



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CRIMINAL APPLICATION NO. E026 OF 2020**

**(Coram: Odunga, J)**

**JNO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Applicant herein, **JNO**, has moved this Court seeking substantially seeking a transfer of his case to another Court and for an order prohibiting his prosecution before the Chief Magistrate's Court in Mavoko SO No. 4 of 2020 and for his discharge on the ground of double jeopardy.

2. According to the applicant, he was arrested and charged with the offence of incest before the Mavoko CM's Court in SO No. 3 of 2019. After the said case had dragged on for 6 months from January, 2019, he was discharged therefrom in June, 2019 under section 202 of the **Criminal Procedure Code**. having stayed in custody throughout the proceedings.

3. According to the applicant the said criminal proceedings were instigated with a view to settling property dispute between him and his wife whose intention was to dispossess him of the property he had purchased. However, by the time of his discharge, his wife had not achieved her objective hence the fresh charges the subject of SO No. 14 of 2020. It was the Applicant's case while the first report was made at Athi River Police Station, the second report was made at Mlolongo Police Station. Apart from that the particulars of the offence were similar.

4. The Applicant stated that while the first offence was defilement contrary to section 8(1) and (3) of the **Sexual Offences Act**, the second charge was incest contrary to section 20(1) of the same Act.

5. In the Applicant's opinion, this amounts to abuse of the court process and the criminal justice system and is contrary to Article 50(2)(o) of the Constitution. It was his further contention that the matter borders on extraneous issues divorced from the pursuit of justice and ought not to be entertained. It was his apprehension that he is unlikely to get a fair trial before the same court since there are other underlying factors that might unfairly influence the decision of the Court. He was further apprehensive that some parties to the case including his wife are likely to influence the matter.

6. In opposing the application, the Respondent averred that a report of defilement was reported at Athi River police station vide OB No. xx/7/2/2019 by the minor (complainant) who was accompanied by the children officer, and investigations were commenced. After investigations were completed, the Applicant was arrested vide police case number CR 442/36/2019 and charged at Mavoko Law courts in SO. No 3 of 2019 - **R v/s JNO**, with the offence of Defilement contrary to section 8(1) of the **Sexual Offences Act** No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11 of the same Act. Since the minor (complainant) was found to be Vulnerable and in need of care and protection as she was staying with the Applicant in the same house, she was temporarily placed at Bondeni Children Home under the custody of the children officer while awaiting court orders. However, the minor escaped from the said custody and efforts to trace her were futile as there were interference to obstruct justice.

7. According to the Respondent, on 24<sup>th</sup> June, 2019 the prosecution made an application to withdraw the charges against the Applicant under section 40 of the aforesaid Act as read with section 87 of the **Criminal Procedure Code** as the minor had not been traced. Pursuant to the said application, the trial court presided by **Hon. Oluoch (C.M)** allowed the application by the prosecution and the charges against the Applicant were withdrawn and the Applicant set free. It was therefore denied that the Applicant that the case was withdrawn under section 202 of the **Criminal Procedure Code** as alleged by the Applicant.

8. It was further averred that on 23<sup>rd</sup> March, 2020 one **JO** accompanied by her daughter (the complainant) made a report vide OB no. xx at Mlolongo Police station alleging that the Applicant had defiled his daughter aged 13 years old which report was booked in the occurrence book and investigations commenced by the police. On 24<sup>th</sup> March, 2020, the Applicant was apprehended and presented before Mavoko law court on 25<sup>th</sup> March, 2020 vide police case no. CR44E/72/2020 and SO. 14 of 2020 - **R vs. JO**. In that case the Applicant was charged with

the offence of incest by a male person contrary to section 201(1) of the **Sexual Offence Act** No.3 of 2006 with an alternative charge of indecent act with a child contrary to section 11 of the **Sexual Offences Act** No 3 of 2006 and he pleaded not guilty to the offence. It was averred that the Applicant did not raise any objections to the charges being read to him at the earliest opportunity on allegations of double jeopardy.

9. While admitting that the complainant in the two criminal cases is the same minor, the Respondent however disagreed that there is double jeopardy committed against the Applicant as the two offences are totally distinct as they were committed on different dates spanning over one year at different times and places, and not within the same transaction.

10. As for the transfer, the Respondent averred that the Applicant had not adduced any valid reason for the criminal case to be transferred from the territorial jurisdiction of Mavoko law courts as the two cases have been handled by two different judicial officers. In the Respondent's view, it will cause unnecessary expenses and delay in transporting and availing witnesses who are residents of Syokimau to another court's jurisdiction. The Court was therefore urged to dismiss the application as it is merely a delaying tactic by the Applicant to defeat the ends of justice.

11. In his submissions, the Applicant set out the history of the land dispute between him and his wife. He stated that due to non-attendance of the witnesses in the earlier case, he applied for the case to be dismissed his application was allowed and the case was dismissed under section 202 of the CPC. The applicant argued that section 87 aforesaid ought not to be used to sneak back a case whose aim is the champion of ulterior motives divorced from the pursuit of justice.

12. It was further argued that the action by the investigating officer and the prosecutor to forcefully extract DNA samples from the applicant is a clear testimony that the matter is not about getting justice. Citing Articles 27(1) and 25(c) the applicant submitted that to charge him again would amount to a violation of his rights. In his view the fact that the matter is being handled by the same Court though by different judicial officers does not necessarily mean that he will get a fair trial as the environment in Mavoko is already polluted.

13. On behalf of the Respondent, it was submitted that after the Applicant entered plea of not guilty in S.O 14 of 2020, the case proceeded with two witnesses until when the complainant gave birth and the prosecution made an application before the court for DNA to be undertaken.

14. According to the Respondent, Article 260 of the Constitution does not define what acquittal means and that there is no bar to subsequent proceedings in instances where a discharge order under section 87(a) of the **CPC** is granted. In support of the submissions the Respondent relied on **Black's Law Dictionary, Tenth Edition** and Article 50(2)(o) of the Constitution and invited the Court to apply the two tests of "Same evidence" and "Same transaction". The Respondent relied on the case of **Conneley vs. DPP [1964] 2 All ER 401** and submitted that in order for a plea of '**autrefois acquit**' to apply the offence charges must be the same as the offence for which one had been previously acquitted. The mere fact that the two trials emanates from the same episode, have the same witnesses or similar evidence or that two separate crimes were committed in the same incident is **not** the true test. Reliance was similarly placed on **Republic vs. Kupferberg [1918], 13 Cr. App. Rep 166** and **Regina vs. Z [2005] 3 ALL ER 95, S. Block Burger vs. United States 284 U.S 299 (1932), Bob Fred Ashe vs. Haroud R. Swenson Warden 399, F – 2D 40 (8<sup>th</sup> Cr. 1968)** Locally reliance was placed on **Nicholas Kipsigei Ngetich & 6 others v Republic [2016] eKLR** and it was submitted that the contention by the applicant that double jeopardy has been violated is misleading and the charges in S.O 3/2019 and that of S.O 14/2020 relate to two distinct transactions. The violations visited upon the complainant took place on different dates and years, with the latter resulting in a pregnancy. The nature of the offences is sexual in nature and were not committed on the same date.

15. As for the issue whether or not the applicant stands to get a fair trial in the same jurisdiction, it was submitted that the applicant has not provided plausible reason to have the matter heard in another jurisdiction the two cases have been handled by two different judicial officers and will not suffer any prejudice. The best interests of the complainant herein who is a child must be taken into consideration. To subject her to the matter being held in a different jurisdiction would cause unnecessary delay of justice and to relieve the events of what happened to her would be negating a traumatic experience.

16. As regards the prejudice caused by the extraction of samples for purposes of DNA, it was submitted, based on the history of the matter, that the allegations that there was collusion between the investigating officer, the prosecution and the prison authorities to forcefully extract the D.N.A sample from the applicant is baseless and malicious with the aim to divert the attention of the trial on seeking justice for a 14-year-old who is now a mother an action brought forth by the applicant.

17. According to the Respondent, by invoking article 165 of the constitution the applicant is within his purview and has every right however the applicant would be misleading the court to assuage the allegation using section 81 of the **Criminal Procedure Code**, the applicant has failed to demonstrate the harm and prejudice the applicant will suffer if the matter is handled within the jurisdiction of Mavoko law courts. The applicant alleges real apprehension, yet all along during the trial of S.O 14/2020 he was actively involved in the case by being given a chance to cross examine the witness as guided by **Section 208 (3)** of the **criminal procedure code** which is anchored on circumstances where an accused person is unrepresented by an advocated the court shall at the close of examination of each witness for the prosecution ask the accused whether he wishes to put any questions to that witness and shall record his answer.

#### **Determination**

18. I have considered the issues raised hereinabove.

19. The first and the main issue before me is whether by preferring the charges the subject of SO No. 14 of 2020, the Applicant has been subjected to double jeopardy. According to **Black's Law Dictionary, Tenth Edition**, double jeopardy is:

***The fact of being prosecuted or sentenced twice for substantially the same offence.***

20. Article 50(2)(o) of the **Constitution** provides as follows:

***Every accused person has the right to a fair trial which includes the right not to be tried for an offence of in respect of an act or omission for which the accused person has previously been either acquitted or convicted.***

21. Article 25(c) of the Constitution specifically states that the fundamental right of a person to fair trial shall not be limited under any circumstances. Section 138 of the **Criminal Procedure Code** amplifies this constitutional edict by providing that:

***A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.***

22. I agree with **Kimaru, J** in **Julius Kilonzo Maweu vs. Republic [2016] eKLR** that for the pleas of *Autrefois Acquit* or *Autrefois Convict* to be successfully invoked, the following must be established:

***i) That there was a previous case in which the Applicant was charged with a particular offence.***

***ii) That the Applicant was either acquitted or convicted of the particular offence.***

***iii) That the decision resulting in the Applicant's acquittal has not been set aside or varied by an Appellate court.***

***iv) That the Applicant is charged with another offence similar to the one or cognate to the one that he was previously acquitted.***

***v) That the subsequent charge, though not the same as the previous charge is cognate to the previous charge and is based on similar facts and circumstances of the previous charge.***

23. In this case, in SO No. 3 of 2019, the Applicant was charged with Defilement Contrary to Section 8(1) as read with 8(3) of the **Sexual Offences Act**, the particulars being that on the 18<sup>th</sup> and 25<sup>th</sup> December, 2018 at Syokimau Area, in Athi River Subcounty, he caused his male genital organ to penetrate the female genital organ of AJ, a child aged 13 years. There was also an alternative charge of Committing an Indecent Act with the same child based on similar particulars. According to the proceedings of the said case on 24<sup>th</sup> June, 2019, the prosecution applied for the withdrawal of the said case on the ground that the victim could not be traced. To that application, no objection was raised by the learned counsel representing the Applicant and the matter was withdrawn under section 40 of the **Sexual Offences Act** as read with section 87(a) of the **Criminal Procedure Code** and the Applicant was discharged. It is therefore clear that the withdrawal was not pursuant to section 202 of the latter as the Applicant alleges. It is therefore clear that the Applicant was neither acquitted nor convicted but was discharged. Apart from that, the particulars of the charge the subject of SO 14 of 2020 relate to the events that allegedly took place on 25<sup>th</sup> December, 2019. That was not the same date the earlier offence was alleged to have occurred. In those premises, there is no double jeopardy.

33. As regards the allegation of ill-motive in bringing the charges against the Applicant, apart from mere allegations, no sufficient material has been placed before me to make such a finding. I associate myself with the decision of **Majanja, J** in HC. Pet. No. 153 of 2013; **Thuita Mwangi and 2 others vs. the Ethics and Anti-Corruption Commission**, that:

***“While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations.”***

24. As for the transfer, the only basis upon which it was sought was on the ground of double jeopardy which I have disallowed. In any case transfer of cases is only granted where the Application is based on reasonable apprehension that a fair trial may not be assured. In this case the apprehension cannot be said to be reasonable as the grounds upon which it is based are clearly misapprehended.

25. As for the issue of extraction of DNA samples, that was not properly speaking the basis upon which these proceedings were instituted. However, the Court of Appeal in **COI & Another vs. Chief Magistrate, Ukunda Law Courts & 4 Others [2018] eKLR** held that:

**27. The right to privacy particularly, not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Those rights, in our view, extend to a person not being compelled to undergo a medical examination.**

**28. Did the examination of the appellants infringe on their rights" It is common ground that the rights and freedoms under the Bill of Rights, subject to Article 25, can be limited under Article 24. Of course, by written law and to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.**

**29. Such a limitation, at least to the extent of compelled medical examination, is evident from the provisions of Section 36 (1) of the Sexual Offences Act which stipulates:**

***“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.”***

30. *Sub-section (6) (a)* thereof describes an appropriate sample or to include

*‘blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; ...’*

It is important to note that the constitutionality or otherwise of the above provision was not an issue before the learned Judge.

31. Our understanding of *Section 36 of the Sexual Offences Act* is that whereas a court is empowered thereunder to direct examination of an accused person to establish his involvement in a sexual offence, such discretion is subject to limitation. In that, the court can only issue such an order with respect to an offence committed under that Act and not any other. Further, in exercising that discretion, like any other discretion, the court is required to act judiciously within the confines of the law.”

26. It is therefore clear that subject to the due process, a court is perfectly within its power to direct examination of an accused person to establish his involvement in a sexual offence. Accordingly based on the material placed before me in this matter, there is no basis for finding that by directing that samples of the Applicant’s be taken for the purposes of DNA examination, the Applicant’s rights have been or are under a threat of violation.

27. In the premises, I find no merit in this application which I hereby dismiss.

28. It is so ordered.

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2021**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

**The Applicant**

**Mr Ngetich for the Respondent**

**CA Martha**