



**Republic v Wita (Criminal Revision E004 of 2022)
[2023] KEHC 295 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E004 OF 2022
JN KAMAU, J
JANUARY 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

EDWARD ODHIAMBO WITA RESPONDENT

RULING

1. In its Revision application dated February 16, 2022 and filed on March 4, 2022, the Applicant herein sought for orders that the court be pleased to call for and examine the record in the Maseno SPM SO No 22 of 2019 against the Respondent herein so as to satisfy and pronounce itself on correctness, legality, regularity and propriety of the order of the subordinate court in the interest of fair administration of justice, that the court revise, vary and/or set aside the orders given on February 4, 2022 under Article 165(6) of the *Constitution* and Section 362 of the *Criminal Procedure Code* so as to accord with fair administration of justice and to issue any such orders as it may please and deem necessary to meet the demands of fair administration of justice.
2. It sought that the Prosecution case proceeds and an order for a second DNA testing be disallowed. It added that in the event this court was to order the said DNA testing, then the Trial Court should be ordered to get confirmation from Government Chemist that the samples still existed in view of the period that had lapsed.
3. The Applicant's Written Submissions were dated November 21, 2022 and filed on November 24, 2022 while those of the Respondent were dated November 22, 2022 and filed on November 23, 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. The Applicant submitted that the Respondent had been charged with the offence of defilement in Maseno SPM SO No 22 of 2019. It pointed out that on February 4, 2022, the Trial Court made a



- Ruling allowing an application by the Respondent to avail the samples/items and directed that he and the Complainant go before the Lancet lab Kisumu for DNA testing. It pointed out that this decision was made after he contested the Report from the Government Analyst.
5. It invoked Section 362 of the *Criminal Procedure Code* and urged the court to vacate the impugned orders for the reason that the case was instituted in 2009 and that the Respondent had had ample time to make the application if he did not trust the outcome from the Government Analyst right from the onset. It was categorical that the said application for the second DNA was made in bad faith and was a tactic to delay justice for the Complainant.
 6. It asserted that the Complainant was aged four (4) years and was still undergoing counselling. It was apprehensive that subjecting her to a procedure of sample taking would interfere with her healing process. It was categorical that the application was not in her best interests as it would lead to a relapse.
 7. It was emphatic that the Government Chemist was an independent institution which did not work under instructions from anyone or institution.
 8. It contended that its application for review was merited and thus urged the court to set aside the impugned orders and to direct that the case against the Respondent proceed to its logical conclusion.
 9. On his part, the Respondent submitted that there was no illegality, irregularity, incorrectness or impropriety requiring invocation of revisional powers to annul or set aside the order. He was emphatic that the Trial Court properly and judiciously exercised its discretion by making an order for a second DNA test. He added that a court may, upon an application by either party, make a ruling regardless of the stage of the proceeding and that a court only became functus officio after pronouncing judgment.
 10. He asserted that if the Prosecution was dissatisfied with the Ruling of the Trial Court, the only cause of action was to appeal against the said decision and not seek revision of its orders. He pointed out that the application for DNA samples was made on April 3, 2019 and a Report prepared on July 16, 2021 which was one (1) year three (3) months after. He pointed out that he was supplied with the DNA Report on November 10, 2021 which was about one (1) year nine (9) months after all other Prosecution witnesses had testified. It added that the Prosecution did not give any reason for the delay in availing to him a copy of the DNA Report.
 11. It was his case that the late supply of the DNA Report prejudiced his defence case since he was denied an opportunity to make an application for a second DNA examination in case he did not agree with the said Report. He added that the Applicant's claim that the samples of the high virginal (sic) swab and other samples that were taken for DNA test were not available between July 16, 2021 when the Report was prepared and February 4, 2022 when the order for second DNA test was issued was misleading. He said that the Applicant had not tendered any document from the Government Chemist who conducted the DNA test indicating that the samples were no longer available.
 12. He therefore contended that the argument for unavailability was therefore premised on assumption and had no basis at all. He pointed out that the Government Chemist had a duty to preserve the evidence and/or samples used when criminal proceedings were on going and failure to do so could not be visited on the Respondent herein who had contested the DNA results.
 13. He urged the court to take judicial notice that DNA tests could be conducted as had been done by archeologists after many years regardless of the age of the samples and the argument on whether or not the samples were fresh or not was not merited. He added that the DNA report was an Expert Report whose veracity or accuracy thereof could only be challenged by another expert report particularly because the accused person was contesting the results.



14. It was his contention that the order for a second DNA test was in line with Article 50(2)(c) of the [Constitution](#) guaranteeing every accused person adequate time and facilities for his defence. He urged the court to uphold the order for second DNA test to be conducted as the same would not prejudice the Prosecution in any way.
15. The issue for determination herein was whether or not the Applicant was entitled to the orders sought based on the provisions of section 362 of the [Criminal Procedure Code](#), Cap 75 (Laws of Kenya).
16. The High Court's power of revision is set out in Article 165 (6) and (7) of the [Constitution of Kenya, 2010](#) which provides:-
17. 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.
18. 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.
19. Section 362 of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) further provides:-

“The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”
20. In addition, Section 364(1) of the [Criminal Procedure Code](#) stipulates that:-
 1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may-
 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - b. In the case of any other order other than an order of acquittal alter or reverse the order.
 2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”
21. Going further, Article 50 (2) (a) to (j) of the [Constitution](#) provides as follows:-

“Every accused person has the right to a fair trial, which includes the right—

 - a. to be presumed innocent until the contrary is proved;
 - b. to be informed of the charge, with sufficient detail to answer it;
 - c. to have adequate time and facilities to prepare a defence;
 - d. to a public trial before a court established under this Constitution;...
 - j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence”



22. This court had due regard to the case of *Joseph Nduvi Mbuvi vs Republic* [2019]eKLR where it was held that:-
- “In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. (emphasis court).”
23. Further, Section 36 of the *Sexual Offences Act* states that:-
- “Notwithstanding the provisions of Section 26 of this Act or any other law, while a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific evidence and to ascertain whether the accused person committed an offence.”
24. The above provision empowers a trial court to make orders for an accused person to undergo DNA tests to establish if he or she committed the offence.
25. Notably, Section 358 (1) of the *Criminal Procedure Code* states that:-
- “In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”
26. It was this court’s considered view that it was within the Respondent’s constitutional right to seek and obtain a second DNA test to be conducted as was ordered by the Trial Court as he had disputed the DNA Report which was produced by the Prosecution and availed to him at the tail end of the proceedings.
27. Indeed, in view of the long duration between the time the samples were taken to the Government Chemist to the time the DNA Report was produced in court by the Government Chemist on November 10, 2021, it was necessary to give the Respondent an opportunity to obtain an expert report to counter that of the Government Chemist. Denial of the Respondent’s application for a second DNA test would ordinarily lead to a ground of appeal at which point the appeal court could still order for a second DNA test as part of additional evidence.
28. As the Trial Court correctly observed, the offence the Respondent faced carried a mandatory life sentence if he was convicted. Weighed against the trauma the Complainant would undergo if she availed herself for a second DNA test, the Trial Court acted within its powers and exercised its discretion judiciously and in the interests of justice when it made an order for a second DNA examination. Indeed, justice cuts both ways and it must not only be done, but it must be seen to be done. This court was not persuaded that a second DNA examination would prejudice the Prosecution’s case in any way.
29. Having said so, it is important to point out that the Respondent was not free to go on a fishing expedition and have a second bite of the cherry to counter the Prosecution’s case, having heard the evidence that was adduced by its witnesses. He could only adduce expert evidence to counter what was contained in the said DNA Report.



30. It appeared from the Ruling of the Trial Court of February 4, 2022 that the DNA testing was done on the flowered dress and lessso which were stained in blood. This court did not see the DNA Report and could not therefore state with certainty that the DNA test was limited to the said items. This court expected that the flowered dress and lessso were still available as they were to be tendered as evidence during trial.
31. This court did not envisage that any proof of such tears would be seen in the Complainant's genitals due to the passage of time. It was now four (4) years since the incident was said to have occurred. The evidence of the state of the Complainant's genitals had already been captured in the P3 Form and Post Rape Care (PRC) Form and hence this would not form part of the second DNA test.

Disposition

32. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for Revision dated February 16, 2022 and filed on March 4, 2022 was not merited and the same be and is hereby dismissed.
33. It is hereby directed that the DNA testing that had been sought by the Respondent in the lower court proceedings to be conducted at Lancet Lab Kisumu at his expense and that the same be limited to the flowered dress and lessso.
34. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JANUARY 2023

J. KAMAU

JUDGE

