



**HMH v Republic (Criminal Revision E142 of 2023)  
[2023] KEHC 22652 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22652 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL REVISION E142 OF 2023  
JN ONYIEGO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**HMH ..... APPLICANT**

**AND**

**REPUBLIC ..... PROSECUTOR**

**RULING**

1. This Criminal Revision was presented to this court via the application dated April 17, 2023 filed under certificate of urgency by the firm of Bashir & Associates Advocates seeking for orders that:
  - i. Spent.
  - ii. Spent.
  - iii. The record of the lower court be called for and examined as to the correctness, legality and propriety of the findings made therein by the trial magistrate on March 6, 2023 in the light of the following questions:
    - a. Whether the rights of the accused person as enshrined under articles 49 and 50 of the constitution were taken into consideration in arriving at the decision to refuse a second DNA testing to prove paternity of baby YD.
    - b. Whether the magistrate considered the gravity of the mandatory sentence for defilement of a child aged between 12 and 15 years, which is 20 years' imprisonment under section 8(3) of the Sexual Offences Act in refusing to allow a second DNA test to ensure that the evidence used is up to par and not cooked.
    - c. Whether the court should have been accorded the benefit of doubt to the accused person given the nature of the evidence.



- d. Whether the trial was conducted fairly in view of the non-consideration of the fallibility of the DNA report.
      - iv. The Honorable Court does order that a fresh DNA test be conducted within 21 days of Court's order at the Kenya Medical Research Institute, a state corporation established through the *Science and Technology Act of 1979*, or in any of the facilities to be determined by this court at the applicant's cost.
      - v. The costs be in the cause.
2. The application is premised on the grounds on its face and further supported by the affidavit of the applicant. The applicant's case is hinged on the fact that he was charged with the offence of defilement contrary to section 8(4) of the *Sexual Offences Act*, No 3 of 2006 and an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. That on October 21, 2021, he applied for DNA test to be conducted and the same was allowed which results were found to be 99.99% more chances that he was the biological father to baby YD, the complainant's child. It was his case that the DNA sampling process was tampered with and as a result, sought for a second DNA testing. He averred that he had never come into contact with the complainant thus supporting his quest to have a second DNA process undertaken.
3. The respondents opposed the application by relying on the grounds of opposition dated June 22, 2023 to wit; that the impugned DNA results were not only accurate but also conducted by an independent body mandated by law to conduct DNA test; that the refusal to have a second DNA conducted was well founded under the law as the same had no bearing to the case of defilement; that the defence did not demonstrate why it doubted the said results and ; the applicant still had an opportunity to cross examine the expert witness during the trial and; the application herein was made in bad faith as the previous application seeking for the said orders were previously dismissed by the trial court.
4. The application was canvassed by way of oral submissions wherein the applicant represented by Mr Bashir reiterated the pleadings filed in support of the application. Counsel thus submitted that the impugned DNA test had been tampered with hence the quest to have a second opinion as the applicant had never come into contact with the complainant.
5. The respondent adopted its grounds of opposition thus contending that the applicant was undeserving of the orders sought as he would have had a chance to cross examine the expert witness on the subject report. That the dismissal of the application previously made before the trial court seeking for similar orders was based on the law and that it should not be lost that the offence involved herein is that of defilement. The respondent urged this court to dismiss the application herein as the same was bereft of merit.
6. I have considered the application herein, affidavit in support, rival submissions by both counsel and the authorities in support. The main issue standing out for determination is whether the prayers sought by the applicant can issue.
7. Under Article 165 of the *Constitution* the high is vested with wide discretionary powers in exercise of its revisionary authority. It does provide as follows; -
  - "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

8. Further, Section 362 of the [Criminal Procedure Code](#) (Cap 75) does provide as follows

"362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".

9. Equally, Section 364 of the [Criminal Procedure Code](#) does provide as follows:

"(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
- (b) in the case of any other order than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

10. A strict interpretation of section 362 of the [Criminal Procedure Code](#) in my view does not limit the revisionary jurisdiction of the High Court touching on a finding on sentence or order passed. The high Court can also deal with interlocutory proceedings in its endeavor to correct any illegality that has been occasioned by an order of the subordinate court. The above cited provisions do empower the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.



11. It is however worth noting that extreme caution must be exercised in order to avoid instances where parties bring forth appeals disguised as criminal revision applications. In *Joseph Nduvi Mbuvi v Republic* [2019] eKLR the Court made the following observation;

“In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor vs Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

12. In the instant case, the applicant contended that the proceedings before the trial court were tainted hence the reason why he sought a second DNA to be undertaken. That he was not satisfied by the report from the impugned DNA report. It is against that backdrop that he contended that this court satisfy itself inter alia; whether the rights of the accused person as enshrined under articles 49 and 50 of the *constitution* were taken into consideration in arriving at the decision to reject a request for a second DNA testing to prove paternity of baby Y.D and; whether the magistrate considered the gravity of the mandatory sentence for defilement of a child aged between 12 and 15 years, which is 20 years’ imprisonment under section 8(3) of the *Sexual Offences Act* in refusing to allow a second DNA test.
13. I have on my part considered the issues raised without losing sight of the parameters governing exercise of revisionary jurisdiction of the High Court which stipulates that the same should only be invoked where there are glaring errors or omissions. It is not a discretion to be exercised whimsically or capriciously. It is meant to correct obvious errors on the face of the subordinate court’s record in order to do justice to those affected by the subordinate court’s order/s. The same is not intended to deal with substantive decisions made by the trial court which would then attract institution of an appeal.
14. This court has not been referred to any error, illegality or procedural impropriety committed by the trial court that would call for correction by way of revision. But even assuming the issues are true, the same are substantive in nature and amounts to grounds of appeal which cannot be addressed through the exercise of the discretionary revision powers of the High Court.
15. For the reasons stated above, I am constrained to allow the prayers sought in the application herein. In other words, I find that the application was prematurely filed, and the same is devoid of merit hence dismissed. Deputy registrar to submit the lower court file to the lower court for hearing of further.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS DAY OF 22<sup>ND</sup> DAY OF SEPTEMBER 2023**



.....  
**J.N. ONYIEGO**  
**JUDGE**

