REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APP. NO. 161 OF 2019

RODGERTS NYAKUNDI NYAPARA.....APPELLANT

VERSUS

REPUBLIC.....STATE

RULING

1. The Applicant was arraigned before the Chief Magistrate's Court charged with a single count of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars contained in the charge sheet are that on the night of 11th day of January, 2019 at [particulars withheld] Village in Nakuru West Sub County within Nakuru County, the Applicant is alleged to have intentionally and unlawfully inserted his male genital organ namely penis into a female genital organ namely vagina of PK, a child aged 4 years, which caused penetration.

2. The Applicant faces the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The specifics as to place, date, time and victim are the same as those of the main charge.

3. The Applicant denied the charge and the Court set the case for trial. The Trial Court admitted the Applicant to bail on his personal recognizance of Kshs. 400,000/- and one surety of similar sum.

4. During the arraignment on 17/01/2019, at the instance of the Prosecution, the Court also ordered the Applicant to supply DNA samples for purposes of a DNA test comparing those samples with others collected from the scene and on the person of the victim. The Applicant did not object to the Application; and the Court made the order.

5. The Applicant gave the DNA samples as ordered and he was eventually admitted to bail upon the surety of one, Joseph Makori Ngare. The surety deposited his title deed for parcel No. East Kitutu/Bonyamondo/II/1085 as security.

6. The matter was scheduled for a status conference on 26/02/2019 to receive the DNA Report. On that date, the Prosecutor informed the Court that she had been unable to reach the Investigating Officer and that she was yet to receive the DNA Report. A new mention date of 05/03/2019 was given.

7. On 05/03/2019, the Prosecutor informed the Court that he did not have the DNA Report and was yet to hear from the Investigating Officer. When the same position obtained at the next mention date of 19/03/2019, the Trial Court was forced to issue a Warrant of Arrest for the Investigating Officer. It is not clear what happened to the Warrant of Arrest but on the scheduled date of 23/04/2019, the Prosecutor informed the Court that the DNA Report was not ready. A new date – 04/06/2019 – was given as a mention date while a hearing date of 13/08/2019 was given.

8. On 04/06/2019, the Trial Court was forced, again, to issue a Warrant of arrest for the Investigating Officer.

9. When the case came up on the assigned hearing date – 13/08/2019 – the Learned Honourable Omido who was handling it had been transferred out of the station. The case was placed before Honourable B. Limo. The hearing was adjourned to 02/09/2019 and again to 03/09/2019. On that date, the Investigating Officer raised an allegation that the title deed deposited in Court had not been verified by a DCI Officer and that the Accused Person had threatened witnesses. The Court ordered DCI-Nakuru to verify the title documents. The Court further "suspended" the bond terms. The matter came up again on 06/09/2019 before Hon. Limo again. Defence counsel made an application for a second DNA test and for reinstatement of the bail/bond terms. After hearing the parties, the Court directed that the matter be placed before the Chief Magistrate for re-allocation since the Prosecution had made submissions that the minor victim (complainant) could only testify in front of a male prosecutor. The Learned Trial Magistrate declined to reinstate the bond terms terming them "suspended" until review by the Court which would be allocated the case for hearing.

10. The case was eventually placed before the Learned Honourable Khatambi for hearing and disposal. The Learned Magistrate heard an application by the Prosecution to cancel bond simultaneously with the two applications by the Accused Person – to reinstate bail/bond and for a second DNA test. The Learned Magistrate gave a reasoned ruling dated 23/09/2019. She concluded that the Prosecution had demonstrated that there were compelling reasons for the bond terms to remain suspended "pending testimony from the Complainant's mother." The Learned Magistrate made a finding that there was a showing that "the Accused Person is a threat to the Complainant's mother if released on bond" and that "if released on bond, there is a likelihood that the witnesses/evidence will be interfered with." The Court remarked that "allegations of witness interference is serious in nature and the court cannot turn a blind eye to the same."

11. On 1/10/2019, the Learned Trial Magistrate issued a second ruling in which she declined to order for a second DNA test. Her reasoning is contained in the following paragraph:

> *I am of the considered view that the Accused Person has a right to dispute DNA results/reports by the Government Analyst, and seek a second DNA test. If the Accused Person had been interested in seeking a second DNA test he should have moved the Court early in advance preferably as soon as the Prosecution obtained a Court order to extract samples. I find that the application has been made too late in the day and granting the orders sought will not add any value whatsoever. Such an application would have been merited if the Accused was seeking to confirm paternity, which is not the case.*
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> *The upshot of the above consideration is that the Court cannot issue orders in vain. It the[n] follows that the application lacks merit [and] the same is hereby dismissed with no order as to costs.*

12. The Applicant believes that both the order refusing to reinstate his bail/bond terms issued on 23/09/2019 and the one declining him to do a second DNA test are wrong-headed and amount to breaching his rights to a fair hearing. He wants both those orders to be reviewed by this Court. The Application is dated 23/10/2019. It seeks the following prayers:

> *1) Spent.*
>
> *2) Spent.*
>
> *3) That this Honourable Court be pleased to call for and examine the record of proceedings in the Chief Magistrate Court at Nakuru, Nakuru Criminal Case No S. O 19 of 2019 (Republic Vs Rodgers Nyakundi Nyapara) for purposes of satisfying itself of the correctness, legality and propriety of the Court's Ruling made on 23rd September, 2019 and 11th October, 2019 by Honourable Y. Khatambi.*
>
> *4) That this Honourable Court be pleased to reinstate the Accused person/Applicant's Bond.*
>
> *5) That this Honourable Court be pleased to revise the orders of the Magistrate in Nakuru Criminal Case No. S.O 19 of 2019 (Republic Vs Rodgers Nyakundi Nyapara) made on 11th October, 2019 and make and order that a 2nd DNA test be conducted.*
>
> *6) That this Honourable Court be pleased to make any orders that it deem fit in the interest of justice.*
>
> 7) *That the cost of this application be provided for.*

13. The Application was orally argued before me. In urging the Application, Mr. Gekonga, Learned Counsel for the Applicant, submitted that the Accused is facing serious charges of defilement and that fair trial demands that once an Accused Person facing such serious charges requests for a second DNA testing, it should be granted to ensure equality of arms between the Accused Person and the State. Mr. Gekonga pointed that the need for the second DNA testing is made more imperative in this case by that fact that the Investigating Officer kept the DNA Report without releasing it to the Defence for more than six months. He pointed out that no explanation was given for the delay hence raising suspicion that there could have been tampering with the report. Mr. Gekonga said that the Investigating Officer kept saying that the Report was not ready yet it was apparently already in her possession.

14. Mr. Gekonga submitted that the Accused Person wanted a second test done by Lancet which is a reputable organization. He further submitted that as per Article 50(2)(c) of the Constitution, an Accused Person is allowed adequate time and facilities to prepare for his defence including a 2nd opinion of any scientific report to be relied on by the Prosecution in its case. He pointed out that the report filed can now only be challenged by cross-examination; which might be enough.

15. On the issue of bail, Mr. Gekonga faulted the Learned Trial Magistrate for treating the allegations that the Accused Person had threatened witnesses casually. He submitted that the person who was allegedly coordinating the threats against the Complainant's mother had put in an affidavit denying the same and that once this had happened, the Learned Trial Magistrate needed to conduct a trial-within-a-trial to establish the truth of the allegations. Mr. Gekonga's view was that there was no sufficient evidence to cancel the bail/bond granted to the Accused Person. He insisted that on the facts, the only option the Learned Magistrate ought to have taken would have been to stiffen the bond terms not to cancel them; that the threshold was not met in the case to warrant the cancellation of the bond terms.

16. Ms. Rita argued the appeal on behalf of the State. She opposed both applications. On the issue of DNA re-test, Ms. Rita argued that the application was futile since the probative value of a second test would be very little. This was because, there were no longer samples available on the person of the Complainant. In the second place, Ms. Rita argued that there was no basis for subjecting the minor to the trauma of collecting more samples from her yet a test had already been conducted by an impartial government agency without vested interests in the case.

17. Turning to the cancellation of bond, Ms. Rita argued that there was sufficient evidence of interference with witnesses on which the

Learned Magistrate acted on. She said that an affidavit was done by the investigating officer deponing that the mother of the victim had been threatened. The affidavit annexed a statement by the mother.

18. Ms. Sabaya, counsel for the Victim, supported the Prosecution's submissions. She argued that any misgivings regarding the DNA report could be sufficiently raised during cross-examination. She submitted that there was no objective basis for the suspicions expressed by the Defence about the handling of the DNA Report since there was no evidence that the report was actually collected in March and then its handing over delayed by the Investigating Officer.

19. However, Ms. Sabaya conceded that the Victim's family was not opposed to a re-test provided that it did not involve the collection of any samples from the four-year old victim. She asked the Court to use the standard of the best interests of the child in reaching the verdict that requiring the child to submit any more samples – even a mouth swab – would be too traumatic for her and against the best interests of the child. She relied on the decision in ***ANM & RMM V FPA & AG [2019] eKLR*** to make the argument that subjecting a person to a DNA test is an intrusive process which should not be lightly ordered.

20. Ms. Sabaya asked the Court to consider that the child has a right to bodily security and integrity and that a re-test was unnecessary to secure the rights of the Accused Person since he could achieve his objectives through other means – including by cross-examining the maker of the Report now in existence.

21. On the issue of bond, Ms. Sabaya pointed out that Section 127 of CPC allows for variation or cancellation of bond terms by magistrates. In her view given the case and circumstances, the bond given was not even sufficient. She submitted that the Standard of Proof for bail is not "beyond reasonable doubt" but on a "balance of probabilities" which, she argued, had been met in the present case.

22. I will begin with an analysis of the request for a second DNA test.

23. As a general matter, absent limiting factors related to the rights of others especially victims of crimes, requests for independent scientific re-tests of samples by the Defence should be freely allowed. This is a straightforward reading of Article 50(2)(c) of the Constitution guaranteeing to every Accused Person adequate time and facilities for his defence. The extent of that right, however, is limited by the rights of others – especially the victim of the crime – and other practical considerations including the practicality of the request; and the impossibility of carrying out the re-test without undue inconvenience to the parties or undue delay.

24. In the Court below, the Court denied the request for a DNA re-test because the Learned Magistrate found such a re-test would be futile. She alluded to the passage of time in reaching this conclusion. However, it is not self-evident that the re-test would be defeated by the passage of time or that its probative value would be little or none as the Learned Magistrate held. It is true that the Defence has not been specific as to the nature of DNA re-test it is asking for. However, the only DNA test the Defence would be entitled to at this point is a re-test of the samples taken earlier from which the Government Chemist has generated a report which has been supplied to the Defence or another test approximating or analogous to the one already taken.

25. What this means is that, to the extent it is possible, the Prosecution must turn over the portions of the samples that remained for a re-test by the Accused Person's expert. Given the nature of the case, it is neither possible nor permissible for the Defence to collect new samples from the victim given that the samples collected from the victim were from high vaginal swab and anal swab taken immediately after the alleged sexual assault. The only sample that may be collected from the victim for purposes of establishing her DNA profile is a buccal swab – and only if the expert identified by the Accused Person justifies to the Trial Court that such a sample is, in fact, needed for scientific purposes for the generation of a second report by the expert.

26. It is true, as the Victim's Counsel argues, that subjecting a victim to a DNA test is, by definition, intrusive and potentially traumatic. However, it is also true that in the same way an Accused Person's right to bodily integrity is balanced with a victim's and society's rights in criminal matters in allowing for compelled collection of evidence from the person of an Accused Person, a victim's rights to bodily integrity must be equally balanced with the rights of an Accused Person to collect evidence which is material to the investigation, preparation or presentation of a defence at trial. In other words, when the liberty of an Accused Person is at stake as when he faces a serious criminal charge like here, the Court must calibrate the Victim's right against bodily integrity against the Accused Person's right to collect evidence necessary for his defence.

27. The answer lies in balancing the rights of the Accused Person to collect evidence for his defence in a case such as this one where his liberty is at stake on the one hand and the right to bodily integrity and dignity of the victim on the other hand. An order for second DNA retesting involving collection of samples from the victim can only be issued where at least three conditions are met:

28. First, the Defence must establish a foundation for the request. Just like in the case for compelled sample collection from the Accused Person, to obtain an order to collect samples from the victim, the Defence must demonstrate that there are reasonable grounds to believe that the DNA sampling procedure might produce evidence tending to confirm or disprove that the Accused Person committed the alleged offence. As the US Supreme Court said in ***Schmerber v California 384 US 770 (1966)***, "bodily intrusions cannot be allowed on the mere chance that the desired evidence might be obtained." For this condition to be met, the Accused Person must demonstrate that DNA evidence is central or an important pillar of the Prosecution case.

29. Second, evidence collection which violates the dignity of the victim or in any other way offends evolving community standards of decency and fair play cannot be collected. For example, in this case, needlessly subjecting the victim to collection of high vaginal swab or anal swab would be impermissible. This is because the potential to collect evidence of high probative value is disproportionately low compared to the intrusiveness of the procedures and harm to the minor victim.

30. Third, there must be a showing that there exists a reasonable probability that a second DNA test would be of assistance to the Defence and that a denial of an order for re-testing would result in a fundamentally unfair trial.

31. Applying the standard I have just announced above to the present case easily yields the conclusion that a re-test of the samples already collected must be allowed as a direct application of Article 50(2)(c) of the Constitution. Here the Defence says that the Prosecution DNA evidence is subject to attack because of the length of time it took the Prosecution to release the results of the DNA tests to it when the Investigating Officer already had the results in her possession. To resolve any lingering doubts on whether the results were in any way interfered with, it is reasonable to give the Defence an opportunity to re-test at its own cost. As for further collection of samples from the victim, the right to bodily integrity bars the collection of any samples using intrusive means other than buccal swab which is minimally invasive. Even then, the following conditions must be adhered to as an incidence of protecting the rights of the minor:

a. An independent expert by the Defence must justify to the Trial Court that the collection of the buccal swab is necessary for the re-test which will be undertaken;

b. The collection of the buccal swab must be done at a government facility;

c. The collection must be done by a qualified and licenced professional who must demonstrate their qualifications to the victim's parents or guardians.

d. The collection must be done in the presence of the minor's parents or guardians and/or legal representative.

e. The Accused Person and/or his legal representative cannot be present at any point during the collection. The interests of the Accused Person will be adequately represented by the qualified medical personnel who collects the buccal swab. This will reduce the trauma experienced by the minor victim and create as friendly and comfortable an atmosphere as possible during the collection of the samples.

32. I will now turn to the issue of cancellation of bail/bond. As narrated above, the Accused Person was granted bail when he took plea. The bond was initially suspended by Hon. Limo on 02/09/2019 at the instance of the Prosecution and the Victim's Counsel when the Prosecutor informed the Court that the Accused Person "may be a flight risk" and the Victim's Counsel informed the Court that the surety was "is yet to be certified by CID Officers." The victim's counsel also informed the Court that "the witnesses are being threatened."

33. The Honourable Magistrate ruled that "*in view of the alleged threats by the Accused to witnesses as per the Investigating Officer's sworn affidavit dated 13/08/2019, the Accused's bond terms shall be suspended pending the hearing of this case*."

34. It is important to point out two things. First, the Learned Magistrate made no finding about the credibility of the allegations that witnesses had been threatened but made an adverse decision anyway. Second, the affidavit relied on by the Learned Magistrate, quite parsimoniously, had only a single paragraph on the alleged threats. It read thus:

The Accused Person Rodgers Nyakundi Nyapara has been following the complainant's mother to an extent of sending people to go and trace her house.

35. In my view, this bald allegation coming from the mouth of the Investigating Officer should not have been sufficient to suspend or cancel the Accused Person's bail terms without more. It is quite curious that the Investigating Officer does not state the source of her information or give any particulars of the alleged threats.

36. However, the decision to suspend or cancel bond was confirmed in a reasoned ruling by Honourable Y. Khatambi on 23/09/2019. By this time, the Prosecution had filed another affidavit by the Investigating Officer. That second affidavit was deponed on 05/09/2019. This time, the affidavit repeats the exact allegation reproduced above and then adds a second paragraph thus:

The Accused Person has been threatening mother of the complainant who is also a witness in this matter (sic). That he is going to kill her if the DNA will be positive, and if it is negative, he will make sure that the said witness will serve jail forever. First was reported through mobile phone to me as the Investigating Officer. Now, the report has been put in the OB vide OB19/4/9/2019. Case pending investigation (sic).

37. The Learned Magistrate was persuaded that these allegations were sufficiently proved using the requisite standard of balance of probabilities. She, therefore, declined to reinstate bail/bond.

38. I should point out at the outset that although Mr. Gekonga loudly complained that the standard and procedure used was wrong, the Learned Magistrate utilized the correct procedure and standard. There is no requirement, as Mr. Gekonga suggested, for a Trial Court to conduct a mini-trial or a trial-within-a-trial in order to make findings on whether the constitutionally-prescribed compelling standard test has been met to deny bail. A Trial Court is perfectly permitted to make a determination on the basis of affidavit evidence as the Learned Trial Magistrate did in this case. Additionally, the standard of proof in making a finding whether bail should be denied or not is the balance of probabilities standard which the Trial Court invoked.

39. However, I am not persuaded that, on balance, there was sufficient credible evidence to deny bail in this instance. I say so because the two affidavits filed by the Investigating Officer do not inspire too much confidence about the credibility of the alleged threats made by the Accused Persons. I will point to the following telltale signs which undermine the ability of the two affidavits to reach the forebodingly high constitutional standard of demonstrating compelling reasons to deny bail.

40. First, it is curious that the allegations are made by the Investigating Officer and not the witness who was allegedly threatened even though in all occasions when the matter was in Court the threatened witness was present in Court.

41. Second, it seems odd that the Occurrence Book extract which was the sole evidence relied on by the Investigating Officer is for 04/09/2019. This was one day before the Investigating Officer deponed her second affidavit; and long after she had deponed her first affidavit on 13/08/2019. This begs the question: how is it that the witness only officially reported the matter and recorded the statement after an affidavit seeking the cancellation of bail had first been filed; and just before a second one beefing it up was filed? The suggestion is ineluctable that the witness statement and OB entry were manufactured to support the application in opposition to the grant of bail.

42. Third, it is also doubly odd that in her statement recorded on 04/09/2019 weeks after the allegations had first been raised in Court, the witness states that the threats were made sometime in April, 2019. It is curious that the witness took at least four months to make the threats known and then the threats are acted on with such prompt alacrity once reported.

43. Fourth, the details of the threats as deponed by the Investigating Officer are different in important detail than those contained in the witness statement. For example, the Investigating Officer narrates that the Accused Person threatened to "kill" the witness. However, in the witness statement, the witness says that "since the time Rodgers was released on bond, he has been threatening me with unknown consequences whenever we meet."

44. In short, I am not persuaded that the allegations made out against the Accused Person meet the standards. On a balance of probabilities, these allegations are not made out. It was, therefore, wrong for the Trial Court to deny the Accused Person bail on account of those allegations only. Perhaps it would have been more prudent for the Trial Court to enhance the bond terms in the circumstances. I agree with the Victim's counsel that the circumstances here call for such enhancement of bond terms.

45. **The upshot is that the Application dated 23/10/2019 has been successful. The orders that the Court shall make are the following:**

a. The order of the Trial Court dated 11/10/2019 declining the request for a second DNA test is hereby revised. The Defence shall be permitted to conduct a second DNA test subject to the conditions outlined in paragraph 32 of this Ruling.

b. The order of the Trial Court dated 23/09/2019 refusing to reinstate bail to the Applicant is hereby revised. In its place, there shall be an order admitting the Accused Person to bail on the following terms:

i. The Applicant's own recognizance in the sum of Kshs. 500,000/-

ii. Two sureties of Kshs. 500,000/-.

iii. The Applicant shall <u>not</u> reside in the Nakuru West Sub-county during the pendency of the Criminal Trial and neither shall he visit the Sub-county without the prior authorization of this Court.

iv. The Applicant shall not, in any way, whether direct or indirect, whether in person or through other persons, contact any of the witnesses in this case. If any such contact is made and verified, the bond terms shall be immediately cancelled; and

v. The Applicant shall report to the Deputy Registrar of this Court every Friday during the pendency of the case.

46. **In view of this ruling, the Court directs that the second DNA test be carried out within two weeks of today, and that the Trial Court sets down the case for taking down the evidence of the Complainant and her mother on a priority basis**.

47. Orders accordingly.

Dated and delivered at Nakuru this 16th day of January, 2020

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JOEL NGUGI

<u>JUDGE</u>