



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 115 OF 2019**

**JB..... APPLICANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

**R U L I N G**

1. **JB (“the applicant”)** was on 29<sup>th</sup> March, 2019 charged with the offence of incest contrary to *section 20(1) of the Sexual Offences Act No. 3 of 2006* before the **Meru Chief Magistrate’s Court in Sexual Offences Case No. 16 of 2019, Republic vs. JB.**

2. It was alleged that on an unknown date of the month of August, 2018 at [particulars withheld] village, Ruiru Location in Imenti North sub-county within Meru County, being a male person, he caused his penis to penetrate the vagina of **R. K.** a female person aged 16 years who was to his knowledge his daughter.

3. He was admitted to bond of Kshs.200,000/- with a surety of a similar amount which was given and the applicant was released from custody. On 24<sup>th</sup> May, 2019, the applicant took out a Motion on Notice seeking a revision of the order of the trial court of 20<sup>th</sup> May, 2019.

4. He contended that on 20<sup>th</sup> May, 2019, the matter was supposed to come up for hearing but the trial court, **Hon. Muragugori SPM** was on leave and the matter was mentioned before **Hon. Mrs. Lucy Ambasi CM** for directions.

5. That the applicant attended in the absence of his advocate, as it was clear that since **Hon. Mrs. Lucy Ambasi CM** was on transfer, the matter would not proceed. That when the matter was called out, the applicant saw the applicant shoot up and walk next to the Magistrate and talked to the Magistrate in low tones. That without being asked to say a word, the Magistrate cancelled his bond and remanded him in custody.

6. That the applicant did not know what the complainant told the Magistrate but that his advocate had informed him that after perusing the court file, the advocate had told him that he saw one statement by the Magistrate that he, the applicant, was interfering with the complainant. He averred that he lives in Ruiru, which is about 40 km from where the complainant lives with her mother. He denied having talked to the complainant for a long time.

7. When the matter came up on 29<sup>th</sup> May, 2019, the court did not require either **Mr. Ndubi**, Learned Counsel for the applicant or **Mr. Murage**, Learned Prosecutor to address it. This was by dint of the provisions of *section 362 of the Criminal Procedure Code*. There was nothing untoward that would have required that the parties address the court.

8. I have considered the affidavit in support of the application for revision and the entire record of the trial court. What comes out of the applicant’s averments are that **Hon. Mrs. Lucy Ambasi** was biased against him. This is borne out of the following averments:-

a) that when he availed his surety for approval of bond that had been granted by **Hon. Abuya**, the said Magistrate, insisted that a pre-bail be filed before she could admit the applicant to bail. That it took the intervention of his advocate for the Magistrate to approve the bond;

b) that on 20<sup>th</sup> May, 2019, the said Magistrate for no apparent reason, cancelled his bond;

c) that the said Magistrate talked in low tones with the complainant before cancelling the applicant’s bond and remanded him in custody.

9. Having reviewed the trial court’s record, I have confirmed the following: -

a) that on 8<sup>th</sup> April, 2019 when the matter came up before the said Magistrate, she ordered that the bond approval do await the filing of a pre-bail report within three days;

b) on 9<sup>th</sup> April, 2019, **Mr. Ndubi**, Learned Counsel for the applicant appeared before the said court and pointed out that bond had already been granted and there was no need for a pre-bail report. Immediately, the Magistrate approved the bond and the applicant was released from custody;

c) the record shows that on 20<sup>th</sup> May, 2019, after the court had fixed the hearing of the matter before court 3 on 17<sup>th</sup> June, 2019, the minor complainant told the court that the accused was harassing her and she was afraid of him. The applicant is recorded as to have stated “*I object*”. It is then that the court is recorded to have cancelled the applicant’s bond and ordered that he remains in custody during his trial.

10. What the foregoing shows is that, what the applicant is insinuating may not at all be true. While it is true that the said court may have called for a pre-bail report when the matter came up for approval of bond, when the matter of the bond having been allowed the previous day was brought to the court’s attention, the court she immediately changed that position and approved the surety.

11. Further, the record shows that the applicant must have heard what the minor complainant told the court on 20<sup>th</sup> May, 2019, as he is recorded as stating that he was objecting to the application by the minor complainant. It is worthy to note that in his affidavit, he does not deny that he told the court that he objected to what the minor complainant had told the court.

12. In this regard, the insinuation of bias has not been proved and I reject the same.

13. The question that therefore remains to be answered is, did the court act irrationally in its order of 20<sup>th</sup> May, 2019. In other words, were the proceedings and order of 20<sup>th</sup> May, 2019 irregular or illegal?

14. The record shows that the matter was supposed to come up for hearing on that day. The presence of the complainant is therefore not abnormal. The Counsel for the applicant did not attend for good reason as the matter could not have proceeded as the trial court was on leave.

15. The record shows that the issue of interference of the prosecution witness was raised after the court gave a date for hearing on 17<sup>th</sup> June, 2019. The fact of the raising of the issue of interference with the complainant does not seem, in my view, to have been raised out of the ordinary.

16. The record shows that after the minor complainant raised her concern, the court gave the applicant the opportunity to respond. It is recorded that he opposed the application but did not deny the issue that had been raised by the minor complainant.

17. As I have already stated, in his affidavit in support of the application, the applicant did not deny that he uttered the words “*I object*” which was recorded by the court. In this regard, I opine that the applicant must have spoken or uttered these words and if so, he must have heard what the complainant told the court.

18. In this regard, the allegation that he was condemned unheard does not arise. When given the opportunity to deny or accept the damning allegations made by the complainant, the applicant decided to sidestep them by only objecting to the prayers the complainant was seeking.

19. Having come to the foregoing finding, what should be the way forward? In the case of **Joseph Lendrix Waswa v. Republic [2019] eKLR**, the Court of Appeal delivered itself as follows:-

***“From the foregoing, it is clear that the Constitution and the VPA gives a victim of an offence a right to access justice and a right to fair trial which rights, as Article 20 (2) provides, should be enjoyed to the greatest extent consistent with the nature of the right. The right to a fair trial as Article 25 provides is an absolute right. The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50 (9) but to be stipulated in a legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to the rights of an accused person to a fair trial”.***

20. From the foregoing, it is clear that while the rights of an accused, should be jealously and strenuously defended, they must be balanced with those of the victim.

21. In the present case, the victim was in court since the matter had come up for hearing. She decided to tell the court her apprehension. Before the court made any order, it gave the accused the opportunity to respond. He did not then deny the complainant allegation. He only objected to being placed in custody for the duration of his trial.

22. The natural human reaction is self-preservation. It is expected that the applicant having heard the damning allegations being made against him at the time, he did not need the presence of his advocate to remember that he had either or not met the complainant, or whether or not he had threatened her. To my mind, his failure to deny the allegation at that time left the trial court with little option, if any.

23. An allegation of threats to the main witness had been made. The relationship of the applicant and the complainant has been said to be that of a father/daughter. That is so close a relationship that undue influence is likely to take place in the event of any contact between the two.

24. Further, since the applicant did not deny the allegation of interference at the time it was made before the trial court, can the court be said to have acted irrationally or irregularly? I doubt. One of the grounds for refusing bail is when there is a likelihood of an accused interfering with the prosecution witnesses.

25. In the present case, the victim herself told the court that the applicant was harassing her and that she was fearful of him. It was not controverted at the earliest opportunity. The denial before this court, may as well be said to be an afterthought.

26. Accordingly, I find that there was nothing irregular that transpired in the granting of the orders of 20<sup>th</sup> May, 2019 by the trial court. However, balancing between the rights of an accused to fair trial and those of the victim, I revise the order to the extent that the applicant's bond will remain cancelled until after the complainant has testified. The applicant can then apply for his bond reinstated unless there be a change of circumstances.

It is so ordered.

**DATED** and **DELIVERED** at Meru this 3<sup>rd</sup> day of June, 2019.

**A. MABEYA**

**JUDGE**