



**Obwoni v Republic (Miscellaneous Criminal Application
43 of 2024) [2024] KEHC 17024 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION 43 OF 2024**

TA ODERA, J

MAY 20, 2024

BETWEEN

DANIEL KINARO OBWONI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Daniel Kinaro Obwoni the accused herein the accused in CM CR case no. E1420 of 2023 filed application dated 6.3.24 seeking transfer of the case criminal case from the Kisii Senior Principal Magistrate's Court to Kericho Senior Principal Magistrate's Court for hearing and determination. The application is brought under Article 50 (2) and 159 (1) and (2) of *the constitution* and Section 81 of the *Criminal Procedure Code*.

The application is based on the grounds that:

- i. The applicant is the accused in a case of obtaining Kshs. 2,000,000/= from one Vanice Kemuma Mose the complainant in Kisii CMCR 1420 of 2023.
- ii. As at 23.10.23 when the applicant was arraigned in court the complainant was a serving clerk in court no. 2 within Kisii Law Courts.
- iii. That one of the witnesses namely Jael Kerubo is the immediate former clerk of judicial officer handling the matter.
- iv. That the applicant has been highly prejudiced by being granted high bail terms with and intent to keep him in custody and his bond approval was inordinately delayed with an intent to punish him due to the influence of the complainant on judicial officers / clerks in the station.
- v. That applicant will not get a fair and impartial hearing due to her relationship with the judicial officers / clerks in the station.



- vi. That the applicant has shown a case of clear conflict of interest and interference and thus his fears are justified.
 - vii. That it is in the interest of justice that the transfer orders be granted.
The application is supported by the annexed affidavit of the applicant in which he reiterated the grounds on the face of the application and annexed a copy of charge sheet (“DKO 1”).
The state filed grounds of opposition dated 12.3.24 and listed the following points:
 - i. The application is frivolous vexatious and an abuse of the process of the court.
 - ii. The application is meant to frustrate the prosecution’s case.
 - iii. The applicant is forum shopping for seeking transfer to a specific court.
 - iv. The threshold for transfer has not been met.
 - v. That discretion of granting bond is not a ground for transfer.
 - vi. That it has not been shown that the entire magistracy in Kisii is conflicted in the matter to warrant transfer to another station.
 - vii. The application is made in bad faith and against the interest of justice.
2. The applicant submitted that the application is within the provisions of Section 81 of the *Criminal Procedure Code* and cited the cases of Maina Kinyati vs Republic and Shilenje vs Republic to support this application. It was submitted that the test is that of reasonableness.
3. The respondent submitted that the applicant waited till the hearing date to make the application and that he is forum shopping by suggesting that the matter be transferred to Kericho and not any other court. Further that the issue of conflict has not been established as no specific relationship between the judicial officer and the complainant has been raised. Counsel cited Criminal Appeal no. E026 of 2021 R Vs Michael Otieno Onyango 2021 eKLR where it was held that the applicant must show bias and also that the application amounted to forum shopping. Misc. Criminal application no. 31 of 2007 Kakamega where it was alleged that the complainant was a clerk within the Law Court and it was held that the role of the court was to determine the case and complainant has a duty to prove his case. Further that we are not told that the conflict affects all the magistrates and that if the court will allow the application then the matter ought to be moved within Kisii Law Court.
- In reply counsel for the applicant said the cited cases were appeal cases where the appellant had the burden of proof while in this case it is the court being indicated and that the standard in CPC section 81 is that of the thinking of a reasonable man. He said it is fair that the case be transferred outside the jurisdiction of this court.
4. I have carefully considered the application the response and the sable submissions by both counsel. Section 81 (1) of the *Criminal Procedure Code* provides -
- Section 81. Power of High Court to change venue
- Whenever it is made to appear to the High Court—
- SUBPARA (a)
- that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
- SUBPARA (b)
- that some question of law of unusual difficulty is likely to arise; or



SUBPARA (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

SUBPARA (d)

that an order under this section will tend to the general convenience of the parties or witnesses; or

SUBPARA (e)

that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order—

SUBPARA (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;

SUBPARA (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;

SUBPARA (iii)

that an accused person be committed for trial to itself.

In the cited case of *John Brown Shilenje v Republic* [1980] eKLR where it was held:

“the High court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him; especially when the statement implies a personal censure on such officer.”

In *Maina Kinyatti vs Republic* (1984) EKLR the court held as follows:

“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.”

In the case of *Republic v Michael Otieno Onyango* [2021] eKLR it was held “The applicant contends that he has no faith in all the Courts in Migori. However, only one magistrate was seized of this matter. There are other competent courts that can deal with the case. There is no evidence that a trial in any other court in Migori would be inconvenient or prejudicial to the applicant. That is why I am convinced that there is mischief in the application.”

5. The issue for determination is whether a fair and impartial trial of the case in the lower court can be held in Kisii Chief Magistrate’s Court in the eye of a reasonable man.
6. The applicant alleges that the complainant is was a Court Assistant working in Kisii Law Courts before her recent transfer and that one of the witnesses namely Jael was a court assistant in the trial court, also that he was given exorbitant bond terms and that the process of processing bond delayed and so he has no faith in the trial court. The State submitted that the application is frivolous and an abuse of the court process, meant to forum shop as the biasness has not been established.



7. The trial court has been accused of granting exorbitant bond terms I have seen the lower court file and I note that applicant was granted bond of Kshs. 500,000/= WSLs or cash bail Kshs. 2,000,000/=. The subject matter was Kshs. 2000,000/=and the trial court had discretion to grant the bond.
8. On delay in processing of bond plea was taken on 23.10.23 and bond approved on 15.11.23. There is no indication on when the documents were presented for processing and this court is also alive to the fact that once documents are presented for processing of bond, they must be investigated before approval. The delay has not been established.
9. On the proposal to transfer the case to Kericho, State submitted that this is forum shopping and I also agree as there are many courts around Kisii and in the entire South Nyanza region. Why does complainant want this case to go to Kericho and not any other station? The discretion as to where the case is to be transferred incase allegations of bias are established lies with the court and not any party. A party is not expected to suggest to court where the case should go to in such circumstances. I agree with the State that the proposal is an attempt by the applicant to forum shop which cannot be entertained by this court.
10. It is trite law that he who alleges must prove. Apart from saying that the complainant was working in Kisii Court as a court assistant till October 2023 and that a witness called Jael was a clerk to the trial court, no evidence in the form witness statements or letter from the court administrator showing the place of work of complainant and the witness have been annexed. The threshold in transfer applications was laid down in the cited John Brown Shilenje case (supra). What I ask myself is whether a reasonable man would form an opinion of bias based on the application as it is. The answer is no. I find that no nexus has been established between the complainant and the witness and the judicial officer to make any reasonable man to conclude that Hon. Mutai will not be impartial and fair if he hears the case. In any event the duties of judicial officers are clear cut and their decisions are based on the evidence and the law as was held in the cited case of. They are expected to work independently and court assistant have no role to play in the decision of the court.
11. I find no merit in the application and I proceed to dismiss it with costs. I order that the case proceeds before Hon. Mutai to its logical conclusion. Mention on 4.6.24 before trial court for directions on hearing.

T.A. ODERA

JUDGE

20.5.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF: -

N/A for the Applicant

Mr. Koima for the State /Respondent

Oigo – Court Assistant

