



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITUI
CONSTITUTION AND HUMAN RIGHTS DIVISION
PETITION NO. 13 OF 2019

(Being an appeal from the Ruling of Chief Magistrate's Court at Kitui dated 15th Oct. 2019 in Sexual offence case No. 8 of 2019, by Hon. F. Nekesa-RM)

EDWARD ILANDI KITHEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

1. A right to a fair trial is one of the fundamental rights sacrosanct to the constitution of Kenya 2010 stipulated under **Article 25** thereof and a right enjoyed by accused and indeed every person in Kenya.

2. The Applicant/Petitioner herein, is charged vide Kitui Chief Magistrate's Court Sexual Offence case number 8 of 2019 with the offence of defilement contrary to **Section 8(1)** as read with **8(3) of the Sexual Offence Act number 3 of 2006**.

The particulars of the offence are that on 6th December, 2018, at [Particulars Withheld] village, Zombe location, within Kitui County, the Applicant/Petitioner defiled (name withheld) a girl aged 16 years.

3. The Petitioner denied committing the offence and the matter is pending for trial in the lower court with four prosecution witnesses having so far testified. The bone of contention arose after the prosecution successfully applied under **Section 31(1) of Sexual Offence Act** that Deoxyribonucleic Acid (DNA) samples be taken from the Petitioner and a child born out of the alleged defilement of the minor who is the complainant at the trial. The Petitioner felt aggrieved with the decision by the trial court and has approached this court through this petition which is headed as originating Notice of Motion. The motion is dated **28th October, 2019** and through it, the Petitioner/Applicant seeks the following reliefs namely: -

i. A declaration that the applicant's constitutional rights have been or likely to be violated by his continued prosecution in Kitui Chief Magistrate's court where the court has made an order directing the prosecution to have the accused be subjected to a Deoxyribonucleic Acid (DNA) test for an alleged crime of defilement.

ii. A declaration that the prosecution of the Applicant in Kitui Criminal Court in Sexual Offence Case Number 8 of 2019 is a violation of the Applicants fundamental rights and is illegal, null and void.

iii. A declaration that the provision of **Section 36 of the Sexual Offence Act Number 6 of 2003** is unconstitutional as in his view the section makes the trial court part of the prosecution, and that the order made on 15th October 2019, should be nullified and **Section 36 null and void**.

4. Petitioner's Case

The Petitioner claim that the order made on 15th October, 2019 that subjected him to a Deoxyribonucleic Acid (DNA) test, subjected him to unfair trial because in his view, by acceding to the prosecution request for a Deoxyribonucleic Acid (DNA) test, the trial court lost its independence and became part of the prosecution. He asserts that as an accused person, he is entitled to an independent and impartial trial. He further states that under **Article 50**, he has a right not to self-incriminate himself and that by giving a Deoxyribonucleic Acid (DNA) sample to be tested, depending on the results, may end up being a self-incriminating exercise.

5. The Petitioner contends that the prosecution must have investigated the matter and made an opinion that there was sufficient evidence to prosecute him and faults their decision to apply for Deoxyribonucleic Acid (DNA) test, in the middle of trial. He claims that the defilement was alleged to have taken place on 6th December, 2018 and when the minor was examined on 28th July, 2019, there was no evidence of defilement going by the P3 form.

6. The Petitioner contends that when the Deoxyribonucleic Acid (DNA) test is done in the middle of the trial, he is likely to be prejudiced. He relies on the decision in the case of **Republic -versus- Father Nguyo (2008) eKLR**, where the court found that, by recording a confession of an accused person, the trial court rendered itself a witness and lost the opportunity of being an impartial umpire.

According to him, the trial court should have remained neutral by declining the request by the prosecution to have Deoxyribonucleic Acid (DNA) test done.

7. He submits that **Section 36 of Sexual Offence Act** is unconstitutional as it goes against **Articles 50 (2) (b) and (c) and 50(4) of the Constitution of Kenya** inter alia relates to fair trial and the right to refuse to give self-incriminating evidence. He points out that any evidence obtained in a manner that violates his fundamental rights should be excluded, as its admission would render the trial unfair. He submits that, had he known prior to being charged that Deoxyribonucleic Acid (DNA) test was part of the prosecution's case he would have pleaded to the charge facing him with full knowledge of the evidence facing him. He terms the attempt to get Deoxyribonucleic Acid (DNA) test as an attempt to introduce new evidence in the middle of trial which he claims amounts to an infringement of his fundamental right under **Article 50 (2) (j) of the Constitution**.

8. The Petitioner further submits that, he would have a say on how the evidence (read Deoxyribonucleic Acid) will be procured, analyzed and produced in court and that only the prosecution and adverse parties to his case will be involved. He contends that he has a right to refuse to give his Deoxyribonucleic Acid (DNA) sample and that right should be protected by this court.

9. It is the Petitioner's case that if the Deoxyribonucleic Acid (DNA) test is done as ordered by the trial court, the evidence presented will for all purposes render the trial unfair for the simple reason that the investigating Officer, the prosecution and the trial court will have built in their subconscious mind a determination that the Petitioner committed the crime he is charged with and that in his view, would be detrimental to administration of justice and presumption of innocence. He contends that, that is how impartiality of the trial court is lost and that even an opportunity to cross-examine witnesses would not help him. He relies on **Homepark Caterers Limited Versus the Attorney General and 3 Others (2006) eKLR**, where the court held that the notion of impartiality is objectivity free from bias or prejudice by any member of the tribunal.

10. The Respondents case

The Respondent opposed this Petition through a replying affidavit sworn on 22nd February, 2020 and its written submissions dated 24th February, 2020 it also made oral submissions through Mr. Okemwa learned counsel appearing for the office of Director of Public Prosecution.

11. The gist of the Respondent's case is that the purpose of the Deoxyribonucleic Acid (DNA) test is to ascertain whether or not the applicant committed the offence. It denies violating the rights of the Petitioner and submits that the provisions of **Section 4(2) of the Children's Act** should be of paramount consideration. It further submits that under **Article 53 (2) of the Constitution of Kenya**, the best interest of a child is given prominence which in its view, means that the principles of a fair trial not only protect the Applicant, but the victim as well. It contends that the trial court is bound by rules of evidence and allowing this application in its view will frustrate the wheels of justice from rolling and settling this matter once and for all.

12. The State further contests the assertion made by the Petitioner regarding the Constitutionality of **Section 36 of the Sexual Offence Act**. It submits that the interpretation of the rights of the applicant should be guided by the letter and spirit of **Article 259(1) of the Constitution** which provides that the Constitution should be interpreted in a manner that;

- a. Promotes its purposes, values, and principles
- b. Advance the rule of law and human rights and fundamental freedoms in the bill of rights,
- c. Permits the development of the law and
- d. Contributes to good governance.

13. The Director of Public Prosecution further submits that the provision of **Section 36 of Sexual Offence Act** gives the trial court a leeway and discretion because the word used is "may" which according to it, means that the trial court could either order or decline to order for Deoxyribonucleic Acid (DNA) test depending on the circumstance.

The State insisted that because the discretion of the court is not taken away, the provision can't be termed unconstitutional in any way because the Deoxyribonucleic Acid (DNA) test does not necessarily assist the prosecution or defence. The Respondent avers that, that since the section is not couched in mandatory terms, the trial court considered all the facts obtaining in the case and gave a detailed ruling.

14. The Respondent contends that the applicant is relying on **Article 50 (2) (c) of the Constitution** as opposed to **Article 53 (1) (d)** of the said **Constitution** which demands that every child should be protected from harm. In its view, the victim suffered abuse and needs protection of the law.

15. The Respondent urges this court to balance the rights of the Petitioner with fairness and justice to the victim. It contends that the provisions of **Section 36 of Sexual Offence Act** should not be invalidated because the legislation was done in good faith to protect children and that invalidating it would leave the children and vulnerable groups of persons in the society exposed.

16. The Respondent further submits that the victim was sexually molested and that it was discovered later that she had become pregnant, which necessitated further inquiries through Deoxyribonucleic Acid (DNA) test to establish the truth. It avers that if the Deoxyribonucleic Acid (DNA) test is not conducted the Applicant may get away with the crime.

17. The State insists that the rights of the Applicant as an accused are still intact even with the Deoxyribonucleic Acid (DNA) test. It relies on the case of **Boniface Kyalo Mwololo versus Republic (2016) eKLR** which held that **Section 36 of Sexual Offence Act** does not breach the rights of an accused person.

18. This court has considered this petition which is also described as an application by way of originating summons. I have also considered the strong opposition made by the State through the Office of Director of Public Prosecution. For starters, this matter ought to have come by way of a miscellaneous criminal application because of the pendency of the main criminal trial in *Kitui Chief Magistrate's Court sexual offence case number 8 of 2019*. This court notes that the Petitioner/Applicant had initially done so but perhaps due to some lack of certainty, he changed the matter to a constitutional petition. Luckily for him, courts at the present are more inclined to determine matters on substance rather than form. This court therefore, entertained this matter and shall determine it on merit or substance rather on how the Applicant/Petitioner approached this court. The fact is, he is before this court and deserves to be heard regardless of the means he has used to reach the court.

19. Having said that, the application/petition before me, has basically raised two issues for determination which are: -

- a. Whether the trial court has lost its impartiality by virtue of directing for a Deoxyribonucleic Acid (DNA) test to be done on the Applicant.
- b. Whether the provision of **Section 36 of the Sexual Offence Act** and indeed subjecting the Applicant to Deoxyribonucleic Acid (DNA) test is unconstitutional and a violation of the rights of the Applicant/Petitioner.

20. Whether the trial court rendered itself partial or lost its independence by ruling that the Applicant undergoes Deoxyribonucleic Acid (DNA) test

The Applicant has impugned the trial court's order/ruling delivered on 15th October, 2019 which allowed the prosecution's application to have the Applicant/Petitioner give Deoxyribonucleic Acid (DNA) sample for test to ascertain paternity of a child born by the victim. This court has considered the representations made by the Applicant's Counsel in this regard and I must say I found the argument a bit remote and stretched. The Applicant believes that because the trial court allowed for the Deoxyribonucleic Acid (DNA) test to be conducted on him, and the victim's child to ascertain whether he was the biological father, the trial court lost its impartiality because once the Deoxyribonucleic Acid (DNA) test establishes that he is the father, then the trial court would proceed with the case with a biased mind. The question posed is what if the Deoxyribonucleic Acid (DNA) results turn negative that is to say if the results shows that he is not the biological father of the baby? In that scenario can the court be said to have a bias against the Applicant? The answer obviously is a *No*. Secondly, the process of Deoxyribonucleic Acid (DNA) sampling and analysis is beyond the purview of the trial court: -

How does the forensic analysis of Deoxyribonucleic Acid (DNA) samples to be taken and the presentation of Deoxyribonucleic Acid (DNA) results involve the trial court? A trial court is only a spectator in that process and only gets involved when an expert witness is called to testify, and present a report on the analysis done and the results. In my considered view, even the prosecution apart from liaising with the Investigation Officer who in turn facilitates objective forensic analysis of Deoxyribonucleic Acid (DNA) samples, really has little say on the actual analysis of the Deoxyribonucleic Acid (DNA) and the results. This is because the forensic analysis is done by Directorate of Criminal Investigation and Government Chemists. The Director of Public Prosecution only awaits evidence to be presented to court. The submissions therefore, that the objectivity or impartiality of the trial court would be affected or called into question is far-fetched and holds no water.

21. I have considered the decision of **Republic -versus- Father Guyo Waqo and 5 Others (2008) eKLR** cited by the Applicant and find that, the circumstances of that case are quite different and distinguishable with the instant case.

In **Father Guyo's case**, an accused person was taken before a Magistrate to record a confession and the Magistrate recorded the confession before the trial commenced. When the trial began, the accused persons raised objections regarding the period they had been held in custody and the manner in which their confession was taken in court, rather than by a Police Officer of a senior rank. The court found that the confession was recorded properly as provided under **Section 25 A of the Evidence Act** and found no basis for allegations of violation of any constitutional right, as envisaged in the Constitutional dispensation at the time.

22. In the present instance, the issue before court is not a confession done before the trial court, but a basis found by the trial court that there was need to have the Applicant under a Deoxyribonucleic Acid (DNA) test to ascertain some of the disputed facts in the trial. The **ratio decidendi** in my view of the *father Guyo's case* is different and does not apply in this matter. The decision in **Homepark Caterers** also falls in the same category because even if the test of an "*objective onlooker*" is used, there is no way an objective onlooker would have a reasonable apprehension that because the trial court allowed the prosecution to conduct a Deoxyribonucleic Acid (DNA) test, its mind would be biased or that the trial court is seen as having joined the bandwagon with the prosecution to have the Petitioner/Applicant proceed from a disadvantage position not unless the Applicant know the truth of the matter and is only engaged in what I can term as shadow boxing. That would be a different matter altogether but to allege that the trial court has lost its objectivity or impartiality on an account of the decision it made on 15th October, 2019, is unfounded as it lacks any basis. The trial court like the Prosecution, does not even know the results of the Deoxyribonucleic Acid (DNA) to be conducted. How can it be faulted for having a preconceived mind regarding the direction of the trial before the entire prosecution's case has been presented before it? There is nothing the court has done and no evidence has been placed before

this court to show that the trial court's conduct in the trial has been improperly tilted against the Applicant. The allegations of lack of impartiality are therefore, a bit wild as I find no basis for the same.

23. (b) Whether Section 36 of Sexual Offence Act is unconstitutional and/or whether subjecting the applicant to Deoxyribonucleic Acid (DNA) test violates his constitutional rights.

The Applicant has faulted the decision requiring him to undergo a Deoxyribonucleic Acid (DNA) test to ascertain the paternity of the baby conceived as a result of the act of defilement on the minor. He has impugned the provisions of **Section 36 of Sexual Offence Act** saying that the same is inconsistent with **Article 50(2) (5) of the Constitution of Kenya 2010**. The provisions of **Section 36 of Sexual Offence Act No. 3 of 2006** states as follows: - In regard to the "Evidence of medical forensic and scientific nature.

“(1) 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.”

24. The court has perused through the decision of the trial court, which has been impugned in this petition/application. I find that, the trial court in making her decision majorly relied in the decision in **Boniface Kyalo Mwololo versus Republic (2016) eKLR** which its decision was also upheld by the Court of Appeal. The Respondent has also cited the said decision in opposing this matter. In that decision (**Boniface Kyalo Mwololo**) the Applicant (Mwololo) had been arraigned for the offence of defilement **Contrary to Section 8 (1) (2) of the Sexual Offence Act**. He was accused of defiling a girl aged 11 years. He denied committing the offence and the trial dragged for some time and in the course of trial, the victim gave birth as a result of the alleged defilement and the prosecution, like in the present, made application seeking an order that the applicant be subjected to Deoxyribonucleic Acid (DNA) test to ascertain if he was the biological father of the victim's baby be done. The application was disallowed by trial court but on review, the High Court allowed the application holding that when an accused person in a sexual offence is required to provide Deoxyribonucleic Acid (DNA) sample, it is not a breach of his Constitutional right and held that: -

“the trial court has erred when it disallowed the prosecution's application to have the applicant provide his Deoxyribonucleic Acid (DNA) sample for the purpose of determining the paternity of the child that is the result of the alleged defilement”.

25. This court's notes that while an accused person facing any kind of crime has rights protected in the constitution well stipulated under **Articles 25(c), 49, 50 (1) and (2)**, those rights should be balanced with the rights of the victims especially where the victim is a child or a person in vulnerable position. It is for that reason; I believe why **Article 53 (1) (d)** thus provides: -

“Every child has the right To be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment.....”

It is without doubt that, sexual violence is a form of worse abuse, violence and inhuman act or conduct against a child. Children as a matter of law should be protected against all forms of such violence. The question that comes to mind is *whether the provision of Section 36 of the Sexual Offence Act No. 3 of 2006* is geared towards the promotion of that right to protection or is a violation to the right of an accused person not to give self-incriminating evidence. To decipher this apparent conflict, it is important to have a look at the provisions of **Article 259 (1) of the Constitution of Kenya 2010** and the **Section 4(2) of the Children's Act**. This is because a Constitution must be read as a whole, rather looking at a provision in isolation. **Article 259 (1) of the Constitution of Kenya 2010** provides that the constitution should be interpreted in a manner that:-

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.

26. Going by the above rule of interpretation, this court takes the view that, **Article 50(2) (L)** cannot be interpreted in a way that enables an accused person or a suspect in a criminal case to get a shield or cover to any criminality and thereby impede justice. A sexual offence or any other serious crime for the interests of justice (rule of law, good governance, human rights etc.) should be well investigated by those lawfully charged to do so and investigation entails gathering of evidence including and not limited to forensic evidence such as in this instance. So long as the investigations and collection of evidence is lawfully done respecting human dignity and the laid down procedures, this court takes the view that there should be no impediment in attaining that objective.

27. Furthermore, it is now well settled principle of law that in matters relating to children or young persons, a court or any other administrative body is obligated to put the interest of that child first. The provisions of **Section 4(2) of Children's Act, 2001** provides;

“In all actions concerning children, whether undertaken by public or private social welfare, institutions, courts of law, administrative authorities or legislative bodies, **the best interest of the child shall be primary consideration**”. (emphasis added).

The protection of the rights of the children is a priority as compared to any other consideration.

I do not think that a right to not to self-incriminate is inconsistent with the order to subject the Applicant for a Deoxyribonucleic Acid test to establish whether he is the biological father of child of the victim's baby. The Deoxyribonucleic Acid(DNA) test is not definite in its outcome. It may or may not vindicate the Applicant in the trial where he has after all pleaded not guilty and maintained that he is innocent. He should therefore, not be wary of the Deoxyribonucleic Acid test or the outcome. He says that, if he was certain about the Deoxyribonucleic Acid analysis, before he took the plea perhaps he could have pleaded differently but certainly nothing stops him from changing his plea if the Deoxyribonucleic Acid results turns out to be adverse to his defence.

28. The Applicant's right to a fair trial in my view, is not violated by the decision of the trial court to subject him to Deoxyribonucleic Acid test. I am not persuaded that the provision of **Section 36 of Sexual Offence Act** in view of the provision highlighted above is unconstitutional in anyway. This view is supported by the preamble of the Sexual Offence Act itself which provides that: -

“the Act or Statute was enacted for purposes of prevention and protection of all persons from harm from unlawful sexual acts...”

The provision of **Section 36 of Sexual Offence Act** should be viewed in that context which is in line with **Article 53 (1) (d)** of the Constitution of Kenya.

Besides that, as observed above, court of Appeal in **Boniface Kyalo Mwololo versus Republic (2016) eKLR** was not convinced that an accused's right to a fair trial would be breached by an order that he undergoes a DNA test. The court observed as follows;

“even in ordinary criminal matters, investigations are normally carried out and the outcome used in evidence. Such investigations include, mentioning just a few; finger printing, sometimes items belonging to a suspect are taken away for further scrutiny which may include forensic examination, this is not always done with approval of an accused person, but is gathering of evidence to be used in a criminal trial. In this scenario, it has never been alleged that, by a suspect availing their finger prints, they incriminate themselves in the trial.....”

The court further observed that stopping or staying of criminal trials should be done only in rare occasions where there is an obvious and blatant breach of the Constitution.

29. This court is bound by the doctrine of precedent in the light of the relevant observations made by the court of Appeal. Besides the doctrine of precedent, I do find that the provisions of **Article 50(2) (c)** cannot be read or taken in isolation. It has to read together with the cited articles in the Constitution for purposes of attaining the desired objectives stipulated under **Article 259 (1) of the Constitution**.

In the end, this court finds no merit in the amended application/petition dated 5th November, 2019. The same is disallowed with a rider that the trial pending in the lower court be fast tracked for the interest of justice.

DATED, SIGNED AND DELIVERED AT KITUI THIS 19TH DAY OF APRIL, 2021

HON. JUSTICE R. K. LIMO

JUDGE