



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO. 12 OF 2014

REPUBLIC.....APPLICANT

VERSUS

AYUB GULLED OMAR.....1ST RESPONDENT

ABEY DAUD ALI.....2ND RESPONDENT

BASHIR ABDI ISSACK.....3RD RESPONDENT

RULING

Introduction

Two files have been placed before me being Criminal Case No. 410 of 2013 Republic versus Ayub Gulled Omar and Criminal Case No. 426 of 2013 Republic versus Abey Daud Ali and Bashir Abdi Issack from Wajir Principal Magistrate's Law Courts. Hearing in Criminal Case No. 410 of 2013 had not commenced while in Criminal Case No. 426 of 2013 some witnesses had testified. It seems that the prosecutor applied to the magistrate in Wajir seeking transfer of the two files to Garissa Chief Magistrate's Court for hearing and determination. The reasons advanced for such an application are captured in the proceedings of 17th January 2014. Other than stating that the reason for seeking transfer was due to safety of witnesses and that of the accused person, the prosecutor did not expound on that.

The court, in making the order of transfer, stated that the issues raised by the state counsel were grave! The learned magistrate did not seek more information on the reasons given. In my view there is nothing stated by the prosecutor to show the reasons behind that application and the court did not seek explanation. To me it seemed like the prosecutor and the trial court were eager to transfer this case for unexplained reasons. This action has caused unnecessary delay in prosecuting this matter. In the interest of expeditious dispensation of justice this court will proceed to determine this matter substantively as returning the file to Wajir will exacerbate the situation.

On 8th May 2014, the two files were consolidated into Criminal Case No. 264 of 2014 and a consolidated charge sheet filed. The charges were read afresh to the accused persons.

Power of the lower court to transfer cases

The power to transfer a case between magistrates is donated to a first class magistrate by Section 79 of the Criminal Procedure Code. It provides as follows:

A magistrate holding a subordinate court of the first class:

- a. **May transfer a case of which he has taken cognizance to any magistrate holding a subordinate court empowered to try that case within the local limits of the first class subordinate court's jurisdiction; and**
- b. **May direct or empower a magistrate holding a subordinate court of the second class who has taken cognizance of a case and whether evidence has been taken in that case or not, to transfer it for trial to himself or to any other specified magistrate within the local limits of his jurisdiction who is competent to try the accused and that magistrate shall dispose of the case accordingly.**

In case of a partly heard case, the scenario is the same in that it is the first class magistrate who should transfer the case upon a report being made to him by any other magistrate subordinate to him (see **Section 80 CPC**). I have no doubt that the method of transfer is as provided in section 79 CPC.

It is therefore clear that only a subordinate court held by a magistrate holding first class court as defined in Section 7 CPC can transfer a case to another magistrate but within the local limits of the first class subordinate court's jurisdiction. It was an error for the Principal Magistrate Wajir, though a magistrate holding first class court, to transfer the files in this matter to Garissa Chief Magistrate's Court because that is outside his local limits of that Wajir Court's jurisdiction.

Power of High Court to transfer

The High Court is empowered to transfer cases to another court in any of the circumstances provided in Section 81 (a) to (e) all inclusive 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 to it; 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.**

The High Court in such cases may be moved by an interested party, or act on a report of the lower court or act on its own initiative. In the matter before me, the Director of Public Prosecutions through the learned state counsel has moved this court. It seems to me that the magistrate in Wajir was not aware of these provisions.

To correct the errors made by the trial magistrate at Wajir, this court vacates the orders made by that court on 3rd February 2014 transferring Criminal Case No. 410 of 2013 and on 14th February 2014 transferring Criminal Case No. 426 of 2013 respectively to Garissa Law Courts for disposal. Further, this court orders that the two files be and are hereby transferred to Garissa Chief Magistrate's Court for hearing and determination. Since the two cases have already been consolidated and the plea taken by reading over the consolidated charge and explaining the same to the accused persons, the Chief Magistrate in Garissa may as soon as this ruling is delivered proceed with speed to give directions in regard to the manner this case should proceed to avoid further delay. It is so ordered.

Dated, signed and delivered this 14th July 2014.

S.N.MUTUKU

JUDGE