



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPEAL NO. 68 OF 2019

EVANS OMWANSU MOKORO.....APPELLANT

-VERSUS-

DCI GUCHA SOUTH.....RESPONDENT

(Being an appeal against the Ruling of Hon. Denis Mikoyan (SPM) at Ogembo Principal Magistrate's Court dated and delivered on the 11th day of September 2019, in original Ogembo Misc. Criminal Application No. 23 of 2019)

JUDGMENT

1. **Evans Omwansu Mokoro** (*the appellant*) filed a Petition of Appeal dated the 12th September 2019, the same was amended by an amended petition dated the 19th of September 2019 filed on the 25th September 2019. In the said petition he seeks the following orders;

a) The Appeal herein be allowed and the decision and/ or Ruling of the Hon. Principal Magistrate be quashed and the orders be set aside.

b) That the applicant's notice of motion application dated 10th day of June 2019 be dismissed.

c) That there be an order inhibiting the applicant herein and/ or any other officers assignees and/ or any other persons working under the instructions from subjecting the appellant to DNA sampling inconconnection to Ogembo Sexual Offences Case No. 46 of 2019

d) That the costs of the appeal and those of the lower court be borne by the Respondent.

2. The appellant was charged before Ogembo Law Court on the 30th April 2019 in Criminal Case No. SO 46/2019 with the offence of defilement. By an application dated the 10th of June 2019 the Respondent sought to have the appellant undergo a DNA Sampling Procedure to ascertain whether or not the Respondent committed the offence of defilement. In an affidavit dated the 10th June 2019, C I Kenneth Kiruai deponed that a report of defilement and threatening was made at Nyamarambe Police Station vide OB 24/1/5/2018 at 1617 HRS by one D R K a resident of Nyamarambe. He traced the reportee at Migori and recorded the statement of the reportee and her mother R M. On the 10/4/2019 he caused an order to be served to the suspect mentioned in the statement to appear before him for a DNA sampling as required by section 122 A of the Penal Code. According to the deponent the victim was born on the 1/2/2000 and was 17 years old and a child as per the Children Act. Attached to the charge sheet filed in the lower court is the certificate of birth of one D R K which states that her date of birth is 02.09.2000.

3. In a ruling dated the 11th September 2019, Hon. Mikoyan held after considering the parties submissions, that the issues raised on the complainant's birth certificate could not be resolved vide a miscellaneous application. That he had seen the charge sheet at Ogembo Criminal Sexual Offence Case no. 45 of 2019 which indicates the names of the minor aged 16 years, who is a child and whose interest must be protected. Hon. Mikoyan allowed the application. The said ruling is the subject of this appeal.

4. In the petition of appeal the appellant has stated 20 grounds. The appeal was canvassed by way of written submissions. The appellant relied on his grounds of appeal and submitted as follows that where a person is supposed to undergo a DNA profiling to prove a criminal case it must be anchored on 3 facts that; there must be prima facie case against the person the DNA is to take place, it must not be actuated by malice or out to embarrass the person whose DNA profiling is to take place and, there must be compelling reasons. It was further submitted that the person said to be a minor is not minor and is a person above 18 years old. That the affidavit sworn by the victim dated the 11th May 2019 shows that the victim D R K is above 18 years and that the birth certificate shows that she was born on the 10/2/1998. That the affidavit and the birth certificate were filed by the victim in the lower court but the trial court disregarded them and went ahead to have the appellant undergo a DNA test. That there are 2 politicians fighting and they are using the victim for their own political interests. That there is no prima facie case against the appellant and no case under the Sexual Offences Act. That the case in the lower court cannot stand, no witness has testified.

