



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION CASE NO. 343 OF 2014

B M MAPPLICANT

VERSUS

REPUBLICRESPONDENT

(Being a Revision from the order of Machakos Chief Magistrate's Court Criminal Case No. 126 of 2014 by Hon. T.B. Nyangena, Ag. PM on 5/12/2014)

ORDER ON REVISION

1. Pursuant to a letter dated the 5th December, 2014 from the firm of **Mutinda Kimeu and Company Advocates**, I called for the record of proceedings in the Subordinate Court presided over by the **Hon. T.B. Nyangena Ag. Principal Magistrate** in order to satisfy myself of correctness, legality and propriety of its order dated the 5th of December, 2014.
2. The accused person is charged with **Incest contrary to Section 20(1) of the Sexual Offences Act 2006**.
3. Particulars thereof being that on diverse dates between the month of November, 2013 and December, 2013 in Kathiani District within Machakos County, intentionally and unlawfully caused penetration of his penis into the vagina of **M M M** a child aged 14 years who to his knowledge is his step-daughter.
4. The charge as framed was read to the accused on the 5th August, 2014 whereby he admitted the same. The prosecution sought time to present facts of the case. When the case came up on the 6th August, 2014 he changed plea. Having denied the charge the case was scheduled to be heard at a later date.
5. The matter came up on the 5th December, 2014 when the Court Prosecutor notified the court that he was not ready to proceed as a child had been born out of the incestuous relationship. He sought an order of the court to have the accused present himself to the **Police Station Kathiani** for purposes of being escorted to the nearest hospital for samples to be taken for Deoxyribonucleic Acid (DNA) profiling. Counsel for the accused responded by stating that a formal application be filed. In view of that response the court deemed it fit to cancel bail terms given. The trial magistrate noted that there was a likelihood of the accused absconding.
6. There is a replying affidavit deposed by the accused on record. He deposed that he opposed the application to have samples taken from him by force as it is presumed that at the point of arraignment in court investigations were complete; there must have been sufficient evidence to sustain the charge without the DNA test.

7. Further, he stated that providing samples for DNA profiling would be assisting the police to prove their case which is unconstitutional and in breach of his rights.

8. **Article 49(1) (h)** provides:-

“an arrested person has the right –

to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

9. The accused was released on a cash bail of 50,000/=. No conditions were imposed. However, when the accused declined to cooperate following an application made by the prosecution, the learned trial magistrate formed an opinion that he was likely to abscond hence cancellation of the bond.

10. The learned Prosecuting Officer did not point out the law that empowered him to make the application. However, **Rule 11** of the **Sexual Offences Rules of Court, 2014** provides that:-

“where a person has been accused of committing an offence under the Act, and it is alleged that a child has been born alive as a consequence of the commission of the offence, the court may order the collecting of such samples in the form provided in the schedule as may be required from the accused person and such samples may undergo such tests as the court may order to determine whether or not the child is the result of the commission of the alleged offence”

11. It is apparent that the court has the power to order an accused person to provide samples following an allegation that a child has been born as a consequence of the offence. It is not stated that the order shall be made prior to the person being arraigned in court. Therefore the averments of the accused person are erroneous and contrary to the law.

12. It is evident that he proved to be a difficulty person hence the order made by the court.

13. I therefore direct that the matter be mentioned before the learned trial magistrate as scheduled for a proper order to be made by the court pursuant to the **Sexual Offences Rules of the Court 2014**. The accused shall then be escorted to the nearest hospital for collection of the samples required. Thereafter, an application can be made for reinstatement of bail.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE