



Republic v Wairia & 3 others (Criminal Miscellaneous Application E005 of 2024) [2024] KEHC 1852 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2024**

**WM MUSYOKA, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CI WAIRIA 1ST RESPONDENT

IP WILLY KIBELIO 2ND RESPONDENT

CPL DOUGLAS RONO 3RD RESPONDENT

PAUL WANJALA OGONGO 4TH RESPONDENT

RULING

1. This matter was placed before me, following directions made in Busia CMCCR Misc. Application No. E040 of 2024, by Hon. EA Nyaloti, Chief Magistrate, on 27th February 2024.
2. The matter before the lower court was principally for a custodial order, that the respondents be detained for 14 days, effective from 27th February 2024, at Kakamega Police Station, to allow the investigating officer to investigate the matter of an alleged robbery with violence. Details of the alleged acts of robbery with violence are set out in the supporting affidavit, sworn on 27th February 2024, by the investigating officer. The matter was placed before the Chief Magistrate, who ruled that the 4 respondents were well known to her, and that she had no jurisdiction to transfer the case to Kakamega. She then directed that the file be placed before the High Court, as that was the court with the requisite jurisdiction to order a transfer.
3. When the file was placed before me, Mr. Ashioya, for the respondents, argued that he did not know why the matter had been placed before me, as it was a miscellaneous application that had been filed at the trial court. Ms. Chepkonga, for the applicant, stated that after the matter was placed before the trial court, the same formed the opinion that, as it was familiar with the respondents, it was best that



the matter be placed before another court, hence the file was moved to the High Court, as that was the court with the requisite jurisdiction to order transfer of matters to other courts. Section 81 of the Criminal Procedure Code, Cap. 75, Laws of Kenya, was cited.

4. In rejoinder, Mr. Ashioya submitted that there was no case before the trial court for transfer, as all there was an application for permission to have the respondents detained beyond 24 hours. He submitted that the applicant should have applied for transfer of the matter. He argued that the Chief Magistrate recused herself, and that did not mean that the other magistrates in the station did not have jurisdiction, or were not suited to handle the matter. He stated that there was no transfer of the matter, and that the High Court could not rule on the matter of the detention of the respondents pending investigations. Mr. Okeyo, who was appearing alongside Mr. Ashioya, argued that section 81 could only be invoked through a formal application, for transfer of the matter.
5. Ms. Chepkonga pointed out that the prosecution had not made an application for transfer of the matter, and that that issue was raised by the court on its own motion. She invited the court to consider the grounds given by the trial court to have the matter placed before a court in another jurisdiction.
6. The matter is fairly straightforward. The respondents are police officers based at Busia Police Station, which shares a fence with the Busia law courts. I understand the Chief Magistrate to say that these officers have been working closely with the courts, with respect to the normal operations of the police and the courts, in the general area of maintenance of law and order, law enforcement and administration of justice within Busia County. That being the case, the trial court took the position that it would put the court in an awkward position, in having to handle a criminal matter affecting public officers, with whom the court has been rubbing shoulders with, in the daily operations of both the police and court systems, and on that basis formed the opinion that the matter ought not be handled at Busia, but should be transferred to another court. However, the Chief Magistrate opined that the trial court had no jurisdiction to order the transfer, and then referred the matter to the High Court.
7. Was the matter properly placed before the High Court? Yes, it was. Article 165(6)(7) of the Constitution grants the High Court supervisory power over subordinate courts, where the Chief Magistrate sits, and that enables the High Court to call for a file, in respect of a matter being handled by a subordinate court, and may make any order or give any direction it considers appropriate, to ensure the fair administration of justice. The trial court can quite properly place a matter before the High Court, for directions one way or the other, and the High Court would be within jurisdiction to give directions, one way or the other. There is a wide discretion.
8. Article 165(6)(7) of the Constitution states as follows:
“165. High Court
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
9. The issue raised by the trial court, about a possible conflict of interest, in view of the proximity between the police and the court at Busia, both in terms of physical location, and operational arrangements, would suggest that it would not be unusual, for the court to find itself in an awkward situation, in such



a case. It would be an administration of justice situation, in respect of which supervisory direction can be sought from and granted by the High Court. It was properly sought, and I have the supervisory jurisdiction to give it.

10. I concede that it was the Chief Magistrate who recused herself, but the situation is, based on the realities on the ground, that the police and the court premises are adjacent to each other, the respondents are very senior police officers at the police station, no doubt engaging frequently with the courts, from administrative and operational perspectives. It would place any magistrate, at the court station, handling the matter, in an awkward position.
11. Can I grant the order alluded to by the Chief Magistrate, of transfer of the matter to another court station? Yes, I can. Section 81 of the Criminal Procedure Code envisages a formal application, but Article 165(7) of the Constitution gives the court wide discretion, to give directions that it considers appropriate, to ensure the fair administration of justice. Secondly, Article 165(3)(a) of the Constitution grants the High Court unlimited original jurisdiction in criminal matters. The High Court, based on that provision, can order the transfer of the matter, and can also make the orders sought in the application placed before the Chief Magistrate, dated 27th February 2024.
12. Article 165(3)(a) of the Constitution states:
“(3) ... the High Court shall have—
(a) unlimited original jurisdiction in criminal and civil matters;
(b) ...”
13. In the upshot, I hereby issue a custodial order that the respondents be detained for 14 days from 27th February 2024, at Kakamega Police Station, to allow No. 232951 Mr. Nephath Marubu ASP, a police officer and an investigator, at the Directorate of Criminal Investigations, Western Region, to complete investigations on a case of robbery with violence, contrary to section 296(2) of the Penal Code, Cap 63, Laws of Kenya, among other offences. I also direct that the respondents be charged, should it come to that, at a court other than the Busia law courts, for the reasons stated in the body of this ruling.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 29TH DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the applicant.

Mr. Ashioya and Mr. Okeyo, Advocates for the respondents.

