



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 254 OF 2011

*(Arising from Criminal Case No. 524 of 2011 of the Senior Resident Magistrate's Court at
Kwale: E.K. Usui Macharia – S.R.M.)*

ROBERT JULO.....APPLICANT

=VERSUS-

REPUBLIC.....RESPONDENT

RULING

This matter has been referred to the High Court by the firm of **COOTOW & ASSOCIATES ADVOCATES** by way of their letter dated 8th November 2011 seeking that the High Court do call for and review the orders made by the learned Senior Resident Magistrate sitting at Kwale Court. The Kwale case under reference is **SRM CR 524 OF 2011 REPUBLIC –VS- ROBERT JULO NYAE** in which the accused person faces a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with S. 8(3) OF THE SEXUAL OFFENCES ACT**. The accused entered a plea of '**not guilty**' and the trial commenced before **HON. E. USUI** Senior Resident Magistrate on 30th September 2011. During those proceedings the complainant informed the court that she had delivered a child resulting from the defilement. This obviously raised the issue of the paternity of the child. The court prosecutor then applied that the accused be directed to subject himself to a DNA test in order to determine whether the child was his. **Mr. Wafula** Advocate for the accused strenuously objected to this application. However the court ordered that in the interests of justice a DNA test was desirable and directed that the accused avail himself at the police station for the same.

Firstly it is presumed that once a suspect is charged before a court of law, investigations into all aspects of the offence have been concluded. By charging this accused with the offence of Defilement the police

must have been satisfied that they had sufficient evidence (minus the DNA test) to sustain the charge. The police ought not be continuing with investigations once a suspect has been charged and further it is not the business of the court (who ought to be a neutral arbiter) to compel a suspect to assist the police to conduct investigations against him.

As pointed out by the defence counsel Article 49(1)(d) of the New Constitution provides:

“49(1) An arrested person has the right

(d) not to be compelled to make any confession or admission that could be used in evidence against the person”

The DNA test seeks to establish the paternity of the child borne to the complainant from an alleged defilement. To compel the accused to provide a DNA sample would be to compel him to assist the prosecution to prove their case. (if indeed he is found to be the child’s father) or in other words to incriminate himself. S. 49(1)(d) provides an accused with constitutional protection against such self incrimination. By ordering such a test the trial magistrate appears to be favouring the prosecution and therefore ceases to be an independent arbiter. Quite apart from the criminal dimension the results of the paternity test may have implications with respect to civil issues like parental responsibility. If the complainant wishes to pursue this, then she is quite at liberty to do so but in the correct forum i.e. in a civil court and not by way of criminal proceedings. The accused is free to **voluntarily** provide a DNA sample if he so wishes but the trial court’s order compelling him to do so is unconstitutional. For that reason I do set aside those orders to DNA testing and direct that the trial proceed to its logical conclusion.

It is so ordered.

Dated in Mombasa this 14th day of November 2011.

M. ODERO
JUDGE
14/11/2011