



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 250 OF 2018

JOSEPH MUSYOKA MUTEMI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Joseph Musyoka Mutemi** who is charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Sub-Section (3)** of the **Sexual Offences Act**, wrote a letter dated the 3rd day of **April, 2018** seeking transfer of his case from the Magistrate seized of the matter on the grounds that: the Magistrate declined to grant him the right of having a DNA test which was the basis upon which the **High Court, Garissa** ordered a retrial of his case; the Court proceeded to hear the matter in the absence of his Advocate; the Magistrate failed to grant his request to have the first witness re-called for further cross examination; and the fact that he was in custody, stressed and frustrated was not considered;
2. Further, he sought an order staying proceedings of the Lower Court and to be granted bail.
3. I have considered the content of the letter. After the Accused/Applicant was produced in Court for a retrial he was released on bail by **Hon. H. M. Nyaberi Ag. Senior Principal Magistrate**. His surety **John Watouku Kyavoa** was approved on the 31st **July, 2014**. On the 29th **September, 2014** the Accused retained **Nzili Advocate** to represent him in the matter. Witnesses were present but since **Mr. Nzili** had just been instructed the case was adjourned by **Hon. M. W. Murage** to the 5th **November, 2014**. When the matter came up for hearing **Nzili Advocate** did not appear in Court. The Accused informed the Court that he was away in **Garissa** and the Court adjourned the case pointing out that it was in the interest of justice that the Accused be represented by Counsel. On the scheduled hearing date, the 8th **December, 2014** **Mr. Nzili Advocate** did not turn up in Court and the Accused stated that he was ready to proceed. Three (3) witnesses testified.
4. The case was adjourned to the 27th **January, 2014** when the Accused/Applicant failed to turn up for trial. On the 25th **February, 2015**, a lady known as **Veronica Musyoka** who introduced herself as a wife to the Accused notified the Court that the Accused was admitted at **Garissa Hospital** but failed to avail any documents to support the allegation. As a result the Court issued a warrant for his arrest. It is not clear if the Accused was arrested but he appeared in Court on the 12th **August, 2015**. One witness testified before **Hon. M. W. Murage**.
5. On the 14th **September, 2015** the matter was before **Hon. K. Sambu**. **Mr. Nzili Advocate** appeared and the record is as follows:

“Mr. Nzili - I am coming up on record for the accused person. We have sought for copies of proceedings. At some point, the accused person had made an application for the recall of the complainant. We pray for a mention to confirm the typing of the proceedings and the readiness of the complainant to be received.

K. SAMBU – PM

14/9/15

Mr. Kivuti – It is indeed true that the court had directed for the complainant to attend today’s proceedings. We pray for summons to the complainant. We pray for a date for further hearing.

K. SAMBU – PM

14/9/15

Court – Mater listed down for further hearing before the trial court No. 2 on 21/10/15 and for the confirmation of the typing of the proceedings. The complainant as earlier ordered is hereby ordered to attend the further proceedings and/or for further directions. Summons of attendance in this regard are hereby issued for service upon the complainant.

K. SAMBU – PM

14/9/15.”

6. On the **4th December, 2015** the Accused whose bond was reinstated failed to turn up.

7. Subsequently he turned up. Following the transfer of **Hon. M. W. Murage** the matter went before **Hon. G. W. Kirugumi** who complied with **Section 200** of the **Criminal Procedure Code**. The Accused was granted the opportunity of having witnesses who had testified recalled for further cross examination. On the **6th April, 2016** **Mr. Nzili** for Accused pointed out that once they cross examined the Complainant further they would not pursue the issue of DNA. In the course of proceedings it had been pointed out that the child that was born allegedly following the act of defilement was dead.

8. Subsequently, on the **13th December, 2017** **John Watouku Kyavoa** who stood surety for the Accused requested to be discharged as a surety on the ground that after the Accused jumped bail he had to look for him and only managed to trace him at **Thika**. The Court discharged him but remarked thus:

“Accused effectively shall remain in custody until he secures another surety and/or until further orders of the court.”

This means that his bail terms remain the same.

9. It is trite law that every person has a right to have a matter in dispute resolved in a fair manner before Court. He has a right of being represented by an Advocate (**See Article 50 of the Constitution**).

10. The Accused/Applicant has been granted the right of representation. It is surprising that the letter was not authored by the stated Advocate, **Mr. Nzili**.

11. Issues raised in the letter should be grounds of Appeal. The learned Magistrate wrote a lengthy Ruling regarding the request made for a DNA test to be done, an issue that can only be addressed on Appeal.

12. In the premises, no plausible reason has been given as to why the matter should be transferred to another Magistrate to be heard *denovo*.

13. Consequently I have nothing to revise. The file shall be placed before **Hon. G. W. Kirugumi** for further hearing on priority basis.

14. Mention on the **6th September, 2018**.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of August, 2018.

L. N. MUTENDE

JUDGE