**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CRIMINAL APPLICATION NO. 122 OF 2019**

**ABDALLA AWADH ABUBAKAR...............................................APPLICANT**

**VERSUS**

1. **INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE**
2. **THE DIRECTOR OF PUBLIC PROSECUTIONS..........RESPONDENTS**

**R U L I N G**

1. Pursuant to the provisions of Articles 49 and 50(2) g & j of the Constitution of Kenya 2010, together with Sections 66,72, 77 and 81 of the Criminal Code, the Applicant has approached the court and prayed in the main that the Criminal charges preferred against it and registered for trial at the Senior Principle Magistrates court, JKIA be transferred to the Principal Magistrate Court, Shanzu or any other nearby court for hearing and determination. There was also a prayer for stay of proceeding pending hearing.

2. The grounds advanced to support the application were that the applicant is a law abiding citizen who has been charged with criminal offences before a magistrate court in Nairobi, JKIA, yet he lives and work in Mombasa Island where the offence was allegedly committed and that the purpose of seeking transfer is to make it affordable and convenient for him and his family to attend the court session. It is asserted by the applicant that the trial of the matter in Nairobi would infringe on his constitutional rights in that it would not be convenient and affordable for his family witnesses friends and sympathizer to attend court due to the distance in as much as it would comprise his right to choose as advocate of our choice who is based in Mombasa owing to costs of travel when compared to his meagre income. To the applicant the decision to file the charges in Nairobi and away from Mombasa where the offence is alleged to have been committed is an intention to punish the accused persons before trial and conviction. He re-visited his inability to instruct an advocate of own choice by stating that owing to distance his advocate could not attend the plea taking session thus forcing him to make a request to an advocate appearing for a co-accused to represent him at plea taking.

3. When served, the Respondents filed a Replying Affidavit sworn by one **IP Ismael Oruko** a member of the Investigating team. That Affidavit opposes the Application on both limbs. On stay pending the determination of the application the deponent took the view that a similar request had been made to the High Court, was declined and no new circumstances have arisen to justify this court granting the same.

4. On transfer the deponent took the position that it behooves an applicant to demonstrate that the court before which the matter is lodged is unlikely to render justice or that he is likely to suffer a prejudice in terms of Section 81 Criminal Procedure Code.

5. On the facts of the case sought to be transferred, the deponent took the position that to have the case tried in Mombasa or Shanzu would be tantamount to have the matter before a Magistrate who would be conflicted in trying a fellow magistrate and judiciary staff and that the decision to prefer the charges in Nairobi was to guard against such conflict. It was then deponed that interests of justice under article 157 (ii) of the constitution mandated that criminal justice be shielded from such negative public perception and that public interest be upheld at all times and that all criminal justice system acts need to take regard the scrutiny with which the public views the drug menace and should avoid prospects of a trial being viewed as a sham. The choice of Shanzu Law Courts was termed **'forum shopping'** intended to result in a certain decision and that convenience of parties should be regarded wholesomely never to be limited to the accused only but also the co-accused persons and even the witnesses. It was submitted that the court notes that one of the accused persons works in Ruiru. It was then deponed that the charge sheet shows that some of the witnesses are drawn from Mombasa and if the consideration was to be purely on the convenience of the prosecution, then it would have been the first to insist on the trial in Mombasa to avoid expenses on the part of tax payers. It was then pointed out additionally that no impartiality has been raised against the magistrate the matter has been placed before and that the bringing of the application in Mombasa rather than Nairobi is itself evidence of forum shopping. The Respondent prayed that the application deserves dismissal.

6. The matter proceeded before the court by parties offering oral submissions. On the date fixed, the Respondent filed a list of authorities while one Lawrence Thoya Baya, the person identified as the 4$^{th}$ Accused in the Criminal Case, appointed an advocate who sought and was granted a chance to address the court as an interested party to the proceedings.

7. I therefore listened to submissions from two counsel for the Applicant, submissions by the counsel for the interested party and those by the respondents.

8. In their submissions, the counsel for the Applicant and supported by that for the interested party, termed the decision to prefer the charges in Nairobi as unconstitutional and contrary to the dictates of the criminal procedure code. Mr. Abdalla appearing for the Applicant with Mr. Abubakhar submitted that there was an outright and clear breach of the Applicants right to an advocate of our choice as well as the right to be tried in an open and accessible court. He cited to court the decision by RSC Omolo J, as he then was, in **Khalid Salim Ahmed Balala vs Republic, Mombasa HCC Cr. Appl. No. 153/1992 (Unreported)** for the proposition of law that in an application for transfer the convenience of the accused and counsel must be taken into account. He also cited to court the decision of the High Court in **HCCR App. No. 50 of 2012 Elizabeth Waithiegeni Gitimu vs Republic,** for the proposition of the law that in a criminal trial the accused is the favourite child of the law who enjoys every benefit of the doubt.

9. For Mr Abubakar, there was thereat to the provisions of Article 48 of the constitution as echoed by the provisions of section 66, 71 and 81 of the Criminal Procedure Code of which are designed to make the criminal trial convenient from the accused person. To him the need for public hearing is for the public to know whether an offence has been committed or not committed.

10. To counsel the accused needs to be tried before his community who should condemn him or vindicate him over the charges by being the community availed the chance to follow the proceedings. Counsel then cited to court the provisions of section 67, CPC to demand that an offence be tried within the district in which it was committed and that it's the burden of the ODPP to provide a justification for preferring the place of trial away from the place of alleged commission.

11. For the interested party, Mr. Onyango Advocate offered submissions which essentially supported the application and emphasized the need for fidelity to the provisions of Article 201(b) on the prudent application and employment of public resources. He pointed out that it would be a waste of public resources to transport witnesses all the way to Nairobi and may be accommodate them when there are nearby courts. Counsel also cited to court Article 6(3) of the constitution to mandate all state organs and agencies which, include the Judiciary and ODPP, to avail their services to all parts of the Republic and that the two have done so and therefore to allow the ODPP to take the trial of the instant case to Nairobi would be to roll back the gains achieved and negate the spirit and letter of the constitution.

12. To counsel, the rationale of Article 50 demanding public hearing is that an accused ought to be condemned and or vindicated over a criminal charge before his community and that during such trial he need support, including emotional support, from all his friends, family and acquaintance which cannot be availed if the trial proceeds in Nairobi.

13. For the Respondent, Mr. Muteti opposed the application on the grounds disclosed in the Replying Affidavit underscoring the fact that courts need to operate beyond suspicion. He urged the court to recognize the fact that the accused persons are employees of the court based in Mombasa a fact that has made Judge Njoki to recuse herself.

14. He pointed out that the right to a fair hearing does not mean that the concerns of the victim to the crime must be ignored. He stress the public concern over drug menace in Mombasa and submitted that it would not view a trial by a Mombasa court to be impartial in a case whose offence was allegedly committed in the same precincts. Counsel then cited to court the decision in **Ken Mariuki vs Republic (2015)eKLR** in which the court underscored the need to inspire public confidence in the administration of justice when faced with an application for transfer of a criminal case. He then reminded the court that in the instant application bias or impartiality of the court at JKIA had not been alleged and that the rights in the bill of rights are not absolute but can be limited on grounds and to the extent acceptable in a democratic society.

15. On choice of place for trial, counsel cited to court the decision in **Dpp Vs Perry Mansukh Kasagara(2018)eKLR** in which it was held that the DPP has the right to commence a criminal case in any court.

16. On costs of transporting witnesses and the court to visit the scene of crime, counsel submitted that the state is not complaining about costs and that justice is a matter of security that demanded greater need to maintaining confidence in the Administration of justice.

17. On convenience to the accused persons, counsel did not dismiss the complaint as vain but urged the court to remember that one of the accused persons, ONESMUS MOMANYI, is a judicial staff based in Ruiru and would be equally inconvenienced if the trial is held in Mombasa.

18. On article 50 and its demand for trial in public, counsel said that the JKIA court is a public building in which nobody has been denied entry adding that the attendance by public at a trial is the least concern of the law but that anybody who desires to attend must meet the costs of such attendance.

19. On article 6(3), counsel submitted that the need to have judicial services taken nearest to the people is tinkered with due to the need to avoid the perception of the court being a trier of self. The court was referred to the decision **in Banjuka vs Republic (2017)eKLR** where the court declined an application for transfer by a notorious criminal who made it his business of having his case transferred all the time while casting aspersions in the judicial offices. The court declined transfer to secure the confidence of public in the administration of justice. He concluded his submissions by stating that the transfer of the case to Mombasa and its surrounding counts will not be viewed to be for the public good.

20. In closing submissions counsel for the interested party took the view that Mr. Muteti submissions were designed to instill fear upon and intimidate the court noting that there was no real impartiality alleged against all the judicial officers serving in Mombasa and the nearby courts to disqualify them from handling the matter. On recusal by Njoki Mwangi J, counsel termed that to be fully understandable because the judge headed the criminal division of the court where the applicant worked. He then denied that the Mombasa court was on trial while insisting that only the named accused persons are. He posed the question of what would happen if the magistrate currently handling the case in Nairobi were to be transferred to Mombasa, whether he would suddenly become conflicted!!!

21. On submissions that article 201 can be tinkered with in the circumstances of the case, counsel submitted that to do that would make the purpose and intent of the constitution laughable. On the order for stay being viewed to counter orders by **Nyakundi J** in Petition No. 140 of 2019, counsel said that there had not been any application on question of transfer placed before the Judge in that petition.

22. On drug menace being of great public concern, the counsel submitted that it is the more reasons the matter should be tried in Mombasa so that those afflicted may know who is behind their plight.

23. It is the foregoing submissions and the Affidavits filed that the court must consider in line with the law applicable to render a determination on the Applicant for stay and transfer of PMCRC 140 of 2019 at JKIA from that court to Mombasa or the courts within its environs.

24. The first prayer was for stay which I would have regarded to have been necessary and effectual if only this determination was to be rendered after the date set for the hearing in Nairobi on 21/11/2019. Now that this determination is here, it would be wholly unnecessary to consider that prayer. I will not give my consideration to it. That leaves the court with the prayer for transfer only.

25. The Application by the Applicant as supported by the interested party seeks transfer not on account of the Nairobi court being conflicted but on the basis that trial in that court would violate the accused persons right to access proximate and affordable justice by put the applicant to unnecessary expenses and also expending public resources in a manner that is not prudent and sufficient and therefore in violation if disclosed clear constitutional principles. It must thus be borne in mind from this early in the determination that I have to decide whether the choice of the place of trial by the DPP to be Nairobi and not Mombasa, where the offence is alleged by the same DPP to have occurred, sits in consonance with the expectations of the constitution and the applicable law for the administration of criminal justice.

26. The stating point must be the procedural statute which is the "criminal procedure code. In that statute, there is PART IV, devoted to "**criminal investigations and place of trial"**. In the provisions running from Section 66 to 77, the ever present dictate is that an accused be tried by a court within whose jurisdiction the offence is alleged to have been committed. In particular section 71 provides:-

> "**<u>Ordinary place of inquiry and trial</u>**
>
> **Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence".**

27. The law gives the decision to choose place of trial to be bound by four factors, and I consider them to be in the Order set out below:-

- Place of the alleged commission
- Place of arrest
- Place where the accused is in custody on the date of the charge or trial.
- Where the accused appears to answer to summons lawfully issued.

28. In my view and opinion, these confines are for the general purpose of criminal justice system that seeks a fair process devoid of undue hardship to he accused be it in terms of access on account proximity or otherwise. While that proximity must be for the convenience of all involved, in my view the person who has the most stake in a trial is the accused person. I consider the accused person to have the highest stake at a trial because he is the person whose liberty and standing, as far as compliance with the law is concerned, is in issue.

29. He is the person the court is obligated to afford to a fair hearing.

He is the person in whose favour the trial must be in open unless the court decides otherwise and for good reasons to be disclosed. I am in no doubt that in this matter none of these considerations to be given regard in choice of the place of trial comes to the accused and support of the decision to change the applicant in Nairobi and in particular the principal magistrate court at JKIA.

30. The reason to the trial being directed to take place at the place proximate to the locus in quo is for the convenience of all concerned including the accused himself, the witnesses the prosecution as far as locating and preparing witnesses is concerned and the court which relies on the convenience to the stake holders to achieve its mandate as delegated by the sovereign.

31. On the face of the charge sheet, the offence being alleged to have been committed in Mombasa, it ought to have ideally been lodged in Mombasa or in the courts proximate to the place of the alleged offence in compliance with the law.

32. Having so said, it is also a fact that circumstances do arise and have in the past arisen, to make it inappropriate for a matter to be tried in the court within whose local jurisdiction the offence was allegedly committed.. The obvious situations would be where for good reasons disclosed the court has become inappropriate due to circumstances like the security of all concerned or just were the trial judicial officer recuses himself or herself. In such situations it is important for reasons to be advanced for a choice of venue contrary to Section 71 & 72 of the Act.

33. That I think is what the Respondent has attempted to do by the Replying Affidavit and submissions offered. As summarized before in this ruling, the position of the Respondent is that the court in Mombasa would be trying itself because the offence was allegedly committed here and the officer was a staff of the court as shown by the recusal by Judge Njoki Mwangi.

34. That position cannot be fully appreciated without regard to the establishment of the court and what the law considers ripe circumstances to disclose a conflict by the court as to be unable to be impartial in judicial adjudication. As put in the Replying and the submissions, an impression is intended that all judicial officers in Mombasa and the satellite courts; (county court, Tononoka and Shanzu Law Courts), an establishment of some 18 judicial officers, are conflicted and unable to handle the matter merely because a magistrate and judicial staff are the accused persons.

35. In fact the contention is not limited to Mombasa and it's immediate environs. The position appears to be that every judicial officer, save for those at JIKIA, are conflicted. I say so after reading paragraphs 14 and 15 where the Investigating Officer says:-

> **Paragraph 14: "THAT it is obvious that <u>any judicial officer before whom they appear within Mombasa jurisdiction would be conflicted</u> for it will tantamount to calling upon the Principal Magistrate Shanzu or any other Magistrate within Mombasa to try and pass a verdict against a fellow magistrate and judicial staff including the applicant**.
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> **Paragraph 15**: **I am advised by counsel of the respondent that the <u>decision to charge the applicant and his co accused away from Mombasa was made to avoid such a conflict</u> for it is important that justice is not only done but be seen to be done"**. [Emphasis provided]

36. That contention must have invited the question posed by the interested parties advocate on what would happen if the magistrates currently sitting at JKIA was to be transferred to Mombasa. Would she/he suddenly become conflicted?

37. One obvious thing that should never escape any reasonable man's attention is the fact that between Mombasa Court precincts where the offence is alleged to have been committed, and JKIA Court where the charges have been preferred, there are several courts more proximate to Mombasa than JKIA. On that, front no explanation has been given why JKIA, in particular, why not even Voi or Makweni? I do find that the choice of JKIA as the court for trial was not informed by any valid reason. For that reason and the distance the accused is expected to cover to attend court sessions coupled with the attendant financial costs, it was not rational or justifiable and has not been justified before me.

38. I do find further that whether a judicial officer is conflicted is a matter to be raised with the court in the usual manner and a decision rendered. It should not be left to the prosecution as a litigant to sit in their offices and pass a final judgment on which judicial officer is conflicted in what matter. To encourage such would be to say that the prosecution gets the liberty to choose the court they consider to favour its position in particular cases. That is itself forum shopping which I consider to be part of the rationale of the law prescribing the place of trial. From the foregoing it is enough to say that under the law the principal magistrate's court at JKIA is not the venue that law dictates criminal case facing the Applicant to be tried.

39. My decision cannot just end here because the Applicant has beyond the law under criminal procedure code relied on the constitutional provisions and alleges his right to be exposed to violation if the trial proceeds at the place chosen by the prosecution. Articles 46 (3), 48, 50 and 201 have in particular been cited to have been violated.

40. One undeniable principle and value of the constitution that is at the lips of every Kenyan at the moment is the inappropriate, inefficient, imprudent and wasteful employment of public resources by the government and its agencies. When you witness some of the actions by government organs and agencies and listen to the concerns of Kenyan in the mainstream and social media one may be tempted to conclude that Article 201 has been rendered otiose or just relegated to the back burners of own constitutional implementation and dispensation. Here I am faced with the question whether it would be prudent and reasonable to employ tax payers money to ferry at least 6 witnesses, including Senior Judicial Officers to Nairobi to give evidence. The Respondent submits that they are not complaining about costs and it should not concern the court because administration of justice is a matter of security and must be taken seriously. That agreement does not and should not be made to pass in this matter.

41. It does not and should not be allowed to pass because the resources at the disposal are not personal to the government or any particular office. The funds are public funds that when prudently used and a surplus realized would be to the benefit of the entire country. To let it pass would be to turn a blind eye to the requirement and obligations on all and Sundry to respect uphold and defend the constitution[1]. Article 201 is one such provision which must be upheld and enforced.

42.There is the principle of the constitution at article 6(3) which I consider to be all encompassing. I consider it all encompassing noting that the executive in the ordinal Government and even the devolved units have implemented the requirement and done quite some work in establishing administrative units chose to Kenyans. Even the judiciary and the office of the DPP have not been left behind. Having done so, would it be justifiable to go back to Nairobi and disregard the public expense met by the institutions and agencies in establishing in Mombasa and its environs? I hold not. It would amount to rolling back the gains made and in violation of the disclosed principle of the constitution.

43. On Article 50, and its dictated for a fair trial audited in public with the right of an accused to choose counsel, it cannot be denied that the court house at JKIA is like all our courts public and open to any member of the public who desires to listen to any proceedings. However one may ask what purpose is intended to be served by conducting trials in public. I take the view that prosecution of criminal cases being conducted for and on behalf of the public, the demand for public hearing is to make the process transparent and accessible to the public so that an aspect of oversight on the propriety of the proceedings is attained.

44. For that reason even the press is encouraged to objectively cover court proceedings and activities for purposes of information and education to the public. But to this court there is another rationale for public hearing of criminal cases. It is that a crime like the one facing the applicant is one against the society, the public of Kenya. It is desirable that the Kenyans know what happened to the narcotics and money produced in court as exhibits.

45. As said by the counsel for the prosecution the effects of drug menace are more prominent and pronounced in Mombasa. It is thus in Mombasa that people have lost their kin and kith to the menace. They surely need to know the face and stature of the persons destroying their society by availing the contraband for consumption rather than destruction. In that context public hearing should be within reach and access of the persons who may want to follow the proceedings for being closely affected by the crime. I interpret public hearing dictated by article 50(2)d to include access to the immediate public within which the offence was committed. On that basis and finding I hold that the immediate public against whom the offence was committed will be denied the chance to follow the trial on account of distance. I also told that the trial being of the accused who says he relies solely on his income as a judicial staff, he needs every support from the community including his relatives, friends and well-wishers during the entire process. It cannot be overemphasized that facing the charges akin to those preferred against the applicant is not a child's play. It can be traumatic. An accused may need the emotional support of the loves ones to even summon courage to stand trial. Considering the distance between Mombasa and Nairobi, I do find that it shall not be affordable to the applicant to summon enough finances to enable the Applicant transport himself and all those who may want to attend the trial in Nairobi. I thus hold the view that to allow matter proceed in Nairobi would be to compromise the accused person's right to a public hearing. That to me cannot be allowed to be done by the 2nd Respondent which says in its strategic plan that one of its guiding principles is constitutionalism[2].

46. My last view on requirement for public hearing is that it is a known strategy in combating crime that the public be educated not only on what constitutes a crime but also on the penalties available. Ordinary Kenyans residing in Mombasa may not understand how the routine handling of a narcotic produced as exhibit in court case constitutes trafficking. When one of their own appears in court charged with the same it may be a lesson to other on how wide the word trafficking may encompass. In addition a criminal suspect need to be paraded among the people who know how best and in public so that when he get convicted, he gets ashamed among his people and when he gets acquitted he gets vindicated in the eyes of the same people.

47. The foregoing findings lead me to consider when this court would consider transferring a criminal case from one court station to another. What considerations are taken into account? The consideration and need to establish the best venue for trial is at the center of administration of criminal justice if the provisions of Section 76, 78, 79, 80 and 81 are given full effect. Those provisions tell me that it is never at discretion and leisure of the prosecution to choose the venue for trial. The law guides choice of venue and the court has the last say. It is that power of the court the Applicants now invoke here. Section 81 Criminal Procedure Code invoked by the application provides:-

**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.**
>
> (emphasis provided)

48. The intention of parliament in enacting this provision is clear that the court in dealing with an application for transfer considers among other factors; the need for a fair and impartial hearing, determination of some unusually difficult point of law, need to visits the scene, the convenience of the parties and expediency of the ends of justice.

49. In the matter before me, the impartiality is advanced from the Respondents' side while the Applicant relies on his convenience and rights under the constitution. I have delivered myself sufficiently on the alleged impartiality and conflict just as I have done with the convenience and the Applicants rights. I may only conclude by saying that I do consider it a prejudice to expose the applicant and his co-accused persons to be tried in Nairobi owing to the distance and the attendance travelling and incidental expenses including accommodation and meals. The accused having asserted that his chosen advocate is Mombasa based, it shall be an added prejudice to the Applicant in terms of transport costs from the counsel between Nairobi and Mombasa. In effect I repeat that the choice of Principle Magistrates Court at JKIA, Nairobi, by the prosecution will not pass as expedient to the administration of justice as it will not only expose the applicant to unwarranted expenses but will also entail the ODPP spending public funds that can be avoided and saved.

50. I direct that the case be transferred from Nairobi to a court within and proximate the region where the offence was allegedly committed.

51. Having decided so and having found at the beginning that it would be unfair and improper to determine that all judicial officers serving in Mombasa and by extension, entire Coast Region, as conflicted in the matter, I have taken note and the concerns of the Respondent that having worked in Mombasa Law Courts, the accused persons may have developed familiarity with judicial officers as to make it difficult for such officers difficult to act impartiality. I have also taken into account that not all officers currently services the region were at their current stations at the time the offence was allegedly committed. Having done so and doing the best I can in the circumstances, noting that there are three judicial officers in Kwale, all of whom were recently posted, I direct that the matter be transferred to and tried at Kwale Law Courts.

52. It is so ordered.

**Dated and delivered at Mombasa this 19th day of November 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[1] Article 3, Constitution of Kenya 2010

[2] Office of the Director of Public Prosecutions, Strategic Plan, 2016-2021