



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR NO. 203 OF 2017

REPUBLIC.....APPLICANT

VERSUS

GILBERT MAINA.....1ST RESPONDENT

DANIEL THUKU.....2ND RESPONDENT

VINCENT KIPNGETICH RONO.....3RD RESPONDENT

PAUL ODOYO NGOMA.....4TH RESPONDENT

RULING

INTRODUCTION

1. By a notice of motion dated on 19/10/2017, the Applicant/Republic seek orders that the Makueni HCRC NO. 203/2017 to be transferred to Milimani High Court for hearing and determination.
2. The same is anchored on the provisions of Article 50 Constitution of Kenya Witness Protection Act (WPA) 2006, Witness protection rules 2015 and all enabling provision of law.
3. It is based on the grounds namely:-
 - 1) The matter herein and the witnesses are vulnerable and under Witness Protection Act.
 - 2) Makueni High Court lacks facilities and conducive environment to enable special protection of the witnesses.
 - 3) Unless protected witnesses evidence is taken by a court sitting at a place deemed fit for protection of witnesses, the witnesses will be exposed to eminent risk.
4. The same is supported by affidavit of Tobias Mwita sworn and dated on 19/10/2017.
5. The application is opposed by the two accused persons in court (accused No.1 Gilbert Maina and accused No. 4 Paul Odoyo Ngoma) vide replying affidavit one by Gilbert Maina sworn on 10/11/2017 and another by Paul Odoyo Ngoma sworn on 27/11/2017 respectively.

6. The parties via their advocates on record agreed and canvassed the motion via oral submissions.

THE APPLICANTs CASE IS THAT;

7. The witness protection agency herein after referred to as **WPA** in a bid to accord protection to the witnesses, conducted an assessment at Kitui Law Courts and found same to be lacking of facilities necessary for proper protection of the witnesses.

8. It (WPA) then moved court via MISC APP. 1/2017 seeking to have matter transferred to a court conducive for witness protection and the court granted orders sought to the effect that evidence of protected witnesses be adduced before a court sitting at a place deemed safe vide order/ruling dated 24/01/2017.

9. Before orders could be effected, the then presiding judge Hon Mutende Judge recused herself and transferred the matter to High Court sitting at Makueni. The Applicant thus requested Witness Protection Agency for assessment of High Court Sit in Makueni, to satisfy itself if the court was at standards suitable for witness protection.

10. The same witness WPA found Makueni High Court not fit for witness protection thus sought transfer of the instant case to High Court sit at Milimani, Nairobi which is deemed safe for witnesses.

1ST ACCUSED/RESPONDENT CASE

11. The 1st accused case is that the Applicant allegations that the High Court sit at Makueni is not safe for hearing of the instant case is untenable since it is the responsibility of the state to ensure that accused person is accorded a fair hearing and to avail such facilities as are relevant in the present case.

12. He further avers that the Witness Protection Act report is wanting in that:

- It does not demonstrate what safe location is or what it entails,

- It does not disclose what facilities are available at Milimani High Court that makes the venue favourable,

- It does not demonstrate what constitutes proper facilities.

13. Most of the prosecution witnesses are based in Lower Eastern part of Kenya and thus transfer to Nairobi might delay hearing due to distance witnesses will be travelling.

14. He avers that it is the duty of the state to protect witnesses and accused interests.

15. He wishes the matter is heard in the Makueni High Court. There is no demonstration of interference harassment or intimidation of witnesses since matter commenced.

ACCUSED/RESPONDENT NO. 4 CASE

16. The Accused/Respondent No.4 avers that the matter was in High court sit in Machakos but was transferred to High court sit in Kitui on their (respondents) application as offence were allegedly committed in Mwingi within Kitui County.

17. The High Court in Kitui issued orders on WPA application whereof the hearing in camera or closed sessions was ordered and also redaction of witnesses' statement inter alia.

18. By then the defence had been supplied with all statements of the witnesses. Thus he opposes application as his rights are not being considered. Though protection order was issued in Kitui, he had already had all names of the witnesses and to date there is no complaint of him trying to contact any of

the witnesses or threatened them.

19. He seeks matter to be heard in the High court sit in Makueni to expedite hearing.

20. The parties agreed to canvass same application by way of oral submissions.

21. The Applicant side submits that the Makueni High Court premises have no cells or buildings where witnesses can be secured during hearing thus only Nairobi Milimani can guarantee such facilities for protection of witnesses.

22. He says that there are about four civilian witnesses who need full protection. He is of opinion that court can transfer case or change venue to hear case in Nairobi. In any case, Nairobi is more accessible to all parties and witnesses plus their advocates than Wote/Makueni.

23. The Respondents via their advocates oppose the application. They submit that the WPA had earlier sought the witnesses who need to be protected to be heard in Machakos High Court.

24. They submit that there are no allegations that they have interfered or will interfere with witnesses. They submit that High Court at Milimani has huge back log and thus their case which is of 2016 will drag long before it is heard thus their right by delay will be violated.

25. It is submitted that under **Section 4 (3) of WPA** the WPA is required to seek:-

- **Case to be tried in camera.**

- **The use of pseudonyms.**

- **And reduction of witness statement.**

26. The last two limbs are over taken by events because the statements were supplied to defence containing their full names and details. As of today no complaint has been made that there has been threats or intimidation to witnesses by accused person.

27. After going through the materials in court, I find the issues are:-

- ***Whether the Applicants have made case for transfer of the instant case to Nairobi Milimani for trial and determination?***

- ***What is the appropriate order to make?***

28. The High Court sitting in Kitui did issue orders on 24/01/2017 for protection of witness and specifically directed that **“evidence of protection witness be adduced before a court sitting in a place deemed to be safe.”**

29. The court did not transfer the case at the point and time it made the aforesaid orders only prescribed for a safe venue to obtain during the taking of the evidence of the protected witnesses.

30. The aforesaid order remains in force and none of the parties has ever challenged the same.

31. Further the Applicant says that there are four witnesses who need protection.

32. The Respondents say that the prosecution will call about 38 witnesses vide the statement supplied to them.

33. During submissions both sides seem to suggest that the court could change venue and hear the protected witnesses elsewhere in lieu of transfer. The prosecution favors trial at High court sit at Milimani

Nairobi while the Respondents favor Makueni venue.

34. However they (Respondents) seem not to oppose trial even in Machakos.

35. This case was instituted in Machakos and then transferred to Kitui at the instance of the Respondents. The High Court Judge Kitui recused herself and transferred the matter to Makueni for expeditious hearing.

36. Under **rule 5 (2) WPR 2015**, the court is mandated to take measures to aiding of giving of evidence including; **(c) (iii)** change of trial venue;

37. **Sub-rule (2)** put safeguard that **‘provided the measures taken shall not prejudice the right of accused person to fair trial**. The court is well aware of the situation of the High court premises at Makueni which are not only inadequate but also condemned by the Public Health Agency. There are no cell facilities *inter alia* nor premises which to be used to protect witnesses.

38. The court also takes judicial notice of the fact that from Machakos to Nairobi the distance is 56 km or thereabout and to Makueni/Wote is 73 km. A person passing via Machakos town route would thus travel longer distance to Makueni/Wote than to Nairobi thus the issues/complaint of escalating expenses by travelling to Nairobi does not hold water.

39. The transfer of the matter to Nairobi Milimani High court criminal division is not demonstrated with statistics that it will be over burdening the court. This court is aware and takes judicial notice that Nairobi High court criminal Division is handling 2016 matters thus the instant matter will be within the range of the matters to be handled.

40. Taking the matter to Machakos will be returning respondents to the venue they rejected when the matter started while still adding to the station back log. I say this because the High court at Machakos has only 2 judges and same is even off-loading cases to Makueni High court station due to massive backlog obtaining in the present situation. Court notes that the respondents never favoured Machakos venue from inception of the case.

41. The court therefore makes the following orders:-

- 1) The instant matter is transferred to Nairobi High court criminal Division at Milimani for hearing and determination.**
- 2) The matter will be mentioned before the presiding judge of the division on a date to be agreed by the parties and their advocates.**
- 3) The Deputy/Registrar of the High Court shall facilitate this court to implement the first (1) and second (2) limbs of the orders above.**

Orders accordingly.

SIGNED, DELIVERED THIS 5TH DAY JUNE, OF 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE