



REPUBLIC OF KENYA



**KENYA LAW**  
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**WK v Republic (Criminal Revision E072 of 2022)  
[2022] KEHC 12620 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E072 OF 2022  
RN NYAKUNDI, J  
JULY 29, 2022**

**BETWEEN**

**WK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Coram: Hon. Justice R. Nyakundi**

Mr Mark for the state

Kalya & CO. Adv

M/S Mwaka & CO. Adv

**Introduction & Background**

1. The applicant herein was charged with the offence of defilement contrary to Section 8(1)(4) of the *Sexual Offences Act* No. 3 of 2000 *vide* Eldoret Chief Magistrate's Sexual Offences Case No. 138 of 2019 on the May 29, 2019. He pleaded not guilty to the charge and particulars that on the February 25, 2019 at [Particulars Withheld] area within Nandi North Sub-County in Nandi County, he intentionally caused his penis to penetrate the vagina of MJ, a child aged 17 years.
2. It is alleged that from the encounter between the applicant and the complainant, the complainant conceived and from the evidence on record in court, the complainant/victim alleges that the applicant is responsible for her pregnancy as a result of the alleged defilement.
3. The applicant thus made an application dated the June 18, 2019 seeking to stay the criminal proceedings in the lower court and that DNA evidence be taken and the results used in the trial.



4. On the November 1, 2019, the trial court dismissed the application. The matter proceeded to hearing and the court placed the accused on his defence. The defence hearing was set to begin on the March 14, 2022.
5. It is this ruling dismissing the applicant's request for DNA test that the applicant now challenges *vide* notice of motion dated the March 11, 2022.
6. The said application is supported by the affidavit of the applicant herein sworn on the March 11, 2022 wherein the applicant deponed that the complainant/victim informed the nurse and the medical officer that he was responsible for her pregnancy and as such, the DNA test is crucial and critical since it forms part of his defence and would need the same to rebut the prosecution evidence that out of the alleged incident, he impregnated the victim/complainant.
7. It was his position further that the DNA test will eliminate any doubt that may arise in the final judgment and more importantly, it will eliminate any doubt or chance that he will either be convicted or acquitted out of evidence that can easily be corroborated. The applicant tied this to his right to be supplied with any material or evidence that would enable him mount a defence to the accusations made pursuant to Article 50(2)(k) of the *Constitution*.
8. Finally, the applicant was of the view that the trial magistrate misdirected herself on the law by misapplying the law by holding that Section 36(1) of the *Sexual Offences Act*, though not couched in mandatory terms was not applicable to the instant case but would be relevant in another forum i.e children cases.
9. The respondent is yet to file its response.

#### **Determination**

10. The singular issue for determination is whether the applicant has met threshold for review of the lower court's ruling.
11. The thrust of the application is that the learned magistrate misapplied Section 36 (1) of the *Sexual Offences Act* by holding that the same having not been couched in mandatory terms was inapplicable to the applicant's case but may be relevant in children cases.
12. Section 36 (1) of the *Sexual Offence Act* provide that:- '(I) Notwithstanding the provisions of section 26 of this Act or any other law, where 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 testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence'
13. It is indeed clear from the above provision that the same is not couched in mandatory terms. This is understandable taking into account that DNA test is not the only evidence that can be relied upon in convicting or acquitting an accused person. There are other types of evidence that can be utilized.
14. In *Robert Mutungi Mumbi v R*, Criminal Appeal No. 52 of 2014, The Court of Appeal reiterated the above with regard to Section 36(1) by stating- "Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical evidence on DNA evidence is not the only evidence by which commission of a sexual offence may be proved."



15. In *George Kioji v Republic* Criminal Appeal no. 270 of 2012 Nyeri this court expressed itself thus on proof of commission of a sexual offence:

“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed under the proviso to section 124 of the *Evidence Act* Cap 80 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone if the court believes the victim and records the reason for that belief,”

16. It seems therefore that the court can order a DNA test where it is of the opinion that the evidence on record is not satisfactory to convict or acquit an accused person. That is, what the court has to determine is whether the evidence of the complainant is believable so that the failure to determine the paternity of the child is not fatal. This is the decisional law that the courts have established many times. See *AML v Republic* [2012] eKLR.

17. However as noted in *Paul Khalifa Kiiru v Republic* [2020] eKLR, there are instances where the absence of DNA testing when circumstances would counsel such testing would lead to inference being drawn against the Prosecution. Herein lies the crux of the matter.

18. Complaint of the alleged defilement was made about three (3) months after the alleged offence was committed. Obviously, taking into account the period of time lapsed, there was not going to be any physical or medical evidence that would assist in proving one of the main ingredients of the offence, penetration. That is why in my view, a DNA evidence is crucial in this case. As acknowledged by court in *Mandellah Lenkokwal v Republic* [2021] eKLR, a DNA report, when produced can either condemn the accused person or exonerate him.

19. A similar view was adopted by the Court of Appeal in *Boniface Kyalo Mwololo v Republic* [2016] eKLR, with the court noting that: “This court agrees with the prosecution and the victim that DNA will settle once and for all who the father of the child that was a result of the alleged defilement is. The court holds that when an accused person in a sexual offence is required to provide DNA sample it is not a breach of his constitutional right to a fair trial.”

20. In the foregoing, it is my view that the DNA test requested by the applicant herein is essential to determining indeed whether there was penetration and that the resultant penetration resulted in the pregnancy. This for me goes to the crux of the case.

21. Consequently, the application dated March 11, 2022 is merited and is hereby allowed in the following terms:

- a) That a DNA test be conducted within 30 days of the ruling herein and its report filed in the trial court.
- b) That there be a stay of proceedings in Eldoret Chief Magistrate Sexual Offences Case No. 138 of 2019 pending the DNA test and report.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

.....  
**R. NYAKUNDI**



**JUDGE**

