



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO.59 OF 2020

JAMOCK KAMAKYA MBUVI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant on 17.7.2020 made an application seeking to have his pending application for resentencing hearing transferred to another court.
2. In response Martin Mwangera opposed the application and averred that the application did not meet the threshold for transfer of the case. It was averred that the application is frivolous and an abuse of the court process.
3. Having considered the application, I have addressed my mind to the law regarding personal and geographical jurisdiction of the High Court, the transfer of criminal cases and the powers and jurisdiction of the High Court.
4. The Applicant wants this court to believe that there is another convenient court to handle the matter and not the trial court. I am required to make a call as to whether or not it is apparent that the call for transfer is well founded.
5. The position of the law is that if it appears that the dispensation of criminal justice is not possible, impartially, objectively and without any bias, at any place, the appropriate court may transfer the case to another court, where it feels that holding of fair and proper trial is conducive. When it is shown that public confidence in the fairness of a trial would be seriously undermined, the court at its own motion or any of the parties may seek the transfer of a case. That power is contained in section 81 of *The Criminal Procedure Code* which provides thus;

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.

6. This provision 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.

7. In **Joseph Korir alias David Arap Chonjo v Republic [2018] eKLR** that relied on **Kamande & 3 Others vs. Republic [2014] eKLR** the court held thus:

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on these factors is that the court has a duty to encourage trust in the integrity and independence of the Judiciary. Therefore allegations which may be directed at Judicial Officers, alleging bias and lack of fairness must not therefore be accepted without there being substantive evidence to back them. If a court was too quick to accept allegations of bias directed against its officers, without first demanding proper substantiation, it would erode the very foundation upon which the judiciary was founded. At the same time, the court must balance this consideration with the need to ensure that justice is not only done, but also seen to be done.”

8. It would therefore necessitate that before invoking section 81 of the CPC, the matter be looked at wholesomely for a change of venue ought not to be granted whimsically, so as not to put into question the independence and integrity of the judiciary.

9. Having evaluated the material placed before me, I find that I am not satisfied that it discloses sufficient justification for change of venue of the hearing in a court other than the trial court. A mere allegation without substantiation is not enough. See **John Brown Shilenje v Republic Nairobi Cr. Appeal No. 180 of 1980** where Trevelyan J., stated that the test is 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.*”

10. A careful perusal of section 81 of *The Criminal Procedure Code Act*, shows that the provision clearly enunciates that the paramount norms of transfer of venue are "expediency" and "the interests of justice." I find that there is nothing to convince me that there would be any affront to a right to a fair trial if the application is not allowed, hence the selection of venue cannot be granted. Suffice to add that it is this court that heard the case up to conclusion and went ahead to sentence the applicant and thus any issues relating to review of sentence as herein sought ought to be addressed by this court. It would appear to me that the applicant is out on a forum shopping which should not be encouraged.

11. The upshot of the foregoing is that the applicant’s request for transfer of the case lacks merit. The same is dismissed. The applicant is directed to set down his application for resentencing for hearing on priority basis.

It is so ordered.

Dated and delivered at Machakos this 7th day of December, 2020.

D. K. Kemei

Judge