



**Republic v Masha & 3 others (Criminal Case E074 of 2022)
[2025] KEHC 13124 (KLR) (Crim) (22 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE E074 OF 2022**

MW MUIGAI, J

SEPTEMBER 22, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

JOHN CHENGO MASHA 1ST ACCUSED

LINAH KOGEY 2ND ACCUSED

CYPRINE ROBI WANKIO 3RD ACCUSED

JAMES RONO 4TH ACCUSED

RULING

BACKGROUND

1. On 16/6/2025, this Court’s Ruling granted ODPP Application in part as follows;
 9. ODPP to file and serve Application on transfer of the case 14 days each side [to respond]
2. On 2/7/2025, Mr. Makori for ODPP confirmed that the Application to transfer this case from Nairobi High Court to Kisumu High Court was filed in Court and served to all Parties.
3. The issue of service was contested that not all Parties/Counsel were served; the matter was adjourned to ensure compliance on service of the instant Application to 17/7/2025.
4. On 17/7/2025 service was confirmed by Mr. Makori ODPP to all Parties/Counsel of the instant application.
5. Mr. Mwangi of IJM, Mrs. Nzuki of IPOA, Mr. Mbanya of Amnesty International, for the victims, Mr. Mango on behalf of LSK & Ms Oluoch, LSK Kisumu Branch supported the Application to transfer



this matter to Kisumu High Court. They requested not to file pleadings and/or submissions on the matter as there was no objection.

6. On 23/7/2025 Counsel for Accused persons; namely Mr. Miyare for 3rd accused person, Mr. Kibet h/b Mr. Arusei for 4th accused person, Mr. Lumwaji for 2nd Accused person and Mr. Munoko for 1st Accused person sought to and later filed pleadings and/or written submissions opposing the application of transfer of the case to Kisumu High Court.

Pleadings

Application for Transfer of Case

7. The ODPP filed a Notice of Motion on 30th June 2025 brought vide Art 25,48,50,157,159 (2) (d) & 165 of Constitution of Kenya and Section 81 of CPC & Section 10 of High Court (Organization & Administration) Act seeking the following orders: -

1. That the application be certified urgent.
2. That the Hon. Court to transfer the instant Criminal Case vide (Republic V. John Chengo Masha & 3 others Nairobi HCCR case No. E074 of 2022) hereinafter, the criminal case from High Court at Nairobi to the High Court at Kisumu for hearing and determination.
3. That in the alternative, the Hon Court to order that its sittings in this matter shall be held within Kisumu County.
4. That the Hon Court to grant any further and or other order that it may deem just and fit
5. That the cost of this application be in the cause.

The Application is grounded by Supporting Affidavit of Mr. Victor Juma Owiti PPC in ODPP on the following grounds;

6. That the transfer of the criminal case from High Court at Nairobi to the High Court at Kisumu, and/or the holding of sittings in respect of the trial in the criminal case within Kisumu County, would facilitate the Court's view of the scenes of the offences the subject of the criminal case, and is therefore necessary for the satisfactory trial of the subject offences;
7. That the transfer will tend to the general convenience of witnesses most of whom are based in and around Kisumu County; and is necessary for the expedient and proper exercise of this Court's judicial authority and be expedient for the ends of justice
8. That none of the accused persons will suffer any prejudice should the orders sought be granted.

The Application is also supported by Replying Affidavit of Ms. Gikui Gichuhi SADPP among the following grounds,

9. The Respondents are charged with criminal charges that relate to cases of human rights violations reportedly committed on residents in informal settlements of Nyalenda, Nyamasaria, Kondele and Obunga areas within Kisumu County.
10. There are over 80 witnesses in this matter and who reside in Kisumu County and transporting them to testify in Nairobi will incur undue expenses and costs.
11. The transfer of the case is necessary, from Nairobi to Kisumu High Court for expedient and proper exercise of Court's judicial authority for the ends of justice.



The Application is also supported by Mr. Benedict Otieno Investigator at the Independent, Policing Oversight Authority (IPOA), in respect of High Court Criminal Case No. E074 of 2022 he is consequently competent and authorized to swear this Affidavit on behalf of IPOA.

12. That the State bears the duty to ensure that victims and other prosecution witnesses attend court to testify as and when required; over eighty (80) witnesses including victims, in support of the prosecution case that the State will be required to facilitate their attendance in Court for the trial using public funds; which would have been deployed for other use for the benefit of the wider public.
 13. That most of the victims-witnesses in the criminal case have expressed their desire to attend Court and follow the Courts proceedings to the logical conclusion and holding the trial in Kisumu will enable them attend Court with ease; it is in the interests of justice and public that this criminal matter be transferred from High Court at Nairobi to the High Court at Kisumu
8. Replying affidavit of John Chengo, the 1st respondent dated 9th July 2025
1. The assertions [by Applicants] are not only inconsistent but also exemplify a glaring double standard for the following reasons:
 - a. In Rep-v-Obado & 2 Others, although the events happened in Migori, the state elected to prefer charges in Nairobi and did not seek transfer; in Rep-v- Fredrick Ole Leliman, the matter was prosecuted in Nairobi rather than Machakos and in Rep-vs-Moses Lenolkulal, proceedings took place in Nairobi not Samburu or Isiolo where the alleged offences arose.
 - b. The victims' Counsel, Mr. Willis Otieno requested Respondents' debarment from stepping in Kisumu for the safety of the victims and witnesses and therefore, he is apprehensive of the DPP's motive in transferring this matter
 - c. DPP has not given sufficient reasons why this case should be transferred to Kisumu after over two years in Nairobi, yet all along, the DPP was aware the witnesses are in Kisumu.
 - d. Transferring this case will put a financial strain to Respondents and defeat the purpose of Article 50 Constitution on the rights of an accused person; he is currently interdicted and residing in Kilifi County, which is over 500 km from Nairobi and almost 1000km to Kisumu and this may occasion court delays or even adjournments because of financial difficulties. Annexed herein and marked "JCM-1" is copy of the interdiction letter.
 - e. The Respondents were demonized and stereotyped both by the mainstream and social media, and by the civil societies as the "killers of Baby Samantha Pendo and the tormentors of People of Kisumu" and photos and videos widely circulated both on print and social media as the perpetrators of heinous acts to the people of Kisumu.
9. Linah Kogey 2nd Respondent's replying affidavit dated 17th July 2025
- a. That the Court, in its Ruling on bail bond and the conditions thereto, clearly directed that all the Accused Persons should not set foot in areas perceived to be scenes of crime all of which fall within Kisumu transfer of the case to Kisumu would directly contradict the said bond terms conditions.



- b. The charges herein, the interdiction and her poor health conditions continually exert pressure on her mentally, physically and financially, (Annexed herein and marked "LK-2-I " is the interdiction letter) Annexed herein and marked "LK-2-i & ii " are screenshot headlines of the Article by British Broadcasting Corporation BBC and on the Daily Nation links provided herein) <https://www.bbc.com/news/articles/cgqv4pyex1o> and <https://nation.africa/kenya/news/baby-pendo-case-murder-suspects-free-bail-5084744#story>
 - c. In International Crimes against Humanity Charges in the Hague for The Prosecutor v. William Samoei Ruto and Joshua Arap Sang- ICC-01/09-01/11, the crimes allegedly occurred in the Republic of Kenya yet the confirmation of charges hearing and subsequent trial proceeded in the Hague- the Netherlands.
10. 3rd accused person's grounds of opposition dated 22nd July 2025 – Cyprine Rhobi Wankio.
- a. The application will inconvenience the Accused Persons and their counsel who were hired for the conduct of the matter in Nairobi; and it will deprive them of adequate time and facilities/ resources to prepare a defense.
 - b. The application is hence made in contravention of Article 50(2)(c) of *the Constitution*.
 - c. ODPP has not established any change in the circumstances that impelled the transfer of the matter to Nairobi from Kisumu in the first place. The charged political environment in the country and patent public outrage against the police shall undermine the safety/security of the Accused Persons in Kisumu and trial of the matter before the Kisumu court. Accordingly, the application has not laid a proper or lawful basis for the transfer.

4th Accused's replying affidavit dated 15 July 2025

11. The Court dismisses the application and maintains the venue in Nairobi since none of the statutory conditions under Section I of the Criminal Procedure Code has been fully satisfied. That indeed there is a "reasonable apprehension to my mind that a fair and impartial trial cannot be had upon the transfer for the reasons I will provide below";
12. He is entitled to a fair trial in terms of Article 50 and Article 25(e) of *the Constitution* and that these rights will be prejudiced if the matter of this nature is transferred to Kisumu, He is still innocent until fair trial and is conducted and he is proved to be guilty.
13. That should the Court find any genuine difficulty, specifically, security threats to his person when traveling to Kisumu, or a significant number of witnesses located in Kisumu the following targeted remedies would suffice;
 - a) The Court may order that Kisumu based witnesses testify via live video link from Kisumu or
 - b) Permit partial sittings in Kisumu with robust protective measures in place. These measures would adequately safeguard safety and ensure the integrity of proceedings without the disruptive and prejudicial impact

Submissions

12. 1st Respondent's Submissions dated 30th July 2025 Legal Framework Under Section 81 of the CPC
13. Section 81 of the CPC vests upon the High Court the discretionary power to transfer a criminal matter from one court to another. Such transfer may only be granted in exceptional circumstances as outlined in the Section.



14. Secondly, the bond ruling imposed constraints on the accused persons' access to Kisumu. The High Court has already made a determination in the bond ruling, limiting the accused persons' movement, particularly in relation to Kisumu. And thus, to access Kisumu, the accused person has to pass through the areas where his access has been limited by an order of this court which has not been set aside or revised.
15. Therefore, any attempt inviting this Honorable Court to order a transfer to Kisumu at this stage would be to indirectly vary or overturn the said ruling, an appeal disguised as an application. The Court must therefore reject attempts to disturb the status quo by way of continued piecemeal interlocutory applications whose main objective is to delay the matter.
16. Fourth, security and fair trial concerns in Kisumu. There is well-documented public hostility against the accused persons in Kisumu and its environs. The safety of the accused person, as well as that of legal representatives and possibly judicial officers, cannot be guaranteed. The security to life of the accused, cannot be traded with the convenience and expense of the DPP and witnesses.
17. Courts have consistently held that transfer or criminal trials should not be done whimsically or casually. In *Republic Lelei & Another [2020] eKLR*. In *John Brown Shilenje vs Republic [1980] eKLR* strong and compelling reasons must be presented where transfer is sought, especially if it implies lack of confidence in the Judicial Officer. In *Maina Kinyatti vs Republic [1984] eKLR*, the Court of Appeal articulated the standard for transfer of case under Section 81 CPC, where the apprehension of unfairness is reasonable.
18. In *Joram Opala Otieno vs DPP & 14 Others [2021] KEHC 9044 (KLR) & Republic vs IG of Police & 2 Others exparte Boniface Nginyo Mwaura [2019] eKLR* emphasized where there is reasonable apprehension that fair trial cannot be conducted and/or without ensuring fairness and safety in trials. Accordingly, the Hon Court to:
 - a. Find that the application is a veiled appeal against an existing bail determination;
 - b. There is no guarantee that the security of the accused persons is assured.
 - c. Find that there exists reasonable apprehension of hostility and insecurity in Kisumu, compromising the right to fair trial

Analysis & Determination

19. The transfer of case is provided for hereunder;
The High Court may under Section 81 CPC 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



.....

- (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.
20. The Court considered detailed oral and written submissions on the question of transfer of hearing and determination of the instant case from Nairobi High Court to Kisumu High Court. The main objective of transfer of a case from one Court to another Court may be due to various considerations but legally the objective is to ensure that justice is served fairly, impartially, and conveniently as follows;
 21. Lack of jurisdiction: The High Court derives jurisdiction from Article 165(3) (a) of Constitution and Section 10 (1) (5) & (6) of the High Court (Organization & Administration Act) on where and when to sit and conduct criminal and civil proceedings.
 22. Fair and impartial trial: If there's a concern that a fair trial cannot be held in the current court, such as due to potential bias or a lack of impartiality; it may be necessary if there is a reasonable fear that the current court is biased due to the presiding judge's personal interest or a high degree of local prejudice, the matter is transferred to another Court.
 23. Forum of Convenience: To make it easier for parties or witnesses to attend court proceedings or to allow for the efficient gathering of evidence, the transfer of the case is the most convenient to expedite the matter. A case may be moved to a location that is more accessible for the people involved, especially if key parties or witnesses live far from the Court where the case was originally filed.
 24. Expedience and justice: The transfer of the case will speed up the legal process or it is deemed necessary for the "ends of justice," the Court may approve transfer of the case to another Court.
 25. Efficiency and Cost-effectiveness; the Court may consolidate cases or to handle a case in a more efficient and cost-effective manner. This can also be applied to consolidate related cases being heard in different courts.
 26. Public Interest & Ends of Justice; the Court should ensure that justice is not only done but seen to be done. If it is in the interest of justice to transfer a case, the Court will consider the application on merit.
 27. In the instant case, the ODPP & IPOA have sought transfer of the case mainly on grounds that there are many witnesses and they reside in Kisumu and the various spots or scenes where the alleged offences took place are in Kisumu which would necessitate the Court to visit the scenes during conduct of the case.
 28. The Accused persons raised concerns of their safety their protection from members of the public and sensitive media coverage of the case, escalated expenses and upholding fair trial. The Court considers the safety security well being of witnesses, victims, vulnerable groups and Accused persons.
 29. The Court makes reference to International Instruments in review of comparative jurisprudence of the matters at hand and the fact that charges preferred are both under Rome Statute of International Criminal Court and domesticated under the operative *International Crimes Act*.
 30. International best practices of protection of all parties before during and after trial proceedings are stipulated as follows;



- a. Declaration of Basic Principles of Justice for victims of Crime & Abuse of Power (1985) provides for Access to Justice & Fair Treatment; witnesses & Victim Assistance and Witness Protection practical measures are undertaken to ensure safety security and well being of witnesses before during after trial by preventing intimidation and retaliation providing physical security, safety measures during trial, information support, right to participate and maintenance of respect and dignity.
 - b. Manual on Human Rights Monitoring by UNHRHC prescribes the responsibility of protecting witnesses, victims and vulnerable groups rests with the State/Government. The State is the Duty bearer with primary responsibility for protecting the rights of all persons under its jurisdiction through judicial, administrative and legislative authorities.

During Trial Proceedings the schedule and venue of trial hearing sessions have a direct impact of protection and participation of witnesses. The venue of trial should accommodate the needs of witnesses and measures should not prejudice the rights of accused persons to due process, impartiality and fair trial.
 - c. Rome Statute of International Criminal Court provides Article 64 (2) the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

Article 66 (1) & (2) Everyone shall be presumed innocent until proved guilty before a Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the Accused

Article 67 The Accused shall be entitled to a public hearing, having regard to provisions of this Statute, to a fair hearing conducted impartially and to minimum guarantees in full equality
 - d. Constitution of Kenya provides for every person's citizen's right to life Art 26 equality before the law

Art 27 human dignity Art 28, Freedom and security

Art 29 Freedom of Association Art 36 and freedom of Movement and residence Art 39. During trial every Accused person is also protected by Art 50 Fair Trial
 - e. HCCRC No. 27 of 2018 KSM High Court Prosecutor Vs Isaac Kiptoo Rono Alias Malakwen Pius Kipkorir Mosonik Julius Kipyegon Mengich
31. The Applicants through DCI Homicide Section deposed that the matter related to offence of murder arising from land disputes along the Nandi– Kisumu boundary. The view expressed was that it was important for the trial to be conducted by a court considered to be neutral to both the accused persons and the victims. Secondly, the applicants said that if the further trial of the case proceeded in Kisumu, there was a likelihood that violence would be ignited between the Luo and Nandi communities, who reside within the area where the offence was committed. The case was to be transferred to Nakuru High Court.
 32. The accused persons pointed out, it would definitely be more expensive and time-consuming for; the witnesses; and the families of the accused persons who may wish to be present in court during the trial. The prosecution's concern was about the need to prevent the possible actualization of land clashes.
 33. Hon F.Ochieng J (as he then was) did not see the connection between the land clashes and the Accused persons, they were out on bond and went about their business as usual in Kisumu and declined transfer of the case to Nakuru High Court. However, he stated that they were apprehensive of the matter being



heard by a Luo Judge and he recused himself referred the matter to colleague Judge in Kisumu High Court. This Court finds these facts persuasive analogy, the fact of ensuing clashes in Kisumu and it was said not to be safe yet the matter proceeded in Kisumu High Court.

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34. The Applicant deposed that all the witnesses and tools of trial are in Migori County and the applicant is apprehensive that there will be unusual difficulty in transporting them to testify, thus inconveniencing all the parties herein and further that the choice of seat of trial is to influence the attention of the case. The court declined transfer of the case.

In The Case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang

35. The Applicants applied for change of venue and proposed conducting the trial in either Kenya or Tanzania which would cause minimum disruption to the private and public lives of the defendants. The right of a defendant standing trial before a criminal court to private and family life, and to public and political life, is well entrenched in international human rights treaties and conventions. The court must balance the need for a trial with their universally acknowledged right to privacy and family life, and public life. Moving the trial to Kenya or Tanzania strikes this delicate balance.

ICC considered security concerns and risks, costs to bring witnesses and victims and impact on them and holding proceedings away from the seat of the Court, the Hague. On the Judges voting they declined the transfer as the seat of the Court was at the Hague Republic vs Abdi Ibrahim Owl No 6 of 2011

36. This is one of the cases transferred from the High Court Nairobi to Garissa High Court. The plea was taken on 12th May 2010 but hearing of this case did not start in Nairobi although the record shows that on 13th July 2011 the prosecution had two witnesses in court. The file was transferred to Garissa and placed before the Court on 15th November 2011. No witnesses were availed and the Accused person was acquitted.
37. The above -cited cases confirm that each case is considered on its specific circumstances and merits on the issue of transfer of case to another Court or not.
38. The instant matter commenced in 2022, following the Ruling CMCC Inquest No 6 of 2017 In the matter of Baby Samantha Pendo (Deceased) delivered on 14/2/2019 by Hon. B Omollo that after evidence adduced made findings and recommendations on the Way forward.
39. In a nutshell, the circumstances giving rise to the alleged offences preferred against Respondents relate and involve 2017 General elections period, Police Officers were deployed to maintain peace, law and order during Pre& Post the elections. On 11th August 2017, after election on 8th August 2017, protests and violence erupted in various parts of Kisumu. In the process of skirmishes and chaos Police Officers were to provide security and protect property. On 12th August 2017, information was received of the death of an infant reportedly injured during Police Officers response to protests in Kilo Junction, Nyalenda area.
40. From these facts, the Applicants applied to have the court proceedings conducted in Kisumu High Court in close proximity to the various parts of Kisumu that skirmishes arose that Police Officers were to quell and in the process acts/omissions are alleged to result to offences the subject of trial. The ODPP& IPOA first made the application for transfer on 25/7/2024 and thereafter, vide the instant application, disclosed that more than 80 witnesses are to testify and ferrying them to Nairobi High Court for trial is expensive and undue financial burden.



41. This Court considers that the application for transfer should be based on valid justifiable reasons. The Court considers the circumstances and merits of the case as a whole. Based on the above facts, the Court considers that the skirmishes spread to various parts of Kisumu and not merely in an isolated spot. Therefore, there are numerous witnesses and it is reasonable in the circumstances that they access justice by attending the nearest convenient Court.
42. The High Court of Kenya in its original jurisdiction and appellate jurisdiction may sit in any part of the country where there is a High Court for the purpose of meeting the ends of justice; testifying and hearing of the case by the witnesses, victims, vulnerable groups and Accused persons and expediting the hearing without hardship inconvenience and lack of fair trial to parties.
43. The over 80 witnesses are better served and will access justice by testifying in the nearest Court and reduce the expenses logistics to travel and stay in Nairobi until testifying in Court. It is only fair and just that where majority of the witnesses/parties reside, the court proceedings are conducted at the nearest Court.
44. Secondly, apart from proximity and convenience of witnesses to attend nearest Court, it will reduce costs and keep witnesses and victims safe and secure from where they reside. The Court maybe required to visit the scenes, the various parts of Kisumu where the places alleged offences took place Nyalenda, Obunga, Nyamasaria, Kondele and Nyamita which the Court restricted visits by the Respondents as one of the bail/bond conditions.
45. The visits to locus in quo would be best done by the Court nearest to the scene and will integrate the scene visiting to the Trial Proceedings. The transfer of the case will expedite the hearing and determination of the matter
46. The Respondents objected to the transfer of the case on various reasons;
 - a. That there is hostility against the accused and that the accused security is not guaranteed if the matter is transferred to Kisumu High Court. the Respondents referred to BBC media prints dated 5/5/2025 and sensitization of the public on the Baby Pendo case and urged that they have been stereotyped and their protection is not guaranteed by the State.
 - b. With regard to Press Reporting, the Court observed;

In Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] eKLR, Ogola J observed:

On the issue of media reporting this Court has taken judicial notice that the Petitioner has been the subject of adverse media reports both print and audio–visual. the cumulative effect of such report is to paint the Petitioner in a bad light. While media reporting is not likely to influence the Court, the Petitioner is likely to be judged adversely in the Court of public opinion.....”
 - c. In Republic v Kunguru Martin Opiyo Junior [2016] eKLR, Wakiaga J took notice of adverse media publicity and the security of the accused person therein was at stake.

In the case Republic V Inspector General Of Police & 2 Others Exparte Boniface Nginyo Mwaura [2019] eKLR the court held that there is necessity on having the trial where witnesses and other facilities for his defence are available. That :-

“Venue is an essential element of jurisdiction in criminal cases. It determines not only the place where the criminal action is to be instituted, but also the court that has



the jurisdiction to try and hear the case. The reason for this rule is two-fold. First, the jurisdiction of trial courts is limited to well-defined territories such that a trial court can only hear and try cases involving crimes committed within its territorial jurisdiction. Second, laying the venue in the locus criminis is grounded on the necessity and justice of having an accused on trial in the municipality of province where witnesses and other facilities for his defense are available.”

- d. Having considered the above authorities this court finds with respect, while media is to inform the public by dissemination of information and/or reports, the Court is only guided by evidence adduced in Court and tested against the law. Media reports cannot be relied upon to prove, for instance, the guilt or otherwise of the suspect issues in controversy. Therefore, the Respondents right that they are innocent until they are found/or not found guilty in a Court of Law remains protected.
- e. That transfer of the case would be expensive and cause difficulty and financial constraints on the Respondents. The accused have been interdicted, the 1st Respondent has children in university within Nairobi, states that he resides in Kilifi which is about 1000 km from Kisumu. The 2nd Respondent suffers ill health and Respondents’ advocates are also based in Nairobi and it would be costly for the accused to meet legal costs The accused would be prejudiced and will be unable to prepare for their defense.
- f. That the prosecution’s inconvenience cannot outweigh / supersede the accused right to fair trial. The matter was instituted in Nairobi and was appropriate and convenient for all parties. The witnesses can also access court through virtual proceedings. The court can direct partial sitting in Kisumu to safeguard the safety and integrity of the proceedings without disruptive and prejudicial impact.
- g. This court finds that the Accused’s circumstances forms legitimate concerns; However, Public Interest and justice of the case requires that the trial commences, it is going to 8 years now, the Interlocutory issues have been dealt with. The apprehension by Accused persons safety and security shall be considered and preventive and protective measures shall be integrated taken to ensure fair trial as prescribed under Article 50 of *the Constitution*. The Court takes que from Isaac Kiptoo Rono case supra, there were land clashes and hence the application for transfer to Nakuru High Court was to protect the Accused persons and ensure fair trial. The Court observed that the Accused persons were out on bond and freely conducted their business and there was no connection between the Accused persons and the land clashes.
- h. Similarly, in this case it is unfortunate that the alleged offences arose during skirmishes, protests and mayhem during the elections period. Today, the political climate has undergone significant change and apprehension of safety and security of Applicants being compromised maybe not be the case on transfer of the case to Kisumu High Court.
- i. In order, for the court to ensure fairness to all parties to the proceedings, the court must strike a balance between the interest of the Respondents and Witnesses/victims such that justice must not be costly so as to hinder the right to access justice. The witnesses and the victim should also benefit from Article 48 and be able to attend trial. Criminal proceedings are also heard in public considering that the Republic is the complainant.
- j) Article 157 of *the Constitution* places power of institution of criminal proceedings on the DPP. The power is not subject to control but may be impugned where it is demonstrated the DPP acts in abuse of power or against public interest. In the instant case the ODPP requests transfer



of case in public interest to facilitate witnesses and victims testify and at the same time ensure Fair Trial to the parties..

- k) Art 10 Constitution binds State organs , State Officers, Public Officers and all persons to comply with /effect national values and principles of governance and Art 243 (3) & 244 of *the Constitution* establishes National Police Service (NPS) and Objects and Functions of NPS among them comply with constitutional standards of human rights and fundamental freedoms (Chapter 4 of Constitution) Therefore, it is NPS to protect and facilitate safety and security for the Respondents and within the Court precincts during trial, while IPOA & ODPP ensure safety and security for witnesses and victims to attend Court and testify in Kisumu High Court.

2nd Application (Oral Application)

47. On 30/1/2025, Mr Willis Otieno of Utu Wetu Organization addressed this Court as follows; The State/ODPP to supply the photograph of 11th accused person [Mohammed Baa] so that the [Victims and/through their Advocates] may pursue enforcing the Warrant of arrest by informing the public at large. The Warrant of Arrest was issued and the public requires the information. A pictorial image of 11th Accused person to be provided and shared with the public so as to have any information to rely to the Police. The National Police Service have numerous put-up photographs of suspects and the public has helped with information. Mr Mango of LSK supported the application to be provided with 11th Accused person's picture/photograph to help execute the warrant of arrest.
48. The ODPP through State Counsel Mr Baraza & Ms Gichuhi opposed the application to provide the photograph of 11th Accused person for public knowledge and to obtain assistance in apprehending the 11th Accused person. The ODPP stated that investigations are conducted by specific legal institutions and the application is an investigative procedure and process left to the investigation arm. The Victim's advocate(s) should approach the Investigation Agencies. There are procedures in disseminating information to the public. The issue of providing pictorial image is regulated by Data Management Act where a private entity seeks Government entity to provide the same. The Court would receive Further Report from IG through Senior Official on execution of warrant of arrest against 11th Accused in 30 days.
49. Mr Kabata of LSK informed the Court that the ODPP published the photograph and shared images of 11th Accused on X Page/Twitter on 14/11/2022 which information was thus circulated to the public.
50. Mr Baraza State Counsel ODPP informed the Court that they sought International Cooperation on Mutual Legal Assistance.
51. On 16/6/2025, Mr Willis Otieno reiterated the application for information related to the public through provision of 11th accused person's photograph so as to effect warrant of arrest that has been in force but not executed. Counsel from Utu Wetu representing victims posited that the matter was of great concern that warrants issued by various Courts with regard to 11th accused person Mohammed Baa had not been executed to date and the National Police Service had not effected warrant of arrest against 11th Accused person and he was constrained to apply to the Court for;
- a. An order directing National Police Service (NPC) to issue public notice published in newspaper(s) with national circulation and online calling for members of the public to share whereabouts of Mohammed Baa 11th accused person with Police or any other law Enforcement Agencies.
 - b. The Notice issues 7 days from date of Application



- c. Tied with the prayer to comply [as outlined above] with National Police Service (NPS) share with victims an image of 11th accused person for purposes of publishing in newspapers with national circulation calling for members of the public to share whereabouts of Mohammed Baa 11th accused person with Victim Counsel, Police or any other Law Enforcement Agencies.
- d. The Information of Police efforts to execute Warrant of arrest against 11th accused person should be reported to the Court.
52. Mr Mango of LSK, Mr Mbanya of Amnesty International Victims, Ms Betty Wambua of IJM; Mrs Nzuki of IPOA were in support of the 2nd instant application on grounds that it was common practice that NPS in carrying out their mandate as Law Enforcement Agency to publish media outlet-2 daily newspapers of national use to seek whereabouts of 11th Accused person. It is a lenient and common request; they offer reward of bounty and that should be carried out in this case. The IG commands NPC which is not a party to these proceedings as per Ruling by Court of Appeal of 21/3/2025.
53. Ms. Oluoch LSK referred to Article 245 of Constitution of Kenya that spells out the legal mandate of NPS and headed by IG. Therefore, IG is to ensure compliance with the Court order, execution of warrant of arrest against 11th Accused person. In light of non-compliance the IG should be held for willful disobedience. The Application before Court was/is proper and the Court has jurisdiction to hear it.
54. Mr. L.Ouma h/b Mr. Eric Gumbo for National Police Service (NPS) responded that the Court ought to take judicial notice that there are 2 reports already provided by IG/NPC through Senior Officer on the circumstances surrounding effecting warrant of arrest against 11th Accused person. There was no challenge to the 2 Reports filed in Court. In the process the public was asked to participate in the process and investigations are conducted by Law Enforcement Agencies.
55. Secondly, the Applicant was to file a formal application and serve parties particularly NPS and then a comprehensive response shall be obtained. The IG/NPS would be able to respond to the question of legality and accountability and any remedial action by (NPS) and this process will ensure fair hearing envisaged by Article 50 of *the Constitution* of Kenya 2010.
56. Ms. Ruth Gichuru State Counsel ODPP, stated that the warrant of arrest was/is to be effected by Investigation Agencies and within reasonable timelines to pursue the 11th Accused person. Meanwhile, a formal application was to be filed and served so that all parties could respond, (NPS) whose head is IG.
57. On 23/7/2025, Mr Willis Otieno again raised similar Application seeking directions on his earlier application to have the Respondents source for public assistance to apprehend the 11th Accused person whose warrant of arrest was issued by 3 High Court Judges. In the alternative, the Respondents ODPP, IPOA & IG to provide and supply photographic image of 11th accused person for purposes of victims taking out a Public Notice in the media to source public assistance on whereabouts of 11th Accused person Mohammed Baa whose warrant has not been executed to date. It is/was a painful experience to victims that the warrant has/had not been executed. Mr. Mango LSK & Ms Nzuki IPOA supported the application and reiterated earlier submissions
58. Mr. L.Ouma h/b Mr Eric Gumbo for National Police Service (NPS) responded that the application by Mr Otieno raises far reaching administration and constitutional implications on the functioning and mandate of NPS which has mandate to maintain law and order and conduct investigations and apprehend suspects on offence (s) committed. The Reports presented demonstrate ongoing efforts of apprehending 11th accused person. An oral application does not afford the opportunity by IG/NPS to address the application.



59. Mr Makori State Counsel ODPP reiterated that an oral application would not suffice a formal application ought to be filed and served to Parties to ensure ample response on the matter.
60. SC. Nelson Havi Lead Counsel for Defense Team posited what was the propriety of hearing the warrant of arrest against 11th Accused yet the Amended Charge Sheet had only 4 Accused persons?
61. Mr. Kibet h/b Mr Arusei for 4th Accused, Mr Lumwaji for 2nd Accused & Mr Munoko for 1st Accused were in support of formal application filed and relied on the ODPP mandate to charge suspects with relevant offence (s)
62. The Court observed that despite the several times the issue of execution of warrant of arrest of 11th Accused person came up; a formal application was not filed and served. Since the parties through respective Counsel ventilated on the matter at length orally and in various dates; the Court took the view, Ruling on the matter would be delivered together with the 1st Formal Application hereinabove. Parties through Counsel were at liberty to file serve/exchange written submissions and give DR Criminal Division physical copy on the issue. To date none was/is filed.

Analysis & Determination

67. The issue for determination is the mode and process of execution of warrant of arrest issued against the 11th Accused person Mohammed Baa, whom since this matter started in Nairobi High Court never appeared in Court and warrant of arrest was issued since 2022 and remained in force to date.
68. *The Constitution* spells out the legal mandate of National Police Service (NPS) Article 238 outlines principles of national security, Article 243 provides for establishment of the National Police Service and shall function throughout Kenya. Article 244 shall state- objects and functions of the National Police Service as follows;
 - (a) Strive for the highest standards of professionalism and discipline among its members;
 - (b) Prevent corruption and promote and practice transparency and accountability;
 - (c) Comply with constitutional standards of human rights and fundamental freedoms;
 - (d) Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
 - (e) foster and promote relationships with the broader society.
69. Article 245 provides Command of the National Police Service as follows;
 - (1) There is established the office of the Inspector-General of the National Police Service.....but no person may give a direction to the Inspector-General with respect to—
 - (a) The investigation of any particular offence or offences;
 - (b) The enforcement of the law against any particular person or persons; or
 - (c) The employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
 - (5) Any direction given to the Inspector-General by the Cabinet Secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.



70. In Court of Appeal Ruling of 21/3/2025, the Court resolved IG/NPS the issue of if both NPS & IG are parties to these proceedings as follows;
48. Whereas the NPSC, pursuant to section 3 (1) (b) of the NPSC Act, wields powers of a body corporate, the NPS is not clothed with such authority by its mother Act. This leads us to the conclusion that the NPS does not have statutory or constitutional authority to sue or be sued and cannot, therefore, be made a party to the appeal. The constitutional and statutory expectation is that it is the Inspector General who sues, or is sued, on behalf of the NPS in appropriate cases. Additionally, the Inspector General who commands the NPS, having been a party to the proceedings before the trial court and who should be a party to the appeal as of right, is well equipped to advance the position of the NPS.
71. The application to summon IG in Court for enquiry on efforts to trace 11th Accused is already dealt with as IG being party to proceedings he mandated Senior Officer to present reports and will continue to do so.
72. Secondly, Section 55 & 56 of Data Management Act regulates the provision of private information and provides for exemptions. Section 55 prescribes the Data Commissioner issues the Data Sharing Code and Section 56 prescribes enforcement of Provisions of the Act and an aggrieved party may lodge complaint to/with the Data Commissioner.
73. Thirdly, Article 157 (6) & (10) Constitution grants ODPP the sole preserve subject only to/by the Court, to institute, take over and continue or discontinue criminal proceedings and shall not require any person's consent or authority to commence proceedings or exercise of functions and shall not be under the direction or control of any person or authority.
74. From the above provisions of law, the application to order National Police Service (NPS) to issue public notice published in newspaper(s) with national circulation and online calling for members of the public to share whereabouts of Mohammed Baa 11th accused person with Police or any other Law Enforcement Agencies is not protected by law as the command of NPS is the IG who is not directed in investigations and enforcement of the law except through writing.
75. The production of photographic image of 11th accused person for purposes of victims taking out a Public Notice in the media to source public assistance on whereabouts of 11th Accused person Mohammed Baa is curtailed by strict adherence of the Data Protection Act.
76. The ODPP amended the Information /Charge sheet from 12 suspects to 4 accused persons who took plea and plea of Not Guilty was entered. The 11th accused person remains at large, the Senior Officer from IG/NPC presented reports on progress and status of efforts to apprehend the 11th accused and continue with efforts of enforcement of the warrant of arrest. The process and outcome shall be in the hands of ODPP on whether to prefer charge(s) against 11th Accused person or not.
77. The totality of these circumstances disclose on the one hand there is concern to enforce the law by executing Warrant of Arrest after preferring charge(s) against the suspect, 11th Accused person upon and at the same time, whether prosecuting Co Accused persons and conducting the trial on the 11th Accused person (when arrested) on offences under *International Crimes Act*.
78. In International Criminal Court, on 6/2/2015, the court dealt with the case of The Prosecutor vs Joseph Kony , Vincent Otti, Okot Odhiambo & Dominic Ogwen, the Court undertook proceedings to consider proceeding in absentia and/or grant severance of the case for the suspects who could not be traced and were on warrant of arrest. The matter revolved around the situation in Uganda of crimes against humanity of murder, enslavement and other inhumane acts, cruel treatment, attack against a



civilian population and pillaging. Warrants of arrests were issued against 4 suspects almost 10 years ago. Mr. Ogwen presented himself voluntarily before the ICC in January 2015 and the issue was whether to hold trial proceedings in absentia of other 3 but proceed with their trial in absentia pursuant to Article 61 (2) (b) of the Rome Statute of International Criminal Court or not and await to conduct trial of all 4 Accused persons. The Prosecutor expressed reservation to proceed as proposed as it would cause unjustified budgetary implications, and only victims of only 1 suspect Mr. Ogwen would participate in trial proceedings.

79. The Judge considered the present case the oldest case before the ICC which was dormant for 10 years due to unavailability of suspects, whereas Mr. Ogwen appeared in Court voluntarily, there was no certainty that the remaining 3 would appear or would be apprehended soon. The factual allegations levelled against the Accused person Mr. Ogwen were less as those pertaining to Co accused persons. In light of the circumstances continuing proceedings against all 4 suspects in absentia of 3 suspects would prejudice Mr. Ogwen and prolong proceedings and instead the court severed the case against Mr. Ogwen to proceed separately.
80. In the instant case, the Trial may proceed with /without 11th Accused person but the Trial proceedings do not exonerate the 11th Accused person's warrant of arrest being executed and if/when enforced, ODPP shall work within its mandate on the way forward.
81. At this stage warrant of arrest of 11th accused remains in force to be executed by IG/NPS as provided by Part 3 Section 21-34 of Criminal Procedure Code and Section 49-53 of [National Police Service Act](#). The progress/status reports to be presented to the Kisumu High Court/Trial Court periodically. Any information on whereabouts of 11th Accused person shall be relied by any person/citizen to Local Administration and Law Enforcement Agencies for prompt action. In the circumstances, the application to obtain photograph of 11th accused person to publish in the print and online media to inform the public would have to be in compliance with the law.

Disposition

82. The 2 Applications considered above commend the following orders;
 1. The Application by ODPP to transfer this case to Kisumu High Court is granted but on the following conditions;
 2. The State as Duty bearer shall through its institutions NPS maintain law and order, ensure safety and security for all parties before, during and after trial within the Kisumu High Court precincts
 3. NPC shall facilitate the transport of and subsistence of Respondents from Nairobi to Kisumu and back during trial for their safety and security.
 4. Fair trial under Art 50 of [the Constitution](#) shall be observed protected and enforced but where just cause and need arises application to made to Kisumu High Court/Trial Court to consider proceedings in camera (not open court no members of the public) or virtual online proceedings (parties and/or Court proceeding virtually)
 5. Warrant of arrest against 11th Accused Mohammed Baa remains in force to be executed, anyone with information to refer/rely to the Police and ODPP to exercise legal mandate under Art 157 Constitution.
 6. Meanwhile Progress/Status Reports to be availed to the Trial Court periodically by Senior Officer on behalf of IG as earlier done



7. The Court File be placed before Presiding Judge Criminal Division of the High Court Nairobi
Hon. K. Kimondo J

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND SEPTEMBER 2025 IN
OPEN COURT IN CRIMINAL DIVISION HIGH COURT NAIROBI.**

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Munoko for 1st accused person – present online

Mr. Lumwaji for 4th accused holding brief Cherono for 4th accused – present online

Ms. Kinyua holding brief Mr. Muganda for 4th accused- present online

Mr. Makori – Office of Director of Public Prosecution (ODPP) - Applicant present online

Mr. Ouma holding brief Mr. Eric Gumbo for National Police Service/Inspector General (NPC/IG) - present online

Mr. Mwangi - International Justice Mission (IJM)- present online.

Mr. Kinoti with Ms. Nzuki -Oversight Policing Authority - IPOA –present online

Law Society

Mr. Mango - Law Society of Kenya (LSK) – present online

Ms. Leah Chinimbaja holding brief Mr. Willis Otieno for Utu Wetu – present online.

Mr. Abdikadir Osman – Kenya National Commission of Human Rights (KNCHR)–holding brief Mr. Edward Mbaya-

Amnesty International – present online

Mr. Kibet holding brief Mr. Arusei with Mr. Muganda – for 4th Defendant – present online.

Mr. Miyare for 3rd Accused person – present online.

