



Mohamed & another v Republic (Miscellaneous Criminal Application E001 of 2025) [2025] KEHC 14227 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2025**

**JN ONYIEGO, J
OCTOBER 9, 2025**

BETWEEN

YASSIN MAALIM MOHAMED 1ST APPLICANT

ABDIKHEIR OMAR 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants by way of notice of motion dated 02.04.2025 brought under articles 47,48,50(2)(e)(g), 159 (2) (a) (d) of the constitution and section 81 of the Criminal Procedure code are seeking for orders as follows:
 1. Spent.
 2. That the court do enter and/or direct that Mandera Criminal Case No. E063 of 2025 (Republic vs Yassin Maalim Mohamed and Abdikheir Omar) involving the applicants be stayed pending the hearing and determination of this application.
 3. That the court do order and direct that Mandera, Criminal Case No. E063 of 2025 (Republic vs Yassin Maalim Mohamed and Abdikheir Omar) be transferred to the Garissa Law Courts for hearing and disposal, in the interest of justice.
 4. That this Honourable Court be pleased to issue any other order it may deem fit to grant in the interest of justice.
 5. That the costs of this application be provided for.
2. The application is supported by the affidavit of the applicants sworn on 02.04.2025 deponing that on or about January, 2024 they were jointly charged in Mandera criminal case number E346 OF 2022



for offence of forcible detainer c/s 91 as read with section 36 of the penal code. That prior to the determination of the said case, the complainants in this case alleged that the 1st accused had threatened to kill one of them which allegation was dismissed by the Honourable Kimani.

3. That on or about 17.01.2025, the complainants in Mandera MCCR/E346/2022 Republic vs Yassin Maalim Mohamed further alleged that the applicants once more had threatened to kill one of them. Consequently, the applicants were allegedly separately charged with trumped up charges of threatening to kill contrary to section 223(1) of the Penal Code in Mandera MCCR/E063/2025, R vs Yassin Maalim Mohamed and Abdikheir Omar the subject of this ruling
4. They stated that the 1st applicant was found guilty in Mandera MCCR/E346/2022 via a judgment dated 20.02.2025 and he has since filed an appeal against the same in Garissa HCCRA/E009/2025 Yassin Maalim Mohamed vs Republic. That their advocate on record wrote to the Mandera Magistrates Court through a letter dated 07.03.2025 requesting to be allowed to attend virtually in Mandera MCCR/E063/2025. It was their contention that since they were based in Nairobi, it would be expensive for the applicant to cater for their advocate's travelling expenses each time the matter came up.
5. That in three occasions i.e (18.03.2025, 27.03.2025 and 28.03.2025), the matter came up in court but their efforts to inform the court to allow their advocates who were on the waiting lobby were unsuccessful and the matter proceeded much to their detriment. They alleged that their previous advocates on record A.A. Khalif Advocates LLP and Ng'ang'a and Associates were frustrated in similar manner and had to cease acting in Mandera MCCR/E346/2022. This court was therefore urged allegedly in the interest of justice, to transfer Mandera MCCR/E063/2025 to Garissa Chief Magistrates Court at Garissa for hearing and disposal.
6. The applicants filed submissions basically reiterating the grounds stated in the affidavit in support. On the other hand, the respondent did not file any submissions but purported to lean on submissions allegedly filed by the interested party which unfortunately were addressing issues touching on criminal case number e346 of 2022 which is not the subject of this ruling.
7. Having considered the application herein, this court is expected to determine whether transfer of this matter from Mandera to Garissa for hearing and disposal is merited. Whether the applicants' advocate has a right to represent the applicants virtually
8. Principles upon which a criminal case can be transferred from one court to another are settled and clearly set out in the criminal procedure code. The position of the law is that if it appears that the dispensation of criminal justice cannot be possible, impartial or objectively held without any bias, at any place, the appropriate court may transfer the case to another court, where it feels that holding of fair and proper trial will be conducive. When it is shown that public confidence in the fairness of a trial would be seriously undermined, the court on its own motion or any of the parties may seek the transfer of a case. That power is contained in section 81 of The Criminal Procedure Code which provides thus;
81. Power of High Court to change venue.
(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.
9. In the case of *Joseph Korir alias David Arap Chonjo vs Republic* [2018] eKLR where the court quoted the holding in *Kamande & 3 Others vs Republic* [2014] eKLR it was held thus:

“When giving consideration to an application for the transfer of a case, the court will assess whether the applicant’s apprehension was reasonable and founded on sufficient material. The reason for laying emphasis on 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 them. If a court was too quick to accept 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.”

10. The crux of the matter herein is the claim that counsel appearing for the applicants in the subject criminal case was denied the right to represent his client virtually.
11. This court is alive to the fact that an accused person has a right to a fair trial and further, to choose, and be represented by an advocate of his own choice. [See article 50 (2) (g) of *the constitution*],
12. Use of technology in dispensing justice cannot be underestimated. Its importance can best be traced to the effects of Covid 19 pandemic attack. During this time, courts like other departments were



affected and the only tool available as a savior was technology where judiciary was forced to hear cases virtually. It is this realization that technology is an enabler to dispensation of justice that the High Court Organisation and Administration Act practice directions on standardized procedures in the High Court (Practice Rules) enacted in 2022 (vide Gazette Notice No.189) embraced the use of technology.

13. It is not to be denied that the main objective of the practice directions was inter alia to enhance access to justice, facilitate timely and efficient disposal of cases and also promote use of technology in court proceedings for expeditious disposal of cases.
14. In the said practice directions, section 27 (h) on Pre-Trial Directions/Conference in Criminal Cases, it provides as follows:

The number and needs of witnesses (including intermediaries), including the length of those witnesses' testimony and whether tele-conferencing or live TV link shall be necessary and/or appropriate;
15. Further, the above has been buttressed vide Section 63A of the Evidence Act which refers to teleconferencing and video conferencing as follows:
 1. A court may receive oral evidence through teleconferencing and video conferencing.
 2. The Chief Justice may develop regulations to govern the use of teleconferencing and video conferencing.
16. From the above quoted provisions, it is clear that video conferencing is also a competent and legal mode of receiving oral / direct evidence. In ensuring that virtual hearings are smooth, parties to the hearings should not only be available, but also use proper gadgets and have sufficient bundles to ensure smooth running of the hearing process. In the same breadth, the documents to be relied on must be served in advance and verified by parties in line with article 50 of the constitution to avoid interruptions during the hearing process. From this legal provisions, use of technology has its space. Unless extremely impracticable to conduct court proceedings virtually, virtual proceedings are the way to go in the modern world.
17. In the instant case, it is alleged that counsel for the applicants was not allowed to access court virtually hence the matter proceeded in their absence. From the record, during the three days referred to, the matter was fixed for mention and not hearing. Further, there was nothing indicating that learned counsel was locked out of proceedings.
18. In any event, from the record, it appears that one Wanjala advocate was all through appearing for the accused save for the three mention dates. How did he manage to appear yet Mr. Nyongesa was not? Further, there is no proof that the defence counsel was ever denied appearance virtually. I am not aware of a court that would insist for counsel to regularly appear physically in Mandera while travelling all the way from Nairobi given the cost implication in terms of transport and insecurity. If there was any communication lapse due to internet challenges perhaps, the same should be resolved amicably by counsel and the court which will enable parties access justice without unnecessary hurdles rather than seek for transfer of cases. Transfer in this case is not the solution.
19. To that end, it is my humble finding that the applicants' counsel should be heard virtually taking into account the distance involved and cost implication besides insecurity. Courts do not transfer cases from one court to another on flimsy grounds. There must concrete reasons advanced. This is meant to guard against forum shopping.
20. As there is no good ground advanced to justify transfer of the case from Mandera to Garissa under Section 81 of the CPC, it is my finding that the application is devoid of merit hence dismissed. The case



to continue with hearing before the current trial court which shall enable counsel for the applicants to appear virtually.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2025.

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J.N.ONYIEGO

JUDGE

