



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPLICATION NO 153 OF 1992

KHALID SALIM AHMED BALALAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Khalid Salim Ahmed Balala, the applicant hereinafter, is a well known Islamic scholar and preacher within Mombasa Town. On the 21st July, 1992, he appeared before the then Senior Resident Magistrate at Voi, charged with a total of five alleged offences, the first being treason under section 40(i) (a) (b) (3) of the Penal Code. As the charge of treason carries with it a mandatory death sentence on conviction, the applicant was remanded in custody and has since then been held in custody at the Manyani Prison near Voi. The offences charged against the applicant were allegedly committed at Mwembe Tayari within the Municipality of Mombasa. By his Notice of Motion dated the 29th September, 1992, and filed under section 81 of the Criminal Procedure Code, the applicant now asks this Court for an order –

“That the criminal case known as Voi SRMCC Case No 871 of 1991 *Republic v Khalid Salim Ahmed Balala* be transferred from the Voi Court to the Mombasa Chief Magistrate’s Court.”

The application does not state which of the various sub-paragraphs of section 81(1) of the Criminal Procedure Code is relied on but looking at the affidavit of Mr Taib Ali Taib, counsel for the applicant, and sworn in support of the application it is clear they are relying on sub-paragraphs (b) (d) and to some extent (e) of section 81(1). In the affidavit of Mr Taib, it is averred that all the offences charged against the applicant are alleged to have been committed in Mombasa, that the applicant was arrested in Mombasa, that virtually all the prosecution witnesses are likely to be in Mombasa, that the applicant and his family reside in Mombasa as does his counsel, and that the relatives of the applicant and his counsel all find it inconvenient and expensive to have to travel to Voi in order to attend the proceedings against the applicant. An Inspector Joseph Mwangi Mutuota is one of the police officers who investigated the charges brought against the applicant. That officer has sworn a replying affidavit and the gravamen of his averments are that while it is true the offences charged against the applicant were allegedly committed in Mombasa yet the prosecution preferred to charge the applicant in Voi and not in Mombasa because of security reasons. It is alleged that the applicant is a religious leader and that his followers have on several occasions resorted to physical confrontation with the forces of law and order in Mombasa and that there was a likelihood of this occurring again.

I wish to start with the provisions of section 77 of the Kenya Constitution which provisions deal with the protection of persons who are charged with criminal offences. Section 77 (2) (c) of the Constitution

provides:-

“Every person who is charged with a criminal offence –

(a)

(b)

(c) shall be given adequate time and facilities for the preparation of his defence.”

I have stated that the applicant is currently held at Manyani Prison. That is some 160 or so kilometers from Mombasa. Counsel for the applicant resides in Mombasa so that for the applicant to prepare his defence, counsel must need to travel to Voi or to Manyani. If there were no Courts with competent jurisdiction in Mombasa, that would be a different matter but that is not the position here. It is obvious that the mere physical distance between the place where the applicant is held and the place of abode of his counsel must hamper or impede the applicant in the preparation of his defence.

Again section 77 (10) of the Constitution provides:-

“Except with the agreement of all the parties thereto, all proceedings of every Court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority including the announcement of the decision of the Court or other authority, shall be held in public.”

That provision gives constitutional validity to the concept of “Open Court,” ie that the Court is open to every member of the public, unless for some special reason, the Court has ruled that proceedings therein are to be held in camera. Section 77 of the Criminal Procedure Code is even more explicit:-

“The place in which a criminal court is held for the purpose of trying an offence shall be deemed an open Court to which the public generally may have access so far as it can conveniently contain them:

Provided that the presiding Judge or magistrate may order at any stage of the trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or building used by the Court.”

The principle underlying these provisions is clear. Unless the parties to a dispute themselves wish it; or unless the Court orders to the contrary, all criminal trials are to be held in open Court. The concept behind this requirement is obvious: justice can best thrive only in the full glare and scrutiny of the public. Otherwise what would be the point in such old maxims as “Justice must not only be done but must manifestly be seen to be done”” If justice were to be administered behind closed doors, how would anyone see that it has been done” What has all this got to do with this application”

I have already referred to the distance between Mombasa and Voi. The relatives of the applicant are resident in Mombasa as are his friends and sympathizers. If they want to listen to his case, they all must travel to Voi, some 160 kilometres away. Relatives, friends and sympathizers of an accused person are the persons most likely to be interested in attending and hearing the proceedings against an accused person. They are the members of the public to whom the Court shall remain open, unless they or any of them is excluded by the Court or cannot all conveniently be accommodated in the place of trial. If an accused person is taken a distance of some 160 kilometres away from them how can they be expected to attend the proceedings” In my view, the prosecution is not entitled to make these statutory provisions

merely illusory, and that is what they are doing in this case by charging the applicant at Voi and not in Mombasa.

On the question of security raised by Inspector Mutuota, it is to be remembered that the charge of treason cannot be tried in Voi; it will have to be tried in Mombasa and at that stage, the forces of law and order, as Inspector Mutuota calls them in his affidavit, shall have to face up to that issue and deal with it. It is equally the understanding of the Court that the applicant himself will also ensure that law and order is maintained. I have already said enough to show that, in the words of section 81(1) (d) & (e) of the Criminal Procedure Code, it has been made to appear to me –

“(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”

and that this application should be allowed.

Accordingly, I now order that the case known as Voi Senior Resident Magistrate's Criminal Case No 871 of 1992 – *Republic v Khalid Salim Ahmed Balala* – be and is hereby transferred to the Court of the Chief Magistrate, Mombasa, for disposal. That shall be my order.

Dated and delivered at Mombasa this 4th day of December 1992

R.S.C OMOLO

JUDGE



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