



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION NO. 53 OF 2016
(IN THE MATTER OF AN INTENDED APPEAL)
BETWEEN
REPUBLIC APPLICANT
VERSUS
K S SRESPONDENT

RULING

The Notice of Motion dated 24.11.2016 seeks the following orders: -

- 1. THAT the venue of the trial be moved from Malindi Law Courts to Shanzu Law Courts.**
- 2. THAT the matter to be heard on a day to day and priority basis.**

The application is supported by the affidavit of Amina Muli, a Social worker sworn on the same date. The respondent filed a replying affidavit sworn on 5.12.2016. Miss Mathangani, Prosecution Counsel, appeared for the State while Mr. Muranje and Miss Ruto appeared for the respondent.

The background to the application is that the respondent is charged in Criminal Case Number 654 of 2016 with the offence of subjecting a child to an early marriage contrary to section 14 as read with section 20 of the Children Act. The particulars of the offence are that the respondent, on unknown date during the month of April 2016 at [particulars withheld] Village in Magarini sub county within Kilifi County, jointly with others not before court unlawfully subjected I B, a child aged 16 years, to early marriage the practice that is likely to negatively affect the child's life.

Miss Mathangani submit that the case has come for hearing before the trial court several times but could not proceed. The complainant has been coerced by the respondent not to give her evidence in court and has been sending emissaries to the complainant. This interference has affected the complainant to the extent that she cannot testify. Counsel submit that section 81 of the Criminal Procedure Code grants this court powers to transfer a matter from one Subordinate Court to another court of equal or superior jurisdiction. Counsel would like to have the criminal case pending before the Malindi Chief Magistrate's Court be transferred to the Shanzu Magistrate's Court. It is further submitted that the Shanzu Court has specialized facilities which will ensure that the minor does not come into contact with her relatives.

It is also contended by the State that the complainant is a child aged 16 years old. She is now under the

custody of St. Francis Rescue Centre. She has been emotional and there has been undue influence. Counsel argued that the right of the victim has to be taken into account. The State is not seeking specific results.

Counsels for the respondent strongly opposed the application. Miss Ruto submitted that the reasons given by the State that the complainant is being coerced by her relatives is unjustified. The complainant has been staying in a Rescue Centre since August, 2016. Her relatives have not been able to access her. The complainant has on several occasions refused to testify stating that she does not wish to have the matter prosecuted because she has forgiven her mother. The accused is a widow and has other young children. It would be expensive for her to travel to Shanzu. She will have to cover the travelling expenses of her advocates and witnesses.

Mr. Muranje submitted that Article 50 of the constitution provides for fair hearing. If the matter is transferred to Shanzu, there will be no fair hearing taking into account the circumstances of the accused. If the place of trial is taken quite far, the accused will not be able to hire counsel due to cost implications yet she is entitled to representation. Her right of representation would have been taken away. It is further submitted that the circumstances of this case do not fall within the purview of section 81 of the Criminal Procedure Code.

Counsel also submitted that the issue at hand involves procedure as to the place of trial. Section 4 of the Children Act requires the child to give her opinion. The child's opinion has not been sought. The prosecution is trying to choose a specific forum. The custody of the child has already been affected. The child does not wish to proceed against her mother. Changing the venue will not change the child's wishes.

The current application is based on the contention that the complainant who is a minor has been influenced by the accused's relatives and due to that influence has refused to testify. The prosecution is seeking to have the venue of the trial moved from the Malindi Court to the Shanzu Court.

I have carefully perused the record of the trial court and it is clear to me that the trial court has competently dealt with the criminal case before it. For purpose of clarity, I will summaries the record of the trial court as follows: -

- i. The accused was charged on 5.9.2016. The case was listed for mention on 7.9.2016 and a further mention on 14.9.2016. It was adjourned to 15.9.2016 at the request of the prosecution.
- ii. On 15.9.2016 the prosecution informed the court that the whereabouts of the complainant had been identified. The case was fixed for hearing on 19.10.2016. In all these occasions Miss Ruto appeared for the accused.
- iii. On 19.10.2016 Mr. Muranje appeared for the accused and sought adjournment as he was yet to acquaint himself with the case. He told the court that he was appearing together with Miss Ruto. Mr. Muranje also asked to address the court in chambers. The adjournment was granted. Mr. Muranje raised issue with the custody of the complainant in that she was being kept in a Catholic Institution yet she was a Muslim and that her relatives (aunt) had been denied access. The court directed that the complainant continue staying at the Rescue Centre but her religious rights be observed. The court granted access to the complainant by her relatives but in the presence of a Children Officer.
- iv. The case was fixed for hearing on 14.11.2016. On that day the trial court ordered the court to be cleared of all members of the public. The prosecution did not proceed. Miss Mathangani informed the court as follows: -

“There is a possibility of reconciling the complainant with her mother. I however require instructions from my office on the way forward. I would require to sit down with the Social worker, one Amina Muli”.

The case was adjourned for mention on 18.11.2016. On that date Miss Mathangani sought adjournment for purposes of seeking directions from Mr. Monda on the way forward. The case was adjourned to 25.11.2016. On that date, Miss Mathangani informed the court that she had consulted and she had instruction to seek the transfer of the matter to the Shanzu Court. Counsel told the trial court that an application had been filed before the High Court with the aim of having the case transferred to the Shanzu Court.

Section 81 (1) of the Criminal Procedure Code gives power to the High Court to change the venue of a criminal case. There are certain conditions to that power. Section 81 (1) (a) states that it should appear that a fair and impartial trial cannot be heard. Section 81 (1) (d) provides that an order under section 81 should tend to the general convenience of the parties or witnesses. Section 81 (e) states that such an order of change of venue should be expedient for ends of justice.

Having gone through the record of the trial court, it is clear to me that the trial court has not been accorded the opportunity to deal with the situation. At no time was the complainant put on the witness box and decline to testify. It could be possible that she has told the State Counsel that she is not going to testify and that is why the trial court was told that there was room for reconciliation. The only time the case was ready for hearing and the court was cleared of members of public, the prosecution informed the court that the complainant wanted to reconcile with the accused who is her mother. The trial court has not dealt with a situation whereby the witness has been put in the witness box and declined to testify. Once that happens, then the trial court will be able to know either the complainant's reason not to testify is due to the venue or influence by her relatives.

It has been submitted by the State that the complainant's relatives have influenced her. The record of the trial court as reproduced hereinabove is quite clear. Mr. Muranje complained that the relatives had been blocked from seeing the complainant. The trial court gave directions to the effect that whenever access is granted, a Children Officer should be present. The state has powers to charge any relative who is asking the witness not to testify with the offence of obstruction to justice. No name of the relative who influenced the complainant has been given. The trial court has not had the opportunity to deal with that issue. The trial court cleared members of the public in preparation for the hearing. The trial court can as well hear the case in chambers or in open court but only in the presence of the accused and her counsel. The accused can be placed quite far from the complainant when the witness is testifying. All this is available to the trial court. There is no contention that the trial court has not been able to handle the matter properly. Indeed, the case has been before the trial court several times in a period of three months.

Given the above scenario, I do find that the current application is not justified. Taking the case all the way to the Shanzu Court will prejudice the accused as she will have to meet the transport costs for her advocates and witnesses. Further, the trial court has not shown that it is incapable of dealing with the case. The conditions provided under section 81 of the Criminal Procedure Code have not been fulfilled. Both parties will be inconvenienced if the case is to be heard before the Shanzu Court. There is no indication that the Malindi Court will not hear the matter in a fair and impartial manner. The application dated 24.11.2016 lacks merit and is hereby dismissed.

Dated and delivered in Malindi this 30th day of January, 2017.

S.J. CHITEMBWE

JUDGE