



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 35 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GILBERT MAINA.....1ST ACCUSED/APPLICANT

DANIEL THUKU.....2ND ACCUSED/APPLICANT

VINCENT KIPNGETICH RONO.....3RD ACCUSED/APPLICANT

RULING OF THE COURT

1. The Notice of Motion before the court is dated and filed herein on **5th October, 2016** by the 1st accused person pursuant to **Article 50(2)** of the **Constitution**. The application seeks as the main prayer an order that the court be pleased to transfer this suit to the High Court in Kitui.

2. The application is premised on the grounds set out therein, and is supported by affidavit of **Mr. Moses G. Muchoki**, counsel for the applicant/accused sworn on **5th October, 2016**. The applicant's case is that he anticipates to take a plea as set out in the charge sheet in the alleged murder of one **Ngandi Malia Musembi**. The applicant however wishes to take plea in the High Court in Kitui which has the territorial jurisdiction in this matter. The alleged offence is said to have taken place on 25th August, 2016 at Mwingi District Hospital in Mwingi Sub-county within Mwingi County which falls within the geographical jurisdiction of High Court Kitui. The applicant is the sole breadwinner of his family and the survival of his dependents is heavily pegged on the Applicant's release on bond or bail, and the applicant is desirous that the matter be tried in Kitui where he is resident as it would be easier to commute to the court. The applicant's case is that the High Court in Kitui is a newly established Court and has a fairly fewer matters compared to Machakos High Court hence it would be faster for the court to dispose of the matter. In addition, the applicant's case is that most of the witnesses come from Kitui County and it would therefore be easier to avail them in court as opposed to when the matter is being handled in Machakos. The applicant is entitled to an expeditious disposal of the suit. The applicant states that he is a police officer and he has no intention whatsoever of absconding, interfering with witnesses or doing anything that might negatively affect his trial, and he undertake to abide by the conditions this court sets. The applicant's case is that the investigations are being conducted by police officers from Machakos and Nairobi and therefore there is no possibility that the applicant would collude with any of his colleagues in Kitui Police Station, and that it is in the interests of justice and fairness that the matter be transferred to the High Court in Kitui and in the absence of compelling reasons the matter ought to be transferred.

3. The application is opposed vide a replying affidavit of **Mr. Cliff O. Machogu** State Counsel, sworn on **21st October, 2016**. The State's case is that the respondent through the office of the Director of Public Prosecutions charged the applicant by virtue of powers conferred by **Article 157(6)(a)** of the

Constitution of Kenya. The State's case is that 1st and 3rd accused persons were police officer attached to the office of the Director of Criminal investigation Kitui Central, Kitui Sub-county performing intelligence duties and general investigations, while the 2nd accused person was the Deputy DCIO in the office of the Director of Criminal Investigation Kitui Central, Kitui Sub County. In their normal course of duties the applicant, 2nd and 3rd accused persons interact with the prosecution counsels attached to the office of the Director of Public Prosecutions, Kitui by virtue of **Article 157(4) of the Constitution of Kenya, 2010** and as such if this matter is transferred to Kitui there will be conflict of interest between the prosecution counsels and accused persons and so a fair and impartial trial cannot be conducted in Kitui. In order to strike balance between the competing interest of the public and that of the applicant/accused persons to have the matter transferred to Kitui, it would be proper to have this matter set up for speedy hearing and determination. The prosecution's case is that this application is frivolous, vexatious, and improperly before court and thus it is an abuse of the court process.

4. Parties made oral submission in court on the application, which I have carefully considered together with the application. In my view, the issues for determination are as follows;

- i) Whether this court has the jurisdiction to try the accused person.
- ii) Whether this court should try the accused person.

Submissions

5. **Mr. Muchoki** submitted that the cause of action took place in Mwingi District Hospital within Kitui County, which falls within the jurisdiction of the High Court of Kitui. Kitui High Court is a new station. He relied on the supporting affidavit which is quite exhaustive. **Mr. Onyango** for the 2nd accused supported the application for transfer. Counsel submitted that the offence took place in Kitui. It would be tedious to transport the witnesses from Kitui. This will cause unnecessary adjournments. The second accused was arrested almost two months after the alleged offence was occasioned, so there is no possibility of the accused person interfering with witnesses. Again, if this matter is not transferred to Kitui the public may get the impression that the High Court in Kitui is incompetent.

6. **Mr. Machogu** in opposing the application submitted that the prosecution is not questioning the competent of Kitui Court. The prosecution is merely addressing the issue of conflict of interest. The accused persons are police officers in Kitui, and may easily interfere with witnesses and with investigations. That is why the State wants the matter to be prosecuted in Machakos. The State cited the case of **Francis Otieno Joseph vs. Republic Cr. Appeal No. 19 of 2015** to support their submissions of possible interference with witnesses.

7. Mrs. Abuga in addition to Mr. Machogu's submissions, added that **Article 165(3) (a)** of the **Constitution** gives the High Court unlimited original jurisdiction in criminal and civil matters. **Section 66 of Criminal Procedure Code** also clothes this court with jurisdiction. The conflict of interest is possible because prosecutors in Kitui have been freely interacting with the accused persons in Kitui. For witnesses, the Director of Public Prosecutions will be able to avail them in Machakos Court without any problem or difficulties.

8. In response, **Mr. Mushoki** submitted that the reasons given by the prosecution to have this matter heard in Machakos are not only subjective but also are not supported by any evidence. The replying affidavit is sworn by the prosecutor and not by the investigating officer from Kitui. Those grounds are merely speculative and hold no substance. Counsel submitted that the 1st accused person was transferred to Kitui in December, 2015. He then took his leave, and was in that station for only three months before the alleged offence took place. It is not shown how the accused has interacted with the office of the Director of Public Prosecutions. It must be noted that the Director of Public Prosecutions is an office and not an individual. Counsel submitted that no names have been given of the Director of Public Prosecution's officers which have been interacting with accused persons. Counsel observed that it is admitted that the investigations were conducted by officers in Nairobi and Machakos. Further, the accused persons were

interdicted, and are not in office to warrant suspicions of conflict of interest. Counsel submitted that this court has unlimited original jurisdiction. However, the objective test is how much would the accused persons be prejudiced if this matter is heard in Machakos. It appears that the trial in Machakos is aimed to benefit the prosecutions officers.

9. Counsel distinguished the authority of *Francis Otieno Joseph-vs- Republic*. The accused persons in that case were seeking transfer to a court which had not been established by the time the alleged offence took place. In contrast the High Court in Kitui was already in existence when the alleged offence herein took place. Further the authority is not binding since the decision is of a court of concurrent jurisdiction.

10. **Mr. Onyango** further submitted that the High Court in Kitui is headed by a judge. The prosecution in Kitui is also headed by able prosecutors. There is only an allegation of conflict of interest but none has been disclosed. Counsel submitted that to save resources, the trial should be in Kitui as opposed to Machakos.

11. To address the issue I raised I will look at the law;

Article 165(3) (a) of the Constitution of Kenya

(3) Subject to clause (5), the High Court shall have-

“(a) Unlimited original jurisdiction in criminal and civil matters”

Section 66 of the Criminal Procedure Code

“Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction”.

12. From the above texts, it is the finding of this court that it has the jurisdiction to try the applicants in this court. However, that jurisdiction can only be exercised by this court upon the court being satisfied that the court with preference in jurisdiction is, for good reason, not able to exercise that jurisdiction. So far, the arguments that the appellants should be tried in this court have not shown why the High Court in Kitui should not try the accused persons. The allegations that the accused persons were based in Kitui and that they will likely interfere with investigations are indeed very unfortunate, for they tend to perpetuate the myth that in Kenya interference with institutional processes is something which is normal, and that such possibility of interference should be protected by court orders. The investigations to be done in this case will be done by legal and authorized state institutions which include the office of the Director of Public Prosecutions, the Police and the Directorate of Criminal Investigations. They are expected to do the right thing. When the case starts in the High Court in Kitui, the court also is expected to do the right thing. The submissions by the State that the accused persons will interfere with witnesses or with investigations, if accepted by this court, will drag back this country. This country is aspiring towards excellence and integrity. To give an order which appears to encourage authorized institutions to continue being lethargic would be a step backwards in the aspirations of Kenyans. What Kenyans expect are that people in charge of public trust should perform their duties professionally. That does not mean that everything will always be smooth. No. But speculation cannot be the basis of a legal order. It has not been shown to this court that the applicants has so far attempted to interfere with investigations or with witnesses. Indeed if that were the position, it could be a factor in determining the suitability of the applicants for bail or bond. In my view, all the reasons advanced against the trial in the High Court in Kitui are at this stage speculative. But even if they were not speculative, a court cannot give an order which appears to encourage citizen either to be lethargic or allows them to work below what is expected of their professional calling. If there will be a time, either now or in the future, when the fears expressed by the state shall be a reality, the state shall take lawful steps to remedy the situation. As it is now, there is no evidence before the court to deny the accused the right to have the matter tried in Kitui High Court which has preference in terms of jurisdiction. Indeed, a trial in Kitui will be much cheaper to the State,

and more convenient to the witnesses.

13. For these reasons, the application before the court is granted as prayed, and this matter is hereby transferred to the High Court in Kitui for trial. Accordingly, the plea will be taken in the High Court in Kitui on a date convenient to all the parties.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Machogu for State

Mr. Onyango for 2nd accused

Mr. Muchoki for 1st accused

Court Assistant – Mr. Munyao