REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL CASE NO. 9 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

SABIT MAMUOR DENG.....1ST ACCUSED

AJAK DAU AKECH.....2ND ACCUSED

RULING

[1] This matter was placed before this Court pursuant to **Section 10(4)** of the **High Court (Organization and Administration) Act, No. 27 of 2015** and **Rule 15** of the **High Court (Organization and Administration) (General) Rules, 2016** for plea-taking during the current High Court Recess. The two accused persons, **Sabit Mamuor Deng (the 1st accused)** and **Ajak Dau Akech (the 2nd accused)**, stand charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya.** They denied the allegations against them; whereupon their Counsel, **Mr. Chege** and **Mr. Okero,** made oral applications on their behalf, seeking that they be admitted to bail pending their trial. Counsel also prayed that the case be transferred from the High Court at Lodwar to Eldoret High Court for hearing and determination.

[2] Mr. Chege, learned for the 1st accused urged the Court to release him on favourable bail terms, contending that he has a known place of abode in Kakuma where he was living with his family before his arrest. It was the submission of **Mr. Chege** that the 1st accused is not a flight risk at all and that no evidence was presented before the Court to prove or even suggest that the 1st accused was escaping from the jurisdiction of the Court at the time of his arrest.

[3] Mr. Okero likewise urged for the release of the 2nd accused on bond, explaining that he is an American citizen who had visited Kenya for the sole purpose of meeting his betrothed, but was unfortunately caught up in clan upheaval at Kakuma Refugee Camp. **Mr. Okero** endeavoured to persuade the Court that the 2nd accused is not a flight risk; and that his arrest at the Jomo Kenyatta International Airport, Nairobi, was no indication that he was fleeing the jurisdiction of the Court. He submitted, therefore, that the allegations that the 2nd accused is a flight risk had not been proved. **Mr. Okero** also took the position that, from a perusal of the witness statements and documents served on the defence, and which have been filed herein, no mention has been made of the 2nd accused by the eye-witnesses. He consequently urged the Court to take that into account as a favourable factor in support of the bond application.

[4] As regards the application for transfer, **Mr. Okero** urged the Court to note that the 2nd accused has been in custody from **17 February 2020,** when he was arrested; and that his plea-taking had been delayed principally because the High Court at Lodwar does not have a resident judge. He was apprehensive that this state of affairs could unnecessarily impede the expeditious disposal of this case, to the detriment of the 2nd accused, who risks losing his employment by reason of his incarceration.

[5] The applications were resisted by **Mr. Chacha**, Counsel for the State, and **Dr. Aukot**, counsel for the deceased's family. **Mr. Chacha** relied on the **Bond and Bail Policy Guidelines, 2015,** in urging the Court to find that sufficient cause has been shown to warrant the continued incarceration of the accused persons. He, for instance, asserted that the accused persons are a flight risk; and that they had attempted to escape the jurisdiction of the Court. He relied on the affidavit of **P.C. Joel Kimaiyo**, sworn on **3 August 2020**, to demonstrate that the 1st accused was arrested at **Nadapal Border Post** while trying to cross over to South Sudan; and that the 2nd accused was arrested at JKIA on his way to the USA. Counsel also pointed out that the accused persons are foreigners and therefore would have no hesitation in fleeing the Court's jurisdiction if given the chance. Accordingly, **Mr. Chacha** prayed that the bail application be dismissed. He relied on **Republic vs. Nadifo Mohamed Abshir** [2019] eKLR wherein a bail application was dismissed on the ground that the applicant did not have a fixed abode within the jurisdiction of the court.

[6] On the application for transfer of this case from the High Court at Lodwar to Eldoret, **Mr. Chacha** made reference to **Section 81** of the **Criminal Procedure Code** to support his submission that the application is incompetent for not having been brought by way of a Notice of Motion, supported by an affidavit. In his submission, **Subsection (3)** of **Section 81** is mandatory; and therefore that it was imperative that the ODPP be served with at least 24 hours' notice prior to the hearing; which was not done. **Mr. Chacha** also pointed out that the State intends to call 17 witnesses, all based in Kakuma and its environs. He therefore took the posturing that the balance of convenience would favour Lodwar High Court as the most ideal place of trial. In this regard, **Mr. Chacha** relied on **Homa Bay High Court Criminal Appeal No. 27 of 2015: Dorothy Aoko Nyika vs. Republic** and **Garissa High Court Miscellaneous Criminal Application No. 14 of 2014: Republic vs. Mohamed Noor Kassim** in urging the Court to dismiss the application for transfer.

[7] On behalf of the family of the deceased, **Dr. Aukot** opposed the two applications and reiterated the Prosecution's posturing that the two accused persons are a flight risk; and that they attempted to flee from the jurisdiction of the Court. He submitted that the 2nd accused was not just returning to his home country on **17 February 2020** when he was arrested at JKIA; but was intent on evading arrest. **Dr. Aukot** also pointed out that the 2nd accused was arrested a second time on **1 July 2020** while on his way to Lokichogio; and that he furnished an implausible explanation to the effect that he was going to Lokichogio to renew his travel documents; yet it is common knowledge that there is no US Embassy in Lokichogio.

[8] Dr. Aukot informed the Court that the two clans involved in this unfortunate incident, the Abek and the Dachuek clans of the Dinka tribe, have had a long history of retaliatory attacks; and therefore that it was in the best interest of the accused persons that they remain in custody. He pointed out that there are 9 other suspects who are yet to be arrested; and therefore that if released the accused persons are likely to interfere with the investigations; including the ongoing attempts to apprehend the remaining suspects. Counsel relied on the following authorities to support his submissions:

[a] Nairobi High Court Criminal Case No. 46 of 2018: Republic vs. Zacharia Okoth Obado;

[b] Nairobi High Court Criminal Case No. 51 of 2018: Republic vs. Joseph Kuria Irungu *alias* **Jowie;**

[c] Nairobi High Court Criminal Case No. 107 of 2010: Republic vs. Mbuthia Kimunya; and,

[d] Nairobi High Court Criminal Case No. 57 of 2016: Republic vs. Fredrick Ole Leliman & 4 Others.

[9] Dr. Aukot, likewise, opposed the application to have the case transferred from Lodwar to Eldoret High Court. He was of the strong view that such a transfer would pose monumental challenges to the trial. According to him, it is in the interest of justice that the trial be held in Lodwar.

[10] There is no gainsaying that bail is a constitutional right. **Article 49(1)(h)** of the Constitution is explicit that, unless there is some compelling reason, an accused person, be he a citizen or foreigner, ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. It provides that:

"An arrested person has the right … to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released."

[11] Moreover, by dint of **Article 50(2)** of the Constitution, every accused person is entitled to the presumption of innocence.

Hence, in the **Bail and Bond Policy Guidelines,** it is recommended that:

The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts.

[12] Accordingly, **Section 123A** of the ***Criminal Procedure Code, Chapter 75 of the Laws of Kenya,*** stipulates that:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.

[13] And, in the **Bail and Bond Policy Guidelines**, it is restated as a general guideline in Paragraph 4.9 that:

“In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences.”

[14] The Guidelines then offer the following non-exhaustive factors for consideration in bail applications:

[a] The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

[b] The strength of the prosecution case.

[c] The character and antecedents of the accused person.

[d] The failure of the accused person to observe bail or bond terms.

[e] The likelihood of interfering with witnesses.

[f] The need to protect the victim or victims of the crime.

[g] The relationship between the accused person and the potential witnesses.

[h] The best interest of child offenders.

[i] The accused person is a flight risk.

[j] Whether the accused person is gainfully employed.

[k] Public order, peace and security.

[l] Protection of the accused persons.

[15] Having taken into consideration the foregoing parameters in the light of the averments set out in the affidavit of **P.C. Kimaiyo** as well as the submissions made by learned counsel, it is plain that no adverse allegation was made about the character or antecedents of the two accused persons. There is no assertion that either the 1st or 2nd accused had previously failed to observe bail or bond terms. They are both adults and therefore the question of their being treated as child offenders would not arise. In the premises, the key issues raised; and which now arise for consideration in connection with the bail application are:

[a] The nature of the charge or offence; the seriousness of the punishment to be meted if the accused persons are found guilty and the strength of the prosecution case.

[b] Whether or not the release of the accused persons on bond would work against the public order, peace and security; or otherwise expose them to peril.

[c] The likelihood of the accused persons interfering with witnesses and the need to protect the victim or victims of the crime

[d] Whether indeed the accused persons are a flight risk.

[16] As to the nature of the offence and the seriousness of the punishment likely to be meted if the accused persons are ultimately found guilty, there is no gainsaying that the offence of murder is one of the most serious offences in the land; and that it entails the death penalty. Thus the approach previously taken, before the mandatory aspect of the death penalty was done away with by the Supreme Court of Kenya in **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR, was that, given the seriousness of the charge and the possible outcome of a conviction, the temptation to jump bail if released on bond was a key consideration. Thus, in **Watoro vs. Republic** [1991] KLR 220, it was held thus:

The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody … the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases…the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction…"

[17] However, in the current constitutional order, murder is an offence like any other for the purposes of bail pending trial; and therefore, a bail application in a murder case, as in any other case, has to be looked at from the prism of **Article 49(1)(h)** of the **Constitution;** and the key question that takes centre stage is whether the accused person will turn up for his trial if released on bond. I therefore find apt the expressions of **Hon. Ibrahim, J.** (as he then was) in **Republic vs. John Kahindi Karisa & 2 Others** [2010] eKLR that:

"This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the Criminal Procedure Code which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the Penal Code including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an

inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released."

[18] In the premises, the fact only that the accused persons are faced with a murder charge is no reason to deny them bail.

[19] The Court was also urged to take into account the strength of the prosecution case as disclosed by the witness statements on the file. It is noteworthy however that **Section 123A(1)(d)** of the **Criminal Procedure Code** makes reference to ***"…the strength of the evidence of his having committed the offence…"*** *and for purposes of the* ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** **"evidence"** denotes:

"the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity.

[20] Thus, such evidence, to my mind, can only be that which has been duly proved, tested and formally admitted before the Court, either by way of affidavits or *viva voce* evidence. And where documents are involved, such can only be introduced either as annexures to affidavits or by the makers in the usual manner of production by a witness testifying before the Court. In making the distinction between filed documents and "evidence" properly so called, albeit in a different context, the Court of Appeal held thus in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others** [2015] eKLR:

"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; …Third, the document becomes proved, not proved or disproved when the court applies it judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case…a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness…we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight…"

[21] Accordingly, in **Republic vs. Jane Muthoni Mucheru & Another** [2017] eKLR, **Hon. Ngugi, J.** took the position that:

"22. In the ruling of 20/12/2016, I explained the proper context of when the strength of the prosecution case can be a legitimate factor in denying bail. The Bail/Bond Policy Guidelines at p. 16 (Paragraph 4.9(b)) is couched in the following language:

An Accused Person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence of the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the prosecution's case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.

23. The Policy Guidelines cited R v Margaret Nyaguthi Kimeu [2013] eKLR for the last proposition. Ms. Mwaniki has argued that at this point the instant case is on all fours with the Margaret Nyaguthi Kimeu Case. This is because, she argued, the Court has now heard key Prosecution witnesses and has a sense of what direction the trial is taking."

[22] Hence, the court proceeded to hold that:

"25. In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused

Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case."

[23] Likewise, in **Republic vs. Joseph Kuria Irungu** [2020] eKLR the strength of the prosecution evidence was appraised from the backdrop, not of the witness statements placed on the court file, but on the basis of the evidence adduced before the trial court by a good number of the key prosecution witnesses. Hence in reviewing its decision on bail, the trial court held thus:

"12. In this matter the court was clear in its mind, that the application for review shall be considered when all those witnesses who were under protection, whose evidence the court ought to preserve had testified. It is clear that the said witnesses have now testified and their evidence preserved. The prosecution's fear that the applicant might interfere with them, now has no foundation at all. The applicant has further provided the court, by way of affidavit evidence of the place where he shall reside during the remaining period of trial and what he shall be doing. I am therefore satisfied that there has been change of circumstance from the time the applicant was first denied bond to the time of this ruling. It is therefore clear that he is entitled to review of the orders denying him bond, having placed adequate material on the change of circumstances as stated herein.

13. The only issue which the court now has to determine, is whether having heard and recorded the evidence of fifteen (15) prosecution witnesses, there now arises the issue of the strength of the prosecution case as a compelling reason, to enable the court deny the same bond, on account that having known the case against him, there is real likelihood and or temptation to abscond, so as to defeat the course of justice.

14. Whereas it is clear that the court has discretion to grant bail at any stage during trial, when the application for bail is made during the course of trial, one of the compelling reasons which the court has to take into account is the strength of the prosecution, as provided for under the Bail and Bond Policy Guidelines at 4.9 (b) …"

[24] It is no wonder then that, before the formulation of the **Bond and Bail Policy Guidelines,** the view propounded, for instance in **Republic vs. Danson Mgunya & Another** [2010] eKLR, was that:

"…criteria (ii) … (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that shows that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."

[25] In the premises, it is my considered view that it is premature, if not impossible at this stage of the proceedings, to engage in an appraisal of the prosecution evidence and determine which direction it will lead to. I have, in coming to this conclusion taken into consideration the case of **Republic vs. Danfornd Kabage Mwangi** (supra) cited by **Mr. Okero** and note that the evidence in that context did not comprise of witness statements but an affidavit by the investigating officer. Moreover, copies of the statements filed herein are largely indecipherable due to their indistinctness; such that it is almost impossible to make sense of the contents thereof. That being the position, I am far from convinced that the strength or weakness of the prosecution is so apparent at this stage of the proceedings as to be a helpful factor in determining the instant bail application.

[26] Turning now to a consideration of the element of public order, peace and security, there is no denying that the incident in question was sparked by rivalry between the Abek and Dachuek clans of the Dinka tribe whose members have been given refuge at Kakuma Refugee Camp. In his affidavit, **P.C. Kimaiyo** deposed in paragraph 2 that the incident of **12 February 2020** in which the deceased herein was murdered was a retaliatory attack on the Abek clan; and in paragraphs 8 to 11 of the aforementioned affidavit, **P.C. Kimaiyo** averred that the situation on the ground is still hostile and that similar revenge attacks are likely to happen against the accused persons, should they be released on bond. Given this background, both **Mr. Chacha** and **Dr. Aukot** were of the firm conviction that the release of the two accused persons would trigger further mayhem and may even cost them their lives. It however emerged that there are suspects who were arrested along with the two accused persons, who have since been released and are living freely at Kakuma Refugee Camp with no indication that their security or public security at Kakuma is in any way imperiled by their release.

[27] Moreover, the question would arise as to whether there are no less restrictive means to achieve the same objective of ensuring peace and security other than denial of bond. As was rightly stated by Counsel for the accused persons, it is not unusual for the courts, in such circumstances, to impose such conditions as are necessary with a view of striking the proper balance between the accused persons' constitutional right to bail and the interests of justice; including the requirement that the accused persons keep off certain localities; the paramount consideration being that they be on hand for their trial as and when required. I therefore would agree with the position taken by **Odunga, J**. in **Republic vs. Robert Zippor Nzilu [2018] eKLR** that:

"...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial. The ordinary meaning of the word "compelling" according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons."

[28] In addition to the foregoing, it is the apprehension of the State that the two accused persons may interfere with the prosecution witnesses. I however find implausible the assertions that some of the suspects are still at large and that the accused persons may jeopardize the ongoing investigations if released at this stage. I say so because the accused persons have been in custody since **February 2020**; and therefore there was ample time and space for the State to conclude its investigations; including apprehending all the suspects. If, as was indicated by **Dr. Aukot**, the said suspects have since fled the jurisdiction of the Court, it is improbable that the two accused persons would be of any further assistance to them in their cause.

[29] Perhaps the only valid concern is the Prosecution's apprehension that the accused persons are a flight risk and therefore are unlikely to turn up for their trial. In the affidavit of **P.C. Joel Kimaiyo** it was averred that after the subject incident, the suspects disappeared to unknown destinations; and that through the information from members of the public, the 1st accused was arrested at Lokichogio while trying to flee to South Sudan through Nadapal Border Post. As for the 2nd accused, it was the averment of **P.C. Kimaiyo** that he was arrested at JKIA on **17 February 2020** while fleeing to the US via Amsterdam. It was also deposed by **P.C. Kimaiyo** that the two accused persons are foreigners with no known fixed abode in Kenya; and therefore that there is no guarantee that they will attend court if released on bond. These assertions were, in the main, conceded to by the defence counsel; though their explanation was that the intention of the accused persons was not to flee the jurisdiction of the court.

[30] Bearing in mind that the standard of proof at this stage is simply on a balance of probabilities; I am persuaded that, given the circumstances in which the two accused persons were arrested, it is more probable than not that they were intent on fleeing from the jurisdiction of the Court. It is also indubitable that the 2nd accused has no fixed abode in Kenya; and while **Mr. Okero** made an indication that he has a friend in Eldoret Town who is ready to provide him with accommodation for the duration of his trial, details of these arrangements were not furnished so as to give the Court a measure of comfort that he will be available for his trial. It is noteworthy that in **Republic vs. Joseph Kuria Irungu (supra)**, affidavit evidence was furnished as to the applicant's intended place of abode during the period of the trial. No such evidence was availed by the 2nd accused person herein.

[31] It is for that reason that I am satisfied that the two accused persons are indeed a flight risk; and that the likelihood of their jumping bail is real; and therefore would agree with the position taken in **Republic vs. Nadifo Mohamed Abshir** (supra) in which bail was denied for the same reason.

[32] The second limb of the application is for transfer of this case from the High Court at Lodwar to Eldoret High Court for hearing and determination. The only reason given is the assertion that Lodwar High Court has no resident judge; and that it was for this reason that the accused persons were unable to take plea for about 5 months until **6 August 2020**. **Mr. Okero** further pointed out that, on the advice of the ODPP, this matter was brought to Eldoret High Court for plea. It was in those circumstances that the application for transfer was made in the belief that the State is in a position to facilitate the travel and accommodation of the prosecution witnesses.

[33] In opposing the application, **Mr. Chacha** made reference to **Section 81** of the **Criminal Procedure Code** and submitted that the requirements of **Subsections (3) and (4)** of that provision were not complied with. However, I have no hesitation in holding that neither **Section 81** nor the authorities cited by **Mr. Chacha** in that regard, are relevant to the circumstances hereof. That provision

states that:

(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 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.

[34] In the premises, any transfer from Lodwar High Court to any other High Court station, including Eldoret, even if warranted, can only be sanctioned by the High Court in Lodwar, pursuant to the inherent jurisdiction and **Article 159(1)(d)** of the **Constitution** (see **Republic vs. Ahmad Abolfathi Mohammed & another** [2018] eKLR). Hence, an analogy can be drawn to the practice in use in the civil jurisdiction of the High Court where such orders have been made in the interests of justice. For instance, in **Rapid Kate Services Ltd vs. Freight Forwarders Kenya Limited & 2 Others** [2005] 1 KLR, **Hon. Emukule, J**. held thus in connection with the High Court's inherent jurisdiction to make orders of transfer from one High Court station to another:

…It is a matter of discretion for the judge and it must be for compelling reasons which would be for the purpose of ensuring justice and this is all within the inherent powers of court under Section 3A…whereas there is no express provision in the Civil Procedure… for the transfer of cases from one High Court to another, it does not mean that in a proper case the court cannot transfer a case before it to another registry of the High Court…"

[35] Likewise, in **JGM v ZMM [2013] eKLR, Hon. Musyoka, J.** took a similar position and held that:

There is no power granted by *Section 17* of the Civil Procedure Act for the High Court to withdraw a suit from one High Court to another. Indeed, there is not a single provision in the Civil Procedure Act and its rules which specifically empowers

the High Court to order the transfer of cases from one High Court station to another. Transfer of suits from one High Court station to another can only be ordered by a High Court in exercise of inherent power. However, such power should only be exercised by the High Court judge sitting at the station where the matter is pending – it is that court that should order that the matter be transferred from itself to another High Court station and not *vice versa*. This is particularly important in a cases such as this, where this court has not had the benefit of seeing the pleadings filed in the cause sought to be transferred.

[36] In the result, it is my finding that on both scores, the applications by the accused persons must fail. A compellable reason has been given for the continued incarceration of the accused persons. Consequently, the application for their release on bond is declined for now. In the same vein, the application for transfer of the case of this case from Lodwar High Court to Eldoret High Court is untenable for the reason that it is misconceived. It ought to have been made before Lodwar High Court. The two applications are accordingly hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF AUGUST 2020

OLGA SEWE

JUDGE