



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL REVISION NO. 46 OF 2016

(Original Criminal Case (S. O.)No. 11 of 2016 of the Chief Magistrate's Court at Naivasha)

JOHN WACHIRA KANYUGO.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR

RULING ON REVISION

1. The Applicant stands charged in the lower court with the offence of Defilement Contrary Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. In the alternative, he is charged with Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the charges indicate that the offence occurred at Hindi Township of Lamu sub-county, erroneously stated to be in Kilifi rather than Lamu County.

2. The Applicant has through his advocate sought revision regarding the trial court's direction to have the matter heard in Naivasha for reasons that:-

- a) the offence was committed at Hindi, Lamu County.
- b) the Applicant resides in Lamu where the complainant was said to be attending school.
- c) some witnesses, including the minor's teachers were from the above school.
- d) the Applicant took plea in Naivasha under duress to end alleged suffering and humiliation in police custody following his arrest in Hindi, Lamu.
- e) the plea court was hood winked by the prosecution's initial charge sheet showing the place of offence as Naivasha, to admit the plea.
- f) the Applicant is apprehensive that he will not be accorded a fair trial in Naivasha.

3. Thus the Applicant requests the court to inquire into the circumstances of the case and order its transfer to Lamu Court.

4. Having called for and perused the lower court file, I note that the Applicant was arraigned in court for plea on 18/4/2016, following a warrant of arrest issued against him on 4/2/2016. Before the plea could be taken the Director of Public Prosecutions' representative, the defence counsel and counsel representing the victim addressed the court as follows:

“STATE COUNSEL

The accused had previously been charged but he failed to come to court and a warrant of arrest was issued. He is now present in court. The previous charge sheet indicated Nakuru County but the charge sheet I have presented is for Lamu – Kilifi. The minor was staying in Lake View but had gone to Lamu to visit the grandmother when the incident took place. We pray that the new charge sheet be used instead of the old one for Nakuru. We have filed charges in Naivasha because the minor and witnesses reside in Naivasha. When the incident was discovered, the schools were almost closing and she knew she would be sent back to Lamu. The incident has traumatized her a lot and that is why we want the charges and the case conducted in Naivasha.

MR. MWANIKI

Being a minor and taking into account what the prosecution have said, we can take plea before this court and even trial.

MR. KIMANI

It is in the best interest of the minor. The girl is traumatized and so this is the best place to conduct trial. Further, the defence counsel has no objection to the matter being heard here.

.....

MR. KAMAU (sic)

I have talked to my client, though he resides in Lamu, he had no problem this matter being conducted in Naivasha.”

5. The court having determined that the trial would proceed in Naivasha read the amended charges to the Applicant. The Applicant denied the charges and was subsequently released on bond. Hearing was set for 28/7/2016, but before then the pretrial was conducted on 11/5/2016. On the latter date the proceedings reflect the following addresses and court order:-

“Question 32

State counsel: We will call 6 witnesses. We will take 2 hearing dates.

DEFENCE – (MR. MWANIKI)

10 witnesses. There are people who were staying with the girl in Lamu and who were in same school with her. We will take at least 3 hearings – 3 at a time.

STATE COUNSEL

Okay with that.

Question 33

STATE COUNSEL

No reason for not proceeding on hearing date.

DEFENCE

No reason for not proceeding on hearing date.

COURT

Matter confirmed for hearing on 28/7/16.

STATE COUNSEL

We have some concerns with the date. Some witnesses are school going – complainant and sister. We prefer August.

MR. MWANIKI

August is okay.

COURT

Date changed. Matter now confirmed for hearing on 23/8/2016.”

6. It appears that on 28/7/2016 a different hearing date was assigned to the case leading to some confusion on the above hearing date – 23/8/2016. The Accused was absent on the latter date but did appear in court on the next scheduled hearing on 18/10/2016. However, on that date the matter was adjourned at the instance of the defence as counsel for the Accused was allegedly stranded on his way to court from Mombasa. As on 23/8/2016 the Director of Public Prosecutions had two witnesses.

7. The matter was set for hearing on 6/12/2016. The proceedings of the day are as follows:

“MR. GACHOMO

We are not ready to proceed. We have applied for revision in High Court. We seek a date to confirm that. I have the letter addressed to the Deputy Registrar dated 2/12/16. I seek that we await the outcome of that revision.

STATE COUNSEL

On our part we were ready to proceed. We had two witnesses. We are learning of it now. I have just received the copy. Despite the circumstance, I believe the best way is to get direction from the High Court before we could proceed with this matter.

COURT

Adjournment granted. Mention on 27/2/17.”

8. From all the foregoing, it is evident that the defence did not object to the trial being held in Naivasha at any one time. The amended charge particulars and statements filed on the record prior to the pretrial clearly indicated that the offence occurred in Hindi, Lamu Sub-County.

9. The question of the place of trial was addressed on 18/4/2016, the defence supporting Naivasha as the venue of the trial, in view of the fact that the Complainant was a minor. At the pretrial the defence also addressed the court at length, and eventually confirming readiness to proceed, come the day of trial.

10. In making her direction to the place of trial on 18/4/2016 the trial court was alive to all the relevant matters raised before her in that regard and stating as follows:-

“I have considered submissions by both parties and taken into consideration the minor’s age and the fact that she and the other witnesses are based in Naivasha and having them travel all the way to Kilifi will be too costly for them. Further, I am told the minor is greatly traumatized and taking her back to Kilifi will not be in her best interest and lastly that the

defence counsel isn't opposed to the trial being conducted in Naivasha, I will allow the prosecution application to have the matter heard in Naivasha."

11. In the present application the defence relies in part on the provisions of Section 72 of the Criminal Procedure Code which states:

"When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued."

12. This provision reiterates Section 71 of the Criminal Procedure Code which provides that:-

"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."

13. Section 71 provides for the trial of offences at three alternate ordinary places for a trial:

- a) where the offence was committed.
- b) where the Accused was apprehended.
- c) where an Accused is held in custody in respect of the offence.
- d) where the Accused has appeared in obedience to summons issued in respect of the offence.

14. Whenever there is doubt as to the court before which a trial should proceed, the High Court is empowered under Section 76 of the Criminal Procedure Code to decide the question. Similarly the High Court is empowered to order the transfer of a case under Section 81 of the Criminal Procedure Code on several grounds, including the convenience of witnesses and parties where it appears that a fair trial cannot be held; or where such order is expedient for the ends of justice or is required by any provisions of the Criminal Procedure Code.

15. In the application before me, the defence cites grounds regarding the place where the offence was committed i.e. Lamu, convenience of the Accused and witnesses from Lamu; and that the charge sheet was filed in the Chief Magistrate's Court Naivasha surreptitiously, resulting in the apprehension that the Accused will not be accorded a fair trial. It is further stated that the Accused took plea in Naivasha under the duress in order to avoid further incarceration and humiliation as he had been in custody for a long period since arrest.

16. A perusal of the court proceedings on the plea date does not bear out the latter ground, and neither were the other grounds raised as objections in court by counsel for the Accused on the plea date or subsequently. Despite the fact that the place of offence, residence of some of witnesses, the Accused and the fact of his arrest and incarceration prior to arraignment were all facts within the knowledge of the defence, these were not raised before the plea was taken. Indeed after the Director of Public Prosecutions explained why the charge was amended and laid before the Naivasha Court rather than a court in Lamu all the defence stated was:

"Being a minor and taking into court what the prosecution have said, we can take plea before this court and even trial."

None of the matters now raised in this application were raised at the pretrial.

17. The court had given sound reasons as why the trial should be conducted at Naivasha stating interalia that:

“Further, I am told that the minor is greatly traumatized and taking back to Kilifi will not be in her best interest and lastly that the defence counsel is not opposed to the trial being conducted in Naivasha.....”

The Accused having been held in custody in Naivasha in respect of the offence, the court was entitled under Section 71 of the Criminal Procedure Code, and in light of the defence position to order the trial to proceed in Naivasha. Secondly but more importantly the welfare of the minor victim was given primacy as required under Article 53 (2) of the Constitution which states:-

“A child’s best interests are of paramount importance in every matter concerning the child.”

18. Besides, this court is persuaded that even if the trial court had acted in error, the circumstances of this case would justify this court’s invocation of Section 81 (e) (i) of the Criminal Procedure Code the result of which would effectively uphold the court’s decision. The said Section is in the following terms:-

“(1) Whenever it is made to appear to the High Court—

(a);

(b);

(c);

(d);

(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);

iii)”

19. Statements on record indicate that the complainant minor was staying and studying at Naivasha and had visited Lamu on holidays. Where a balance has to be struck between the minor complainant’s interest and those of the adult Accused, the former would, barring exceptional circumstances tilt the scales on a question of this nature. There is no evidence that a trial in Naivasha would in any way abrogate the Applicants’ fair trial rights. The Applicants’ allegations that he may not receive a fair trial have not been supported by any grounds. The choice of Naivasha by the prosecution as endorsed by the court is in my view justified by the reasons on the record. Unless the Applicant furnishes material to support the above claim, it appears that on the face of it the prosecution and the court acted in good faith in setting the place of trial as Naivasha.

20. Reviewing all the material before me and in particular the court record, I am persuaded that this is not a matter where this court ought to invoke its revision jurisdiction. It seems to me that the defence change of heart regarding the venue of the trial is an afterthought.

21. There is no merit in the application before me. The two trial magistrates who were initially seized of the trial have since left the station. A different trial magistrate **Kitagwa RM**, is currently seized of the same. I reject the application for revision and will remit the lower court file so that the case can be mentioned, as scheduled, on 27th February, 2017.

22. In light of the fact that the Accused person hails from Lamu, I direct that for purposes of expedition, the matter be allocated two days on the next hearing to be scheduled.

Written and signed at Naivasha this 17th day of **February, 2017.**

C. W. MEOLI

JUDGE