EA 441, *Porter v Magili* (2002) ALL ER 465, [Charity Muthoni Gitabi v Joseph Gichangi Githabi](#) (2017) eKLR, [Kalpana .H. Rawal v Judicial Service Commission & 2 others](#) (2016) eKLR and the case of [Philip .K. Tunoi v Judicial Service Commission & Another](#) (2016) eKLR where the courts held similar views. They submitted that in order to create confidence in the trial process, it was best that trial be conducted in a neutral court and the best option was Kakamega Law Courts. They further averred that the complaint was lodged in Kakamega, and the investigations conducted by officers from Kakamega. They urged the court to dismiss the application for lack of merit.
9. The interested party also filed her submissions dated 14<sup>th</sup> December 2024 through her advocate. They submitted that Article 157 (6) (a) of the [Constitution](#) provides that the DPP can institute criminal proceedings against any person before any court. She argued that Article 157 (10) grants the DPP absolute independence while discharging their duties to mean that they shall not be under the direction or control of any person or authority while exercising their powers or functions. She submitted that the Applicant's application amounts to the Applicant inviting the court to order the DPP on where to prosecute an accused person which is unconstitutional and a violation of Article 157(10) of the [Constitution](#). She further asserted that Article 157 (11) of the [Constitution](#) provides that one of the factors the DPP should take into account in exercising their prosecutorial powers is public interest which was one of the factors considered when the case was lodged in Kakamega.
10. The Interested party submitted that the Applicant must demonstrate convincingly that there will be prejudice to this right to fair trial or biasness if the transfer of venue is not allowed. She relied on the case of [Joseph Korir alias David Arab Chongo v. Republic](#) (2018) eKLR and the case of [John Brown Shilenje v. Republic](#) Nairobi Appeal No. 180 Of 1990 where the courts held similar views. She further posited that it would not be in public interest to try the main criminal case in a venue where the ODPP's office has serious conflict of interest since the main complainant is at logger heads with the ODPP Busia. She submitted that the ODPP Busia might also have a bias with respect to the Applicant herein since they are the tenants of the Interested party who is the main complainant in the criminal case. She urged this Court to dismiss the transfer application and order the matter to proceed as scheduled.

## Analysis

11. I have carefully considered the application herein, the affidavits sworn by the parties, the submissions and the relevant legal provisions. The main issue for determination is whether this court should transfer Kakamega Magistrate Court Criminal case number *E1943 of 2024* to Busia law courts as sought by the Applicant.
12. Section 81 of the [Criminal Procedure Code](#) grants power to this court to change the venue of hearing where necessary. It provides that:-

“ 81. Power of High Court to change venue.

(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 provision 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 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;
    - (iii) 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) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.
- (4) An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application. (5) 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 prosecutor.”

13. In the instant case, the charge sheet indicates that the offences that the Applicant herein is being charged with were committed at an unknown place. The Respondents argue that the ODPP’s decision to prosecute the matter in Kakamega was guided by the provisions of Section 74 of the [Criminal procedure Code](#) which provides that:-

- “74. Trial where place of offence is uncertain When—
- a. it is uncertain in which of several local areas an offence was committed;



- b. or an offence is committed partly in one local area and partly in another;
  - c. or an offence is a continuing one, and continues to be committed in more than one local areas;
  - d. or an offence consists of several acts done in different local areas, it may be tried by a court having jurisdiction over any of those local areas.”
14. Despite these averments by the ODPP, no evidence has been tendered to show that the offence against the Applicant herein matches the provisions of Section 74 of the *Criminal procedure Code* to warrant the filing of the case in Kakamega law courts.
15. It is undisputed that the Applicant herein and the complainants in the case are residents of Busia County. It is also undisputed that the offence of forgery against the Applicant herein relates to a company that is based in Busia County. The Applicant in his affidavit also alleged that he was apprehended in Busia, a claim that was not controverted by the Respondents. It is therefore the Applicant’s claim that the court in Busia possesses the rightful territorial jurisdiction to hear and determine this matter.
16. Section 71 of the *Criminal Procedure Code* provides as follows regarding territorial jurisdiction of courts in criminal cases:

“

“71. Ordinary place of inquiry and trial  
Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.”

17. The court in the case of *Elsək Osman Erdinc v Republic* [2021] eKLR held that:

“The rationale is that Section 71 of the *Criminal Procedure Code* provides inter alia that every offence shall ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed or within the local limits of whose jurisdiction the accused person was apprehended, or is in custody on a charge for the offence. Although, the Director of Public Prosecution original choice of forum for trial was Shanzu Law Courts, the Court takes judicial notice that it is a parallel decision in contravention of Section 66, 67 and 71 of the *Criminal Procedure Code*. In reality and in absence of any compelling reasons, Shanzu Law Courts was a forum non-convenience to try the applicant for the offence committed within the local limits of Mtwapa Sub-County in Kilifi County. Despite the clear provisions of the Law, the Court in Shanzu continued to be the forum of non-convenience until on suo moto it moved to transfer and change the venue to Malindi Chief Magistrate Court.”  
The court further stated that: “This question profoundly affected the course taken by the Director of Public Prosecution to initiate a trial of the applicant before Shanzu Law Courts, notwithstanding overwhelming evidence of the local limits of the offence having been committed in Kilifi County. I take the strong view that Shanzu was not an adequate forum to hear the criminal case implicating the accused who is domiciled at Kilifi and the



parties to the case including the victim are all residents of the same sub-county. Closely akin to the subject under discussion and the foregoing affidavits and submissions by both counsels, Shanzu Court was not within the Director of Public Prosecution to use as a forum for convenience to adjudicate the merit of the case without first determining permissive jurisdictional requirements of the cause of action.”

18. From the provisions of Section 71 of the *Criminal Procedure Code* and the authority cited above, I find that the most suitable place that the ODPP ought to have filed the case is at the Busia law courts since the company where the alleged forgery happened is located in Busia and the Applicant and the interested parties including all the possible witnesses are all residents of Busia County. The Kakamega law courts therefore lacks jurisdiction to hear and determine the case.
19. Consequently, the Applicant’s application is misguided since orders of transfer cannot be granted when a case was commenced in the wrong jurisdiction. The court in the case of *Jamock Kamakya Mbuvi v Republic* [2020] eKLR held that:

“This provision (Section 81 of the C.P.C) enumerates, although not exhaustively, the extraordinary circumstances which would justify a departure from the stipulation that the place where the offence is committed is where the inquiry into, prosecution and trial of a case has to be conducted. A motion to transfer is allowed on the ground that prosecution was commenced within the right jurisdiction, but for exceptional reasons, the case should be transferred to another venue outside jurisdiction, subject to any equitable terms and conditions that may be prescribed.”
20. Additionally, the court in *Stanley Muia Makau v Republic* [2020] eKLR held as follows:

“A motion to transfer is allowed on the ground that prosecution was commenced within the right jurisdiction, but for exceptional reasons, the case should be transferred to another venue outside jurisdiction, subject to any equitable terms and conditions that may be prescribed.”
21. Although I am cognizant of the apprehension of bias that the O.D.P.P rightfully has in this matter, it is not upon them on that ground, to interfere with the jurisdiction of the rightful court as provided by law at first instance. Allowing the case to continue in Kakamega would amount to this court condoning an irregularity.
22. What the ODPP ought to have done is file the case within the rightful jurisdiction, which is at the Busia law courts, then seek a transfer under Section 81 of the *Criminal Procedure Code* on grounds that a fair and impartial trial could not be had in Busia due to the conflict of interest of the ODPP at Busia .That is the correct procedure provided for in the law.

### **Determination**

23. In the view of the above, I hereby make the following orders:-
  - a). The Applicant’s application is hereby declined.
  - b) The ODPP is directed to withdraw the matter from Kakamega Chief Magistrates Court and file it at the Busia Chief Magistrates Courts.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JANUARY 2025.**

**A. C. BETT**



## **JUDGE**

In the presence of:

Ms. Chala for the State

Mr. Otieno for the Applicant

No appearance for Mr. Gatundu for Interested party

Court Assistant: Polycap

