REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 23 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS..................................APPLICANT

-VERSUS-

PERRY MANSUKH KANSAGARA...............1ST ACCUSED/ RESPONDENT

VINOJI JAYA KUMAR..................................2ND ACCUSED / RESPONDENT

WINNIE MUTHONI MUTISYA....................3RD ACCUSED/ RESPONDENT

TOMKIN ODO ODHIAMBO.........................4TH ACCUSED/ RESPONDENT

JACINTA WERE..5TH ACCUSED/ RESPONDENT

WILLIEC OMONDI WERE...........................6TH ACCUSED/ RESPONDENT

LYNNETE JEPCHIRCHIR CHERU.IYOT..7TH ACCUSED/ RESPONDENT

JOHNSON KAMAU NJUGUNA....................8TH ACCUSED/ RESPONDENT

LUKA KIPYEGEN..9TH ACCUSED/ RESPONDENT

JUDGMENT

Background

1. This is one of the matters that have spun off from what might be called the Solai Dam tragedy. On 9th May, 2018, Kenyans woke up to the horrific news splashed in all news media of the collapse of Milmet Dam – also known as Solai Dam – in Nakuru County. The collapse of the dam led to farms and villages being washed away in the on-rush of the water's break. Downstream, hundreds of people were caught up in the muddy sludge. Forty eight people lost their lives in the flood chaos.

2. Following investigations, the Director of Public Prosecutions on 5th July, 2018, charged the nine accused persons with various offences including: forty-eight counts of manslaughter, one count of neglect to perform official duty and one count of failing to prepare an environmental impact assessment report.

The accused were all arraigned in the Chief Magistrates Court at Naivasha in Criminal Case No 977 of 2018.

3. The 1st and 2nd accused are the owners of the Solai Dam; the 3rd 4th and 5th accused are employees of the Water Resources Management Authority; the 6th and 7th accused are employees of the National Environmental Management Authority (NEMA); the 8th and 9th accused are the County Director of Water and Sub County Administrator, Subukia.

4. The hearing of the criminal case was due to commence on 10th September, 2018. On 5th September, 2018, the DPP filed an application under certificate of urgency in the High Court to transfer the Criminal Case No 977 of 2018 from Naivasha to Nairobi. The High Court being on recess at the time, the application was referred to Bwonwong'a, J, the duty Judge, sitting at Narok,

5. The certificate of urgency sought the following orders, inter alia::

"….

> ***3. That Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court is scheduled for Pre-Trial Conference on 10th September, 2018 thus the urgency in the matter;***
>
> ***4. That stay be granted of the proceedings in Criminal Case No. 977 of 2018 at the Naivasha Law Courts be granted pending the hearing and disposal of this application;***
>
> ***5. That it is in the interest of justice that this application and the Notice of Motion application dated 5th September, 2018 be heard and determined on a priority basis…."***

6. Upon hearing the certificate of urgency, the duty Judge certified it urgent and directed the applicant to serve all the respondents with the application. At that hearing, Mr. Muteti appeared for the applicants and Mr Masinde for the respondents. Mr. Amunga, who was also present, was permitted to come on record as holding a watching brief for the victims. Further, he was permitted to file affidavit evidence on behalf of the victims. All respondents were directed to file their replying affidavits within seven days.

7. The learned Judge then granted a stay of the proceedings in **Criminal Case No 977 of 2018, Naivasha**, pending the *inter partes* hearing of the present application. A mention date was fixed for 17th September, 2018 before me, when I fixed an oral hearing of the application for the following day.

8. At the hearing, it emerged that the 1st Respondent/Accused had also filed an urgent application dated 14th September, 2018, which essentially sought: that the 1st Accused be allowed to travel to India on 13th September, 2018 to fulfill visitation rights granted to him by the High Court in Delhi; and that orders of the High Court, Narok, staying the proceedings in in the Chief Magistrates Criminal Case No 977 of 2018, Naivasha, be set aside or discharged.

9. During the hearing of the present application, Mr Ojienda for the 1st Accused indicated that he had abandoned the application seeking the discharge the interim orders issued by Bwonwong'a, J.

10. The Notice of Motion filed in this matter, and which is the subject of the present hearing, is itself worded as follows:

> ***"1. THAT the Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court be transferred to the Chief Magistrate's Court at Nairobi.***
>
> ***2. THAT the Honourable Court makes any other Order that it deems fit.***
>
> ***WHICH APPLICATION is based on the following grounds and the sworn affidavit of No. 236128 CI. JOHN SHEGU:***
>
> > ***1. THAT trial in Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court to the Chief Magistrate's Court at Nairobi is scheduled for Pre-Trial Conference on the 10th September, 2018.***
> >
> > ***2. THAT the Management of the Patel Coffee Estate's Limited and officers form Water Resource Management in collusion have tampered with the active crime scene being the Milmet Dam by directing that the said Dam being a scene of crime and of Prosecution's evidence-exhibit be decommissioned.***
> >
> > ***3. THAT identified witness(es) have been hidden, transferred and threatened with the assistance of the local administration making it impossible for the Witness Protection Agency to effectively conduct their mandate.***
> >
> > ***4. THAT the security of the Prosecution Team/ in view of the circumstances is at high risk.***
> >
> > ***5. THAT it is in the interest of justice and within the discretion of this Honourable Court to consider granting the orders sought."***

11. The motion is premised on a Chamber Summons application of even date set out in the following terms:

> ***"1. THAT the Honourable Court do certify this matter as extremely urgent deserving to be heard ex-parte in the first instance;***
>
> > ***1. THAT the Applicant seeks leave of the Honourable Court to have the Notice of Motion application dated 5th September, 2018 be heard and determined during the vacation;***
> >
> > ***2. THAT the Honourable Court be pleased to order the transfer and/or change the trial venue of Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court to the Chief Magistrate's Court at Nairobi;***

3. THAT Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court is scheduled for Pre-Trial Conference on the 10th September, 2018 thus the urgency in this matter;

4. THAT the Honourable Court grants any other orders the Honourable Court deems fit.

Which application is supported by the supporting affidavit of Catherine Mwaniki filed herewith and on the following grounds, inter alia:

a. THAT it is in the interest of justice that this matter be dispensed with at the earliest time possible since some of the witnesses lined up by the Prosecution have expressed concerns about their safety in Naivasha.

b. THAT Criminal Case No. 977 of 2018 at the Naivasha Chief Magistrate's Court is scheduled for Pre-Trial Conference on the 10th September, 2018.

c. THAT it is also in the interest of justice that this application be allowed."

12. Perry Mansukh Kasangara, the 1st Respondent, filed a Replying Affidavit sworn on 17th September, 2018, together with grounds of opposition and a list of authorities and supplementary list of authorities. Johnson Kamau Njuguna, the 8th Respondent filed a Replying Affidavit sworn on 15th September, 2018 on his own behalf and on behalf of Luka Kipyegen, the 9th Respondent. He also filed a list of authorities. Advocate I Mburu, on behalf of the 3rd and 4th Respondents filed a Replying Affidavit sworn on 18th September, 2018. Jacinta Were, the 5th Respondent, filed a Replying Affidavit sworn on 17th September, 2018. The DPP also filed a list of authorities.

13. Mr Godfrey Otieno Onyango, the Chairman of the Justice and Environment Foundation (hereafter the "JEF"), filed a Replying Affidavit sworn on 17th September, 2018, stated to be authorized by the *"Victims of the Solai Dam Tragedy Victims (SDV)"*. The SDV are stated to be co-petitioners with JEF in Petition No 13 of 2018, in the Environment and Land Court Nakuru.

14. The application for transfer of the case from Naivasha to Nairobi must be subjected to the law on transfer of hearings.

The Law on transfer of a hearing

15. The constitutional and statutory mandate of the DPP is broad. He has unfettered discretion under **Article 157(6)** of the Constitution to:

"(a) institute and undertake <u>any</u> criminal proceedings against any person <u>before any court</u> (other than a court martial) in respect of any offence"

16. With regard to transfers of hearings from one station to another, the applicant correctly grounded his application under **Section 81** of the **Penal Code**. The section provides as follows:

"(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."

17. From the above section, it is clear that, textually, there are five situations in which the court can transfer a hearing in a lower court. These are situations where:

i. A fair and impartial trial cannot be held in subordinate court;

ii. Difficult or unusual questions of law are likely to arise in the trial;

iii. For a satisfactory trial of the offence, a view of the place at or near where the offence was committed is required;

iv. It is more convenient to the parties or the witnesses that the trial be moved;

v. It is in the interest of justice or the provisions of the Criminal Procedure Code that the trial be moved.

18. When applying these provisions, there are several principles or tests that should be taken into account in determining whether or not to exercise the power to transfer a hearing. Some of the authorities were brought to the court's attention establish the following principles or tests:-

i. The High Court will always require strong grounds for transferring a case from one judicial officer to another – **Sir H T Prinsep Criminal Procedure in British India (1926) page 646**

ii. Whether the applicant has made out a clear case for transfer of the file by discharging on balance of probabilities the burden of showing that the apprehension in his mind that there will be no fair trial is reasonable – **Maina wa Kinyatti v R [1984] eKLR.** Here, the court of Appeal adopted the following holding of the Calcutta High Court in the case of **Dupeyron v Driver ILR XXIII Cal 495** that:

> ***"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"***

iii. Whether the applicant's apprehension is reasonable and founded on sufficient material **– Kamande & Others v R [2014] eKLR**

iv. Where threats to an applicant or witnesses are alleged, the applicant must give particulars of the threats; he must disclose what type of threats they were, whether they are verbal or from persons he knows; or on phone or by letter and how many they were – **Mathew Matheka Musau v R [2007]eKLR Dulu J** declining to grant transfer to applicant/accused.

v. Whether public confidence is promoted. *It is the duty of the court to have regard to the importance of securing the confidence of the public generally, every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences* -see **page 648 Prinsep** (supra) quoted in **John BrownShilenje v R [1980] eKLR** by Trevelyan J

vi. Where the applicant's allegations for transfer involve the suggestion of unfairness and impartiality in the conduct of a case. In **Ken Muriuki v R [2015] eKLR** Wendoh J allowed an application for transfer of the case where she found that if the case would be heard before the magistrates currently based at Meru Law courts then ordinary members of the public would believe that either one of the parties may not get justice. Her view was that although the court has independent and confident magistrates, that registry staff cannot influence the decision of the court, and that the fact that the respondents had been seen talking to court staff was not evidence that the staff compromised, nevertheless there was significance in how a reasonable man looks at the situation, given the facts. The court further stated that courts should have in mind the words of Ochieng J in **Kamande &3 Others v R [2012] eKLR** where he stated:

> ***"when giving consideration to an application for the transfer case, the court will assess whether the applicant's apprehension was reasonable and founded on sufficient material. The reason for laying emphasis of 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 that."***

vii. Whether there is real bias in the mind of the presiding judge or magistrate

19. In **R v Titus Kithangarari Chabari [2016] eKLR** Mabeya J allowed a case to be transferred where the CID officer in the local area alleged witness interference and intimidation. There the officer:

"(12) ….averred that intelligence information did not only disclose that the respondents intended to plan demonstrations at the hearing, which they never denied, but that holding the trial at the present court or anywhere within the county may lead to a miscarriage of justice. That there was a threat to security. These allegations were never denied nor was the deponent of the Affidavit in support, CIP Moses Waliula, called to be cross- examined on his averments…. "

Parties' Submissions, Analysis and Determination

20. Mr. Muteti appeared with Mr. Owiti for the Applicant, DPP; Mr. Ojienda appeared for the 1st and 2nd Respondents; Mr. Mburu appeared for the 3rd and 4th Respondents; Mr. Gordon Ogola held brief for the 5th Respondents and appeared for the 8th and 9th Respondents; and Mr. Amunga appeared for the Victims.

21. In summary, the grounds raised in support of the motion are: **first,** that there has been tampering by the accused persons with the crime scene including the commissioning of the dam which was one of the prosecution's evidence exhibits; **second,** that witnesses have been hidden, transferred and threatened with the assistance of the local administration; **third,** that that the security of the prosecution team is in the circumstances at high risk; and **fourth**, that it is in the interest of justice that the court consider granting the orders sought. In support of the motion, the applicant filed an affidavit sworn by Chief Inspector John Shegu, of the Directorate of Criminal Investigation, one of the investigating officers in the Patel Dam case.

Tampering with crime scene

22. The allegation of tampering with the crime scene is dealt with in paragraphs 9, 10, 11 and 12 of the affidavit of CI Shegu. The applicant avers that it had notified the trial court that it would apply to move the court to the scene of the crime; that such application was objected to; that the court directed that such application should be made at the appropriate time to be determined at the pre-trial conference; that the prosecution team visited the crime scene only to find it had been tampered with and that on inquiring with the management and owners of the dam, it was evident that there had been collusion with the employers of the sixth and seventh respondents to tamper with the scene by the commissioning the dam without informing the DPP.

23. The applicant annexed photographs marked JS 3a –JS 3l, purportedly showing 'before and after' pictures of the crime scene. They also attached a letter from the Water Resources Management Authority dated 30 May 2018, in which the authority gives the instruction to the dam owners, inter alia, that *"the dam should be decommissioned"*

24. In response, the 1st Respondent deposed in his affidavit that: the prosecution visited the crime scene alone and without any formal application to visit the said scene (paragraphs 9, 50).

25. In his affidavit, the 8th Respondent's response is that: the nature of the interference upon the crime scene and the individuals alleged was not indicated by the applicant; that the prosecution had failed to secure the crime scene giving rise to the misguided belief of tampering (paragraphs 11-13); and that there has been no application to visit the crime scene with the result that the solo unauthorised visit thereto by the prosecution amounted to an abuse of office and of prosecutorial powers (paragraphs 14-15).

26. The victims Affidavit sworn by Godfrey Onyango, supports the transfer of the case from Naivasha to Nairobi. Nothing is specifically asserted concerning tampering with the crime scene.

27. The court has carefully considered the question of tampering with the crime scene. Whilst it is true that there are photographs attached by the applicant in relation to the dam, there was no explanation or description of the form and extent of alleged tampering to assist the court to appreciate the applicant's concerns. So that, the court is unable to understand that indeed there has been tampering with the scene.

28. With regard to the letter by the Water Resources Authority (WRA) marked "JS 4", there is no doubt that the subject dam has been decommissioned. The letter, however, appears to be a broad based letter giving instructions in respect of several dams including, Solai Dam. With regard subject dam (**Milmet dam**), the letter instructs the owners that they are not to: *"impound, divert, store or obstruct water from the failed Milmet dam"* and that they: *"should cut through the embankment of the Milmet dam to let water flow into its natural water course without any obstruction"*

29. In the same letter the WRA reminds the owners that they had *"not submitted an interim dam damage or failure report which was to be done within three days of occurrence and a detailed report within 21 days as stipulated in the Water Resources Management Rules"*.

30. To my mind it appears that the WRA was acting, in respect of the failed dam, in accordance with a statutory mandate requiring them to put in place certain requisite measures following the failure of the dam. It would therefore have been helpful if the applicant had specifically indicated the nature and extent of tampering beyond the reasonable statutory measures that were permitted to be taken by the WRA in respect of the failed dam. It would also have been helpful for the applicant to indicate steps they had taken as the prosecutor to require preservation of relevant aspects of the crime scene, and which steps had been contravened by the respondents.

31. All in all I am not satisfied, on balance, that there has been sufficient material placed before the court on the issue of tampering with the crime scene to support the applicant's case that tampering with the scene had occurred, and that the same would affect the conduct of the trial. In addition, it is not clear to this court that there is a necessary connection between tampering with the crime scene, even if that had been shown to have occurred, and the consequential need to transfer the trial from Naivasha to Nairobi. It appears to this court that the question of how to manage the scene of crime would not necessarily be better or more appropriately handled if the trial court were located in Nairobi.

32. In my view, what **section 81(1)(c)** of the **Criminal Procedure Code** requires, particularly with regard to moving the trial venue in

relation to the crime scene, is that if it appears to the court that a view of the scene where the offence has been committed is required for the satisfactory trial of the offence, then the court can order that the trial venue be moved so that such a view of the scene can satisfactorily be accomplished. This section anticipates not merely a request for a site visit to the crime scene, but that if the court hearings are domiciled in one local or territorial jurisdiction, then the court may, on sufficient grounds relocate the hearings to another locale where the crime scene is located.

33. What might have been expected in this case is that the applicant would have been urgently seeking that the trial court moves to the crime scene to ensure the evidence is secured. Instead, the applicant has opted to seek to move the trial venue to Nairobi on account the allegation that the crime scene has been compromised. Accordingly, I am not satisfied that this ground can stand in support of the application for transfer of the trial.

Hiding of and threats to witnesses, demonstrations and security of the trial and the Prosecution

34. Two elements have been included under this head: witness tampering/threats and security of the trial and prosecution, because they were presented as closely related.

35. Here, the affidavit of C I. Shegu alleges (paragraphs 3, 4, 5,6, 7 and 8) that: members of the public within Solai area in Nakuru, demonstrated against the charging of the first and second accused persons; that the local administration has been involved in interfering with the witnesses, causing witnesses to contact accused persons in alleged meetings; that identified witnesses have been hidden, transferred and threatened with the assistance of the local administration; that there is lack of cooperation the local administration; and that consequently, the witnesses have become intimidated making it impossible for witness protection agencies to carry out their mandate, and that Nakuru and its environs will not provide a secure environment for the prosecution witnesses to testify without intimidation, and finally, that there is no secure environment for the prosecution counsel in the trial court.

36. The affidavit of Godfrey Onyango on behalf of the victims has several paragraphs on this point (paragraphs 1, 6, 7, 8, 11). The deponent complains that most of the victims and families of the victims are also witnesses. He states that they have filed a suit for restitution and compensation in Nakuru; that the victims, being vulnerable, have fears because of the way they have been treated by the owners of the dam including the first and second respondents; that the first and second respondents and officials of the local administration and political leaders by interfering with them in connection with compensation; that victims have not been able to grievances open against the dam owners as the local administration does not create a conducive environment, and that they are apprehensive that there will be interference with witnesses.

37. In respect of the victims' affidavit, there is scant information as to who the specific affected witnesses are, particularly given the fact that the prosecution has not identified and listed the expected witnesses in the trial.

38. The1st Respondent's response on this issue is in paragraphs 51 and 58 of his affidavit. It is averred that no evidence has been presented of demonstrations or of the allegations concerning interference with witnesses or their safety. Similarly, the 3rd and 4th respondents assert that the prosecution has not, in any event, availed any witness statements or list of witnesses to the defendants, nor identified individuals who have allegedly been threatened or interfered with. The same response is given by the fifth respondent at paragraphs 7, 9 and 10 of her affidavit.

39. In **Republic v Ayub Gulled & 2 Others [2014] eKLR**, the High Court was presented with a situation where the Wajir Principal Magistrate had transferred two related files to Garissa Chief Magistrate's Court to secure the safety of witnesses and the accused person. Unusually, the prosecution there had not expounded on the difficulty being addressed by the transfer. The High Court expectedly found that the Magistrate's court had no power to transfer as it was not a subordinate court of the first class, and that *"the prosecutor and the trial court were eager to transfer this case for unexplained reasons."* However, Mutuku, J, vacated the lower court's orders, and substituted them with its own order transferring the matter to the Garissa court. The reason was that the original action had caused unnecessary delay in prosecuting the case and it was in the interests of expeditious dispensation of justice that the matter be finalized in Garissa. This case is useful for the recognition by the judge of two points: First, that even where there are allegations of witness insecurity, there should be reasons expounding the same; Second, that expeditious dispensation of justice is a critical factor in determining whether or not to permit a transfer.

40. In the **Titus Kithangarari Chabari case (supra)**, Mabeya J allowed transfer of the case from Marimanti Resident Magistrate's Court to Embu Senior Resident Magistrate's Court on grounds of witness intimidation. There, however, the assertion of intimidation and intention to stage demonstrations had not been denied or challenged. The Court found that holding the trial anywhere within the county presented the threat of insecurity and a miscarriage of justice.

41. In the present case, the material provided by the DPP did not demonstrate the occurrence or threatened occurrence of demonstrations, or give clear indication of the witnesses who were threatened, intimidated or hidden, and whether this occurred against them as individuals or as a group. Further, having not issued a list of witnesses or the witness statements it is hardly probable that there is a common understanding amongst all the parties as to who the witnesses are.

Management of the trial

42. In paragraphs 12, 13, 14, 15, 16, 17 and 18, and again at paragraphs 22, 23, 24, 25, 26 and 27 and 28 of the affidavit of C.I. Shegu, there are complaints suggesting inept or unbalanced management of the trial process, or that prosecution team was being unfairly treated in the lower court. The specific complaints concern the following: how the court was being moved by the first and second respondents advocates; the trial court's adjournment on 13 August 2018; directions to the first and second accused to serve the DPP with formal applications and their failure to so comply; and instead that the court entertained oral applications.

43. Further, the complaints from paragraphs 22 onwards of the applicant's affidavit disclose that during the hearing of the respondents application to travel to India, the trial court adjourned the matter to 12 July 2018 at 2pm; However, that the court instead convened a session

in the morning of 12 July 2018 and proceeded to determine the first respondent's application to travel India without the presence of the prosecution team.

44. This complaint about the alleged inept management of the trial process is repeated by the victims in their affidavit at paragraphs 11(iii), (v),(vi), and (vii). These paragraphs refer to and support the paragraphs in the applicants' affidavit. However, the victims' affidavit merely closely restates the complaint and does not provide any additional details concerning the ineptness of the trial procedure. The key concern was, in fact, regarding the trial court's handling and acceptance of the applicant's application to travel abroad.

45. The gravamen of this complaint falls within the rubric of the first and fourth grounds in the applicant's motion. That is to say, that the prosecution feels frustrated by the actions of the first and second accused and that the trial court appeared to have been entertaining and affording the respondents greater latitude than the prosecution received.

46. Given the seriousness of this complaint and its grave implications, this Court in exercise of its supervisory jurisdiction under **Article 165(6)** and **(7)** of the **Constitution** and **section 362** of the **Criminal Procedure Code** called for and perused the trial court's proceedings. This is what the court found: on 11th July 2018 the court directed that ***"the matter shall be mentioned tomorrow 12/7/18 at 2.00pm after the pre-bail reports shall have been filed and thereafter considered by the court".*** Present for the prosecution at that mention was Ms Nduati. The matter came up again on 12th July before Honourable Bidali, CM, the prosecution being represented by Ms Mwaniki. The learned Magistrate considered pre-bail reports and issued a ruling on the same date. In his ruling he took into account the prosecution's contentions concerning the inaccuracy of the pre bail report complained of at length in the present application, and concluded: ***"I am satisfied that the accuracy of the two reports is in doubt".*** Consequently he ordered a new pre bail report in respect of two of the accused persons.

47. With regard to complaints by the DPP about how the first and second accused persons were moving the court, the complaint is recorded in the trial court's proceedings of 13/ 8/18, and was raised by Ms Mwaniki for the DPP. The record notes that she complained about counsel filing applications and not informing or serving the DPP in Nairobi, yet they knew that the matter was being handled from the head office in Nairobi. In his directions Honourable Karanja ruled that: ***"the application on issues ought to be presented. I am in agreement and would prefer that a formal application be made and the same be filed and served to enable the DPP make an equally formal and substantive reply. It is therefore directed that counsel for the first and second accused do make a formal application which should be served to all the other accused persons/counsels and it is expected that the prosecution shall file their response addressing all the issues raised".*** The matter was then set for mention on 30/8/18.

48. On 30th August 2018, the matter came up again before Honourable Karanja. The DPP was represented by Ms Kavindu, who complained on the record that the application had not been served on Ms Mwaniki, but was agreeable to the matter being heard on the 10/9/18. On 6th September 2018 the matter again came up before Honourable Karanja. Ms Kavindu appeared for the DPP. The record notes that the first accused's notice of motion dated 5 September 2018 had been filed on 6th September 2018, and he directed that the application be heard inter parties on 10th September 2018. He also directed that it should: *"be served upon the prosecution i.e. the office of the DPP in Nairobi"*

49. This court notes that throughout the proceedings in the trial court the DPP was always represented by one or more counsel from the DPP's office: the various counsel on record are: Mr. Muteti, Mr. Owiti, Ms Kavindu, Ms Mwaniki, Ms Abuga, and Ms Nduati. On no occasion were proceedings conducted in the trial court in the absence of counsel from the DPPs prosecution team. This court also notes that the applicant has repeatedly asserted that it operates through a "Prosecution Team", which suggests that one or more members of the DPPs office would always be on hand to handle the brief on behalf of the DPP.

50. Having taken the trouble to peruse the lower court's file and the proceedings in some fair detail I am unable to identify aspects of unfairness in the procedures practices or positions applied by the trial court such as would tend to imply or give the appearance of unfairness, impropriety or impartiality. What is very clear is that this is an extremely contentious, high profile, high stakes litigation. However, I do not consider that any order is expedient or required - on the basis of the complaint by the prosecution set out in the preceding paragraphs of the affidavit - that the file should be transferred to another court station.

51. Overall, therefore, there is nothing in the proceedings of the trial court that, on balance, appears to me to truly lend itself to creating a reasonable apprehension on the part of the prosecution that the trial is unfairly managed and therefore should be transferred. I am guided by the words of Ochieng J in **Kamande & 3 Others v R [2012] eKLR** (supra) where he said that in considering an application for transfer of a case on grounds which may be directed at judicial officers, alleging bias and lack of fairness must not be accepted without there being substantive evidence to back such allegations:

> ***"If a court was too quick to accept the 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."***

52. Finally, it was pointed out by the DPP that under **Section 81(3)** of the **Criminal Procedure Code** the DPP is exempted from the requirement to support his application for transfer by an affidavit. That is a well taken point. It is trite that the purpose of an affidavit is to provide sworn evidence in form of facts supporting a position. From this perspective, it may be assumed that the discretion of the DPP in requesting a transfer of a case is open-ended and unqualified. However, it is clear that from **Article 157(11**) of the **Constitution** that the DPP must comply with certain parameters. That Article provides:

> ***"In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"***

The DPP can therefore start a case in any court. Once he commences such a case, he is under duty to conduct it upon some rational and well established principles. He does not exercise that power and discretion willy-nilly. In carrying out his mandate under **Article 157(11)**, the

DPP must:

> ***"…have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"***

53. Clearly, therefore, when exercising his powers even in an application for transfer of a case, the DPP must at all times be able to demonstrate that his actions fulfill the constitutional paradigms at **Article 157(11)**. Thus he must be able, to provide material that sufficiently demonstrates that he is at all times acting in the public interest, in the interests of the administration of justice and that, in respect of a transfer, the application will prevent and avoid abuse of the legal process. This is the constitutional minimum against which all actions of the DPP must be measured.

54. In conclusion, I have found that on each of the grounds cited by the applicant, this court was not satisfied that there was sufficient material to warrant an order to transfer the case from Naivasha to Nairobi.

Disposition

55. For all the above reasons the application for transfer of the proceedings in Naivasha Criminal Case No 977 of 2018 to Nairobi is hereby declined.

56. Accordingly Order 3 of this court issued on 12th September, 2018 staying the aforesaid trial court proceedings is hereby vacated.

57. The criminal trial shall be mentioned within seven days for notification of the orders herein.

Orders accordingly.

Dated and Delivered at Naivasha this 2nd Day of October, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Makori with Kinyanjui for the Applicant
2. Masinde for the 1st and 2nd Respondents
3. Mburu for the 3rd and 4th Respondents
4. Mburu holding brief for Karanja 8th and 9th Respondents
5. No Representation for the 5th Respondent
6. No Representation for the 6th Respondent
7. No Representation for the 7th Respondent

Court Clerk – Quinter Ogutu