



Republic v Wesonga & 2 others (Miscellaneous Criminal Application E017 of 2023) [2024] KEHC 6602 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6602 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E017 OF 2023
SC CHIRCHIR, J
MAY 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

BERNARD WESONGA 1ST RESPONDENT

HUMPREY MUSUNGU 2ND RESPONDENT

HUSSEIN MOHSIN SHARIFF 3RD RESPONDENT

RULING

1. What is coming up for determination is the Notice of Motion by the Director of Public Prosecutions (Applicant) dated 20/3/2023.

It seeks for the following orders:

1. Spent.
2. Spent.
3. Spent.
4. This Honourable court be pleased to transfer Mumias Case No. E535 of 2022 R vs. Hussein Mohsin Shariff and Mumias Criminal Case No. E419/2022 R vs. Benard Wesonga & Humprey Musungu from Mumias Law Courts to Kakamega Law Courts for hearing and determination.
5. That this Court be pleased to issue such orders as may be fair and just.
6. The costs of this Application be in the cause.



2. The Application is supported by grounds appearing on the face of the Application as well as an Affidavit by Kaushik Panchmatia who describes himself as the Complainant in the case.
3. The Applicant's case is that the two cases was investigated by the Directorate of criminal investigations (DCI) at Kakamega and therefore the trial ought to be in Kakamega; that indeed he had requested for the investigations to be moved to Kakamega after he lost confidence on the investigators at Mumias.
4. He further states that since the case began in the year 2022, the police have failed to avail investigation files or witnesses. The Complainant believes that there is a deliberate intent to defeat justice. He is also apprehensive that a fair and impartial trial might not be achieved if the hearing proceeds at the Mumias Law Courts.
5. It is further contended that the Complainant stands to suffer irreparable loss, frustrations and/or prejudice if the order for transfer is not granted and that the Accused persons on the other hand will not suffer any prejudice.
6. The Application is opposed. The Respondent filed a Preliminary Objection together with grounds of opposition.

Preliminary objection

7. In the preliminary objection, the respondent has raised the following grounds:
 - a). The Applicant has no locus standi to initiate these proceedings as intended. The same should be struck off with costs
 - b). The Application is bad in law as the reliefs sought are not available in the present circumstances
 - c). This honorable court has no power to hear and determine the Application herein in the manner intended
 - d). The Application offends the principles of the constitution
 - e). The Application is incurably defective and ought to be struck out with costs
8. On the grounds of opposition, it is the 1st and 2nd Respondent's case that the motion as drawn is incompetent, incurably defective and the grounds relied on do not warrant the orders being sought. They further state that the hearing has been scuttled by the Applicant's failure to avail the Court file(sic). It is further stated that the Applicant has not demonstrated any bias on the part of the Court.
9. It is further stated that the Applicant has not satisfied the threshold as set out in DPP vs. Perry Kasangara & 8 others to warrant the order being sought; and finally that the Applicant has not demonstrated what prejudice he will suffer if the case is heard and determined in Mumias Law Court.

Applicant's Submissions

10. The Applicant reiterates the grounds of opposition. The Applicant further asserts that it has the locus standi to seek for transfer of the case and relied on the case of Stephen Gukonyo Kingumu & Wilham Omueaya & another (2017)eKLR to buttress his submission.
11. The Applicant further argues that the right given to the Applicant under Article 157(6) includes the power to make application for transfer of criminal cases; that there is no law that bars the DPP from seeking a transfer of cases. In this regard, the Applicant has relied on the case of Francis Otieno Joseph vs. Republic(2015) eKLR and Section 81 of the Criminal Procedure Code which grants the High Court power to transfer cases, and the circumstances under which such transfer may be made.



12. The DPP reiterates that there would be no fair trial if the trial is conducted by a police officer based in Mumias who did not conduct the investigation. It is further submitted that there is a likelihood of the police officers based in Mumias interfering with the witnesses.

1st and 2nd Respondent's Submissions

13. By way of preliminary, the Respondents contend that the Applicant has no locus standi to initiate the instant application as it offends the provisions of Article 157(10) of *the Constitution*; that by virtue of the fact that the Affidavit in support has been sworn by the complainant and not the state counsel, then the Application as been brought by the complainant and not the DPP.
14. The Respondent then proceeded to cite a number of authorities to demonstrate that the D.P.P is the only person to take any action on behalf of the Complainant and not the Complainant himself.
15. The Respondents further argue that it is evident that the prosecution is under the control of the Complainant, in clear breach of Article 157(10) of *the Constitution*. It is contended that the averments which the court would rely on to determine if rights have been infringed come from the complainant and not the D.P.P.
16. It is further submitted that the Applicant has not given the basis upon which his apprehension that he may not receive a fair trial, is based.
17. It is submitted that considering investigations have been completed, and the matter commenced in court, then any transfer should be premised on the impartiality of the court and that no grounds have been adduced to impugn the impartiality of the court.
18. The Respondent further contends that transferring the case will not change the witnesses or the Investigative body and therefore, any transfer will be an exercise in futility.
19. While relying on the decision in Francis Otieno Joseph vs. Republic (2015)eKLR, the Respondents argue that the issue of investigation does not fall under the purview of Section 81 of the CPC ,unless the court itself is implicated in such a conduct.

Determination

20. The following issues lend themselves for determination:
 1. Who is the Applicant in this suit and the question of locus standi
 2. Whether the order sought should be granted.

The Applicant and the question of Locus Standi

21. The Respondent has raised a preliminary objection to the effect that the Applicant who they contend, is the Complainant in this case has got no locus standi to bring the present Application.
22. The Notice of motion has been drawn and filed by the prosecution counsel in the office of DPP . The Applicant in this case is the Republic through the office of the D.P.P. The Application is thus filed by the D.P.P. It is supported by the grounds appearing on the Application and the Affidavit sworn by the Complainant in the two cases, one Kaushik Panchmatia.



23. Application for transfer of cases is stipulated under Section 81 of the CPC. Section 81(3) provides as follows:
- “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 D.P.P. be supported by an Affidavit.” (Emphasis added)
24. Thus where the Applicant is the D.P.P, a supporting affidavit is not necessary. The Respondent has argued that to the extent that the Supporting Affidavit is the Complainant’s, then the Complainant is the Applicant. I do not agree with this submission. Firstly, the Notice of Motion is drawn by the prosecution counsel under D.P.P. In terms of section 81(3),the D.P.P’s Application need not be supported by an Affidavit. Secondly, and it follows, that the Complainant’s Affidavit was unnecessary. An unnecessary document cannot nullify an otherwise competent document. I say this because the Notice of Motion supported by the grounds on the face of it, is competent in as far as Section 81(3) is the CPC is concerned.
25. The Affidavit being unnecessary, it cannot be said to be the basis of the determination of the Application. It also follows that it does not make the Complainant the Applicant. In other words when the Application for transfer is being made by the DPP and the DPP decides to do beyond that which is necessary, the court can still determine the Application and ignore the Affidavit.
26. The Applicant is the D.P.P. The D.P.P’s locus standi is not in question. The preliminary objection is therefore dismissed.

Whether the orders sought should be granted.

27. As stated before, the Affidavit by Kaushik Panchmatia was not necessary Therefore I will not consider it in determining the Application.
28. It is the Applicant’s case that the Applicant has no faith in the Investigative Agencies at Mumias ;that they are not the ones who investigated the case, yet are now the ones charged with summoning witnesses as well as having custody of the investigation files; that going by the past trend in the court appearances, they may not avail witnesses to testify.
29. That the Complainant is apprehensive that he would not receive a fair trial in Mumias Law Courts.
30. I have perused the Lower Court records for the two cases .In E535 of 2022, the Accused is one Hussein Muhsin Sharrif (the 3rd Respondent herein), and in E419/2022, the Accused persons are the 1st and 2nd Respondents herein The Complainant in both cases is Rish Hauliers company.
31. The Application is premised on Section 81 and Section 362 of the CPC and Articles 22, 50, 159, 15 (2) and Article 161(6) of the constitution.
32. Section 81 of the CPC provides a follows:
- “ 81. power of the 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);or



- c);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 the provision of this code , may order :
 - i)
 - 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)

- 33 . The D.P.P. states that the matter was investigated by DCI’s office at Kakamega but the files were illegally and unprocedurally transferred to DCI-Mumias; that the police have been reluctant to avail witnesses or avail police files; and that for the said reason the hearing has never started
- 34. The above averments show an apparent disagreement between__ the D.P.P’s office and the DCI’s office. The real issue is who between the two local offices of DCI should be handling their files and getting witnesses to attend court. The DPP is not happy with the DCI’S officers at Mumias and would prefer that the Kakamega office of DCI handle the case.
- 35. These are issues internal to the two offices and has nothing to do with the courts. The D.P.P. is in effect, inviting the court to deal with some operational differences between its office and the DCI.
- 36. Does this court have the power to interfere in their disputes? I do not think so, and this is why: I am of the view that investigative and prosecutorial issues between the D.P.P. and the DCI’s office were not contemplated in Section 81 of the CPC. Instead, the Section contemplates circumstances touching on the trial court.
- 37. I have considered the case of Francis Otieno Joseph vs. Republic (2015)eKLR. A copy of the said judgement was not provided but I have done my own search . It is Homabay HCC Misc. Cr. Application No. 19/2015 Francis Otieno vs. Republic (2015) eKLR. I did not see the finding that the Applicant has referred to. Further, my reading of the said Ruling show that the facts were almost similar to the present case in that the Applicant was dissatisfied with the investigative agencies; Majanja J held that:” in my view the conduct of investigations does not fall within the purview of section 81 of the criminal procedure code , unless the court is implicated in such conduct.”
- 38. Further , I have considered the reasons for the transfer. The Applicant has submitted that due to the failure of the DCI’s office to avail witnesses and files, the hearing has never started. This is refuted by the Respondent. I have perused the Lower Court records of each of the cases.
- 39. In Criminal Case No. 419/2022, the pleas was taken on 1/8/22 and the court ordered the hearing to start on 1/9/22; On the date of the hearing , the Prosecutor told the court that the investigations officer had not indicated whether “he needed to use the exhibits” .The hearing was then adjourned to 8/11/2022 ,and on that day ,the defence indicated that they had not been supplied with the statements. The Prosecutor’s response was that he could not do so as he did not have the police file; The matter



was adjourned to 7/2/23. But was still not heard, but the reasons were not indicated. The Defence's complaint was that the Investigation's officer's statement was missing a fact which was confirmed by the Prosecution. The prosecutor however assured the Court that he will get the statement and give it to the defence counsel. The hearing was then adjourned to 23/3/2023.

On 23/3/2023, the Prosecution sought to consolidate the two cases. The court was also notified that the present Application had been filed. The record indeed indicated that the Application had been filed just a day before. Thus the case was mentioned 2 times and no further steps were taken.

40. In Criminal Case No. 535/2022, the plea was taken on 16/9 /2022. The first hearing was to come up on 14/11/22 but on that day, the Prosecutor told the Court that he did not have the file, and the hearing was adjourned to 1/2/2023. On 1/2/2023, the Prosecution told the court that he did not have a witness and at the said time, he told the court that he had instructions to refer the matter to the High Court, "following new revelations". The revelations were not conveyed to the Court. On 27/3/23, the prosecutor informed the court that he intends to consolidate the two cases and sought for a mention. The consolidation was done on 25/5/2023, and no further action was taken.
41. The above is a summary of the Lower Court proceedings. The summary negates the submission by the D.P.P. that the matter has never proceeded for failure to summon witnesses and avail the police file. There was only one incident when the witnesses were not present, and one adjournment on account of police file not being available.
42. Those two occasions are not enough to conclude that there was any interference of witnesses and failure to avail the file. Thus even the reasons for the transfer are unmerited. There is no tangible evidence to show the DCI officers are being uncooperative.
43. However, as I had earlier stated these are issues between the D.P.P's office and the DCI's office. It was not contemplated by Section 81 of the CPC. These are Administrative issues that should be dealt with Administratively. Let the D.P.P. and DCI offices sort out their differences outside of the court.
44. In conclusion, I do not find any merit in the Application and it is hereby dismissed.
45. I direct that the trial files be returned to the Mumias Chief Magistrate's Court for the proceedings to continue.

DATED, SIGNED AND DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 30TH DAY OF MAY 2024.

S.CHIRCHIR

JUDGE

In the presence of:

Godwin- court Assistant.

