



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 19 OF 2015

DIRECTOR OF PUBLIC PROSECUTIONS..... APPLICANT

VERSUS

MUKDHAR SAID JUMAAN.....RESPONDENT

RULING

By way of a Notice of Motion application dated the 20th day of February, 2015 and which is expressed to be brought under section 81 (a) (e) (ii) of the Criminal Procedure Code the applicant who is the State seeks the transfer of Lamu Criminal Case No. 232 of 2014 Republic –Vs- Mukdhar Said Juma from Law Courts to Mombasa Chief Magistrate's Courts and or any other Court with jurisdiction near Shimo La Tewa maximum prison for hearing and determination.

The grounds are that:-

1. **The Accused is a high risk terror suspect who poses a lot of danger.**
2. **The Accused is remanded at Shimo La Tewa GK Prison in Mombasa and he poses a lot of danger to both security officers and members of Public each time he is moved from prison to Lamu Law Courts.**
3. **The learned Magistrate in Lamu has severally declined to have the matter transferred or withdrawn under section 87 (a) of the Criminal Procedure Code.**

The application is opposed on the grounds the supporting of affidavit contains misleading and false averments.

That no attempt has been made to prosecute the case almost eight and half months after the arrest.

Further that the case can be heard at Hindi mobile Court in Lamu where other similar cases are being heard.

That the Respondent stays at Kiunga and he has three witnesses who stay at Kiunga and who would find it difficult traveling to Mombasa.

The Accused is charged with three Counts. Counts No. 1 and 2 relate to robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code whereas the 3rd Counts relates to soliciting and giving, support to Terrorist groups for the commission of Terrorist acts contrary to section 9(1) of the prevention of Terrorism Act of 2012.

In the first Count it is alleged that he jointly, with others not before the Court and armed with dangerous weapons namely firearms robbed No. 69897 corporal George Makhulu of a G3 rifle butt No. 580 Serial No. 6932499 loaded with 20 rounds of ammunition of the value of Ksh. 220,000/= and immediately before the time of such robbery murdered the said No. 69897 corporal George Makhulo.

In the second Count it is alleged that he robbed No. 88395 private Vincent Imbenzi a G3 rifle butt No. 643 serial No. 6932562 loaded with 20 rounds of ammunition valued at Ksh. 220,000/= and immediately after the time of such robbery murdered the said No. 88395 Private Vincent Imbenzi.

The particulars in the 3rd Count of soliciting are that being the driver of motor vehicle registration No. KAV 599E Toyota Land Cruiser pick up dark green in colour knowingly supported the commission of Terrorist acts by soliciting and supplying a terrorist group namely Al-Shabaab militias with assorted foodstuffs.

Section 81 of the Criminal Procedure Code grants powers to the High Court to change venue in the following manner whenever it is made to appear to the High Court.

(a) That a fair and impartial trial cannot be heard in any Criminal Court Subordinate thereto, or

(b) That some question of law 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 and 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 proceeding 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 Court of equal or superior jurisdiction.***
- III. That an Accused person be committed for trial to itself.***

I have perused the record of proceedings in the Lower Court. An attempt was made to have the instant Lamu case transferred to Mombasa on security grounds. Later another application was made for withdrawal of the same case under section 87(a) of Procedure Code. Both applications were rejected.

It is instructive that the Accused was arraigned in Court on 4th June, 2014 since then his case has not commenced for trial owing to the applications before the Lower Court which hinges on insecurity.

It is these insecurity concerns that led to the Accused being remanded at Shimo La Tewa GK Prison.

I have perused annexure "CN 2" which is a letter from the DCIO Lamu East the ODPP in which he states that the Accused is a terror suspect who poses danger to officers collecting him from Shimo La Tewa to Lamu and back. He further states that the officers carrying out this exercise are from Kiunga (Lamu East) which is about 180 Kilometers from Hindi and the road is in a very bad state with a police Land Cruiser taking not less than six hours for the journey from Kiunga and vice versa. The road is prone to terrorist attacks as evidenced by attacks on KDF convoys twice within a month with fatalities. The sub county Directorate had inadequate funds to pay the officers.

He also noted that Hindi prison refused to accommodate the suspect for fear of attack by the terror group.

I am of the considered view that the security concerns attributed to this application are very real and they cannot be taken for granted.

The ugly head of common notoriety that there has been a spate targeting Civilians as well as armed personnel. It would not be reasonable to transport an accused suspect from Shimo La Tewa GK Prison to Lamu County every time there is a mention and a hearing of his case when there is a Court within easy reach.

This would expose the officers transporting him to great security risks. Paragraph 9 of the supporting affidavit of CI Charles Njogu shows that the Accused hails from Mombasa and most of the Witnesses are KDF officers who are based at 15 KR Mariakani barracks which is within Mombasa and hence no prejudice will be occasioned to the Accused.

In his affidavit the Accused depones that he resides at Kiunga and he has three Witnesses all who stay at Kiunga.

This may mean that the Accused has two abodes one in Mombasa and the other at Lamu.

It is the duty of this Court to balance the interest of an individual against of the state.

The present case presents serious legalistic and security concerned. It would be unreasonable for police to be transporting an Accused person from Shimo La Tewa to Lamu through hostile territory for a distance of 180 kilometers which takes six hours duration.

The officers used in transporting one single Accused (seven in number) can be put in better use in ensuring security for the larger community. The expenses for the transport and related allowances can also be put into better use.

In a nutshell an order for transfer of the case to Mombasa is for general convenience of all parties including Witnesses and its also expedient for the ends of justice.

As earlier observed, the case has taken long to commence.

I order that Lamu Criminal Case No. 232 of 2014 be hereby transferred to Mombasa Law Courts.

To be mentioned on **26th May, 2015** before the Chief Magistrate for further directions and orders.

Production order issues for the Accused. Case to be heard expeditiously.

Ruling delivered dated and signed this **12th** day of **May, 2015**.

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M. MU YA

JUDGE

12TH MAY, 2015

In open Court in the presence of:-

Learned Counsel for the prosecutions Mr. Masila Learned Counsel for the Accused Olaba absent

Court Assistant Mr. Musundi

MUYA – JUDGE

Order

Certified copies of the ruling to be furnished to the Director of Public Prosecution and the Defence.

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M. MUYA

JUDGE

12TH MAY, 2015