



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**MISC. CRIMINAL APPL. NO. E001 OF 2021**

**MONICA CHEPKOECH BORE.....APPLICANT**

**=VRS=**

**THE REPUBLIC.....RESPONDENT**

**RULING**

By the Notice of Motion dated 29<sup>th</sup> January 2021 filed herein on 2<sup>nd</sup> February 2021 the applicant seeks orders that: -

**“1. “Spent”**

**2. THAT there be stay of proceedings in Nyamira Chief Magistrate’s Court Criminal Case No. 542 of 2020; Republic =v= Monica Jepkoech Bore pending interpartes hearing of this Application.**

**3. THAT there be stay of proceedings in Nyamira Chief Magistrate’s Court Criminal Case No. 542 of 2020; Republic =v= Monica Jepkoech Bore pending hearing and determination of this Application.**

**4. THAT this honourable Court be pleased to transfer Nyamira Chief Magistrate’s Court Criminal Case No. 542 of 2020; Republic =v= Monica Jepkoech Bore to Eldoret Magistrate’s Court for full trial.**

**5. THAT this Honourable Court be pleased to make such Order as it deems mete and just.”**

The application is premised on grounds that: -

**“1. The Applicant lives and resides in Maili Nne in Eldoret town within Uasin Gishu County with no stable income.**

**2. The Applicant is out on cash bail in Nyamira Chief Magistrate’s Court Criminal Case No. 542 of 2020; Republic =v= Monica Jepkoech Bore which is scheduled for hearing on 3<sup>rd</sup> February 2021.**

**3. The Applicant was charged on 15/6/2020 in Nyamira Chief Magistrate’s Court under Section 313 and 382 of the Penal Code Cap 63 Laws of Kenya for offences that are alleged to have been committed by the Applicant at Kerio Dreams Resort in Eldoret Town within Uasin Gishu County.**

**4. That cause of complaint arose outside the jurisdiction of Nyamira Law Courts and further the Applicant was arrested on 10/06/2020 within Eldoret Town in Uasin Gishu County through Langas Police Station.**

**5. That a scene visit on the said place (Kerio Dreams Resort) which the said offences were allegedly committed is necessary by the trial court for satisfactory trial of the said offences.**

**6. The Applicant is sickly and suffering from chronic low back pain thus cannot travel and/or sit for long hours. Further the Applicant is above 58 years hence more vulnerable to Covi-19 pandemic. For the ends of justice to be met, it is more convenient to the Applicant, complainant and witnesses for the trial to be conducted in Eldoret.**

**7. That the trial court has not proceeded at all and further, no witness has testified in the said case.**

**8. THAT it is the interests of justice that orders sought be granted as no prejudice will be suffered by the Respondent is the orders sought herein are granted.**

**9. THAT this application is brought in good faith and without under delays.**

**10. Unless this application is certified urgent and the orders sought herein are granted, the trial court will proceed on 3<sup>rd</sup> February 2021 pending hearing and determination of this Application thus rendering this Application nugatory and mere academic exercise.”**

The application is supported by the affidavits of the applicant sworn on 29<sup>th</sup> January 2021 and 19<sup>th</sup> February 2021. In the affidavit sworn on 29<sup>th</sup> January 2021 she has reiterated the grounds on the face of the application while the supplementary affidavit sworn on 19<sup>th</sup> February 2021 has several documents annexed to it.

In opposition to the application, Counsel for the respondent filed a replying affidavit in which he deposes that the cause of action arose in Manga; that all the witnesses reside in Manga and that given the nature and circumstances of the offence it shall not be necessary to view the scene of the offence and the application should be rejected.

The application was canvassed orally. Mr. Bulbul, Learned Counsel for the applicant informed the court that he entirely relied on the grounds on the face of the application, the affidavits and the annexures thereto. He submitted that should this court decline to grant the application the applicant's right to a fair trial will be violated in that she will not have adequate facilities to travel all the way from Eldoret to attend the hearing. He urged this court to grant the application.

Mr. Majale, Learned Counsel for the respondent, opposed the application and in addition to his averments in the replying affidavit submitted that the ground raised by Counsel for the applicant does not warrant the transfer of this case to Eldoret. Mr. Majale pointed out that as a condition to being granted bond the applicant undertook that she will attend court as and when she is required and if she cannot do so then the prosecution shall apply that the bond be cancelled. He urged this court to reject the application.

In reply, Mr. Bulbul reiterated the grounds on the face of the application, in the supporting affidavit and in the supplementary affidavit and urged this court to allow the application.

I have carefully considered the application, the grounds thereof, the affidavits in support and in reply, the annexures, the rival submissions and the law.

An application for the transfer of a criminal trial can be made under **Sections 78, 79, 80 or 81 of the Criminal Procedure Code**. Sections 78, 79 and 80 are however not relevant to this case as they involve transfer of cases by Magistrates. The power of the High Court to change the venue of a trial is provided at **Section 81 (1) of the Criminal Procedure Code** and **Section 81 (2) of the Criminal Procedure Code** provides that such power may be exercised upon the application of a party interested or on the court's own volition. **Section 81 (1) of the Criminal Procedure Code** states: -

**“(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.”**

Before granting the current application therefore, this court must be satisfied that the same meets any of the criteria set out in **Section 81 (1) (a) – (e) of the Criminal Procedure Code**. Having considered the material placed before me I am not satisfied that the applicant has met any of the criteria that would justify the transfer of her case from the Chief Magistrate's Court at Nyamira to Eldoret. For one, it is clear from the charge sheet that the offence the subject of the charge occurred in Manga in Nyamira County not in Eldoret. The applicant has not demonstrated that a fair and impartial trial cannot be had in any subordinate court within Nyamira County and more especially in any of the other courts within Nyamira Law Courts. Moreover, nowhere in her affidavits does she allege bias or any form of impropriety on the part of the trial Magistrate that would warrant this court to move the trial to another court.

Secondly, the applicant does not allege that some question of law of unusual difficulty, is likely to arise which the court at which she is presently being tried will not be able to handle. She has also not demonstrated that a view of the place the offence was committed will be necessary and that should it become necessary then the trial court sitting in Nyamira shall not be in a position to go view the scene. In any

event the nature and circumstances of the offence is not one that would require a visit to the *locus quo*. Further, whereas the applicant has stated that she shall not be able to travel from Eldoret. Under **Section 81 (1) (d) of the Criminal Procedure Code** it is not her own convenience that is considered when determining the application but the **general convenience** of the parties. It is my finding that in this case the general convenience of the parties favours a hearing in Nyamira rather than in Eldoret because this is where the offence is alleged to have been committed, the investigations undertaken and it is also where all the prosecution witnesses reside.

In the upshot I am not satisfied that an order for transfer of the case is expedient for the ends of justice. Neither am I persuaded that such an order is required by any provisions of the Criminal Procedure Code. This court owes it to the cause of justice to exercise the discretion bestowed upon it under **Section 81 (1) of the Criminal Procedure Code** judicially so as not to risk to be seen to be encouraging forum shopping. The application is not merited and it is dismissed.

**Ruling signed, dated and delivered electronically on this 4<sup>th</sup> day of March 2021.**

**E. N. MAINA**

**JUDGE**