



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Flesch (Miscellaneous Application E001 of 2025)  
[2025] KEHC 10475 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARALAL  
MISCELLANEOUS APPLICATION E001 OF 2025  
AK NDUNG'U, J  
JULY 16, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ULRICH KARL HEINZ FLESCHE ..... RESPONDENT**

**RULING**

1. By way of a Notice of Motion dated 24<sup>th</sup> February, 2025, the Applicant sought orders that:-
  - a. Spent
  - b. That Criminal Case No. SO E008 of 2024 against the respondent Be and Hereby transferred to the Nairobi Children's Court for hearing and determination.
2. The application is based on the following grounds:-
  1. That the respondent has been charged with Defilement contrary to S. 8[1] as read with S. 8 [4] of *Sexual Offences Act*, Child Pornography Contrary to Section 24 [i] [d] of the Computer Misuse and Cyber Crimes *Act No. 5 of 2018* and Trafficking in Persons Contrary Section 3 [I] as read with S. 3 [5] of the Counter Trafficking in persons *Act No. 8 of 2010*.
  2. That the victims are in a rescue shelter in Kiambu County and it would be unsafe to transport them to Maralal for the hearing.
  3. That upon further investigation, a witness in Maralal have been threatened. Making it unsafe for the matter to proceed there.
  4. That the respondent's life is in danger if released on bond, due to the public's outcry with regards to this matter.
  5. That this court issues any orders that it may deem fit.



3. The application is supported by the Affidavit of the Investigating officer SGT. Wycliffe Jeffa in which he reiterates the grounds in upon which the application is based.
4. The application is opposed and in a replying affidavit [which however is not sworn] the Respondent depones that that the case should not be transferred but should be heard at Mararal. That given that the witnesses are far away at Kiambu, he is willing to do virtual hearing.
5. It is the Respondent's case that no prove is provided that he has threatened witnesses and he does not intend to do so. He adds that the alleged OB Report about interference with witnesses through proxies is a matter the police have capacity to investigate and is therefore a petty ground to have the case transferred to Nairobi.
6. He adds that he was arrested in the local jurisdiction and transferring the case would prejudice him. Further that it would be expensive for friends who visit him in prison to go to Nairobi.
7. The application was canvassed by way of written submissions.
8. I hasten to note at the earliest that the replying affidavit filed by the Respondent was not sworn before a commissioner of oaths and thus in strict legal terms is of no evidential value. I attribute this omission to the fact that the Respondent is a pro se litigant who is certainly disadvantaged when it comes to understanding the law and its procedures. I will proceed to determine the application based on the evidence of the Applicant on its merit and on the submissions where the Respondent could have raised a point of law.
9. The law on transfer of a criminal case is found in Section 81 of the [Criminal Procedure Code](#) which provides as follows;
  - i. 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.

10.

“Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer.” The Court of Appeal further observed that it is the reasonableness of the accused person’s apprehension that is relevant and if the accused shows that his apprehension is reasonable then he has set out a clear case.”

11. The applicant’s main contention with regards to transfer of this matter are:

- a. The victims are in a rescue centre in Kiambu county making it unsafe to ferry them to Maralal.
- b. That upon further investigation, a witness in Maralal has been threatened, making it unsafe for the matter to proceed there.
- c. The respondent’s life is in danger if released on bond, due to the public’s outcry with regards to this matter.

12. The victims had to be taken to a rescue center in order to shield them from the stigma and psychological trauma associated with sodomy in Samburu culture. It would be prudent and convenient if this matter is heard in Nairobi children’s court.

13. Secondly, vide a report recorded vide 0B No. 15/30/11/2024 at Maralal Police Station, the respondent through his proxies while in custody, has gone ahead to intimidate a witness even before the case has commenced in the trial court. It’s evident that a fair and impartial trial would not suffice in Maralal due to witness intimidation.

14. Thirdly there’s public outcry with regards to the respondent’s actions in Samburu county. The community where the respondent used to reside before his arrest and where the offence was committed are bitter and are keenly following this court case. The main purpose is to take the law into their hands once the respondent is released on bond.

15. In John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980 Trevelyan J. stated ;

“The test of that of, "Reasonable apprehension in the applicants or any right thinking person’s mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice; there must be reasonable grounds for allegations." The cases cited by the applicant’s counsel are to the same effect.”



16. The principles set in the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, though made in a civil case setting illuminate the factors applicable in the transfer of a trial as follows; “Section 18[1] of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction ..... It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....”
17. On the material before court the following salient facts come to the fore;
- a. The complainants in this case are minors who are victims of sexual offences.
  - b. The minors are the main witnesses in the matter.
  - c. The victims have since been relocated to a rescue centre in Kiambu to shield them from stigma and psychological trauma associated with sodomy in Samburu culture.
  - d. There is unsubstantiated evidence via an OB record of a reported attempt to interfere with a witness in the matter.
  - e. There is an allegation that the local community is incensed by the alleged acts of the Respondent rendering him exposed to possible harm.
18. It is demanded of this court by *the Constitution*, statute and international conventions that this matter being one involving children, the best interests of the children are paramount. That would include an expedited hearing.
19. This is a matter concerns children. Article 53 [2] of *the Constitution* of Kenya provides that;
- “a child’s best interests are of paramount importance in every matter concerning the child”.
20. This constitutional command is given effect by section 8 of the *Children Act, 2022 [Act No 29 of 2022]* which provides as follows: -
- [1]. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—
    - [a]. the best interests of the child shall be the primary consideration;
    - [b]. the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule. 19 No. 29 of 2022 Children



- [2]. All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
- [a]. safeguard and promote the rights and welfare of the child;
  - [b]. conserve and promote the welfare of the child; and
  - [c]. secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest.
- [3]. In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.
21. The Supreme court in *MAK v RMAA & 4 others* [Petition 2 [E003] of 2022] [2023] KESC 21 [KLR] [2 March 2023] [Judgment] addressing the best interest principle expressed itself as follows;
- “The children’s rights legal regime [*the Constitution*, *Children Act* [repealed], CRC, and the African Charter on the Rights and Welfare of the Child] emphasized the centrality of the best interest of the child. The best interest of the child was determined by the circumstances of the case as they specifically related to the child. That comprised the principles that prime the child’s right to survival, protection, participation, and development above other considerations and included the rights contemplated under article 53 [1] of *the Constitution*. The focus had to be on the child and what was best for the child.
- There was no hierarchy in the children’s rights provided for under *the Constitution*. All the rights provided under article 53 were in the child’s best interest. The ‘best interests’ concept was further strengthened by being the paramount consideration. The best interests of the child were to be the determining factor when deciding on the child.”
22. This court is alive to the Constitutional guarantee enjoyed by the Respondent for a fair trial as enshrined in Article 50 [2][a] to [q]. Caution must therefore be taken to ensure that even as the children rights are enforced, the Respondent is not prejudiced and his right to a fair trial denied.
23. It is my considered view that whereas there is no prejudice at all on the part of the Respondent should the trial be heard in Nairobi, the mainstay of the prosecution’s case is that such a transfer would facilitate an expedited trial as the prosecution would be in a position to present its witnesses with ease, safely and in a timely manner and shield the minors from stigma and psychological trauma.
24. Whereas that may be so, I am alive to the fact that the witnesses include other persons over and above the minors involved. The hurdle of transporting the minors to court safely and shielding them from stigma and psychological trauma are surmountable. The state has adequate transport and security to ensure safe passage and abode in the day the minors shall testify. The stigma and psychological torture are taken care of by the provision for camera proceedings and the state agencies involved should be in a position to protect the children from exposure to the public during the hearing date[s]. I take judicial notice of the elaborate court facility at Maralal Law Courts with provision of adequate rooms where the children can be held away from the public eye awaiting commencement of proceedings.
25. It is my further finding that the claims of interference with witnesses and possible harm to the Respondent are not properly substantiated.



26. Lastly, it would remiss of this court to fail to take judicial notice of the available judicial resources both at the Milimani Children Court, Nairobi and at the SPM Court at Maralal. The Milimani Children Court is inundated by many cases and even though I do not have the benefit of that court's diary right now, it is beyond conjecture that the said diary must be months ahead from now. On the contrary, the SPM Court at Maralal has 2 courts of competent jurisdiction to try the matter herein and owing to a lighter workload, and with the cooperation of the parties, this trial can be done and dusted in less than 3 months. The interests of expedited justice both to the victims and the Accused would be better served by a trial at Maralal.
27. With the result that the application for the transfer of Maralal SO E008 of 2024 is hereby declined. I direct that the said matter be set down for hearing with strict adherence to the safe guards established in trials involving minors and should there be a witness requiring witness protection, the relevant agency be called in for their necessary action.

**DATED SIGNED AND DELIVERED IN OPEN COURT THIS 16<sup>TH</sup> DAY OF JULY 2025**

**A.K. NDUNG'U**

**JUDGE**

