



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 8 OF 2017

MOSES MUSYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER ON REVISION

1. By a letter dated 13th September, 2017, Messrs Mulinga Mbaluka & Co. Advocate seek revision of an order by **Hon. G. W. Kirugumi Senior Resident Magistrate, Mwingi**. On the 26th day of May, 2017 the learned Magistrate made an order pursuant to the provisions of **Section 36** of the **Sexual Offences Act** directing the Applicant/Accused person to submit himself to the Government Chemist for purposes of obtaining samples for DNA sampling.

2. The Accused was aggrieved by the order on grounds that can be condensed thus:

- i. By making such an order the trial Magistrate appeared to be assisting the Prosecution to conduct investigations in the matter.
- ii. The order made was an act intended to intimidate the Accused and it amounts to violation of his constitutional rights.

He sought an order setting aside the order so that the matter can proceed without him being subjected to an embarrassment.

3. **Section 36(1)** of the **Sexual Offences Act** provides thus:

“(1) 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.”

4. In the case of **Boniface Kyalo Mwololo vs. Republic Misc. Criminal Application No. 69 of 2015 (2016) eKLR Kamuru, J** stated thus:

“Section 36(1) of the Sexual Offences Act does not give an accused person the option of refusing to provide his DNA Sample. The DNA Sample can be provided at any time during trial before the Accused has been put on his defence..... This court holds that when an accused person in a sexual offence is required to provide his DNA Sample it is not a breach of his constitutional right to a fair trial.”

5. The same Applicant moved to the Court of Appeal challenging the constitutionality of the order that he be subjected to DNA sampling in **Criminal Application Nai 1 of 2016 (Boniface Kyalo Mwololo vs. Republic (2016) eKLR)**. In dismissing the application the Court was of the view that **Section 36(1)** of the **Sexual Offences Act** should be read together with **Article 53(2)** of the **Constitution** where the best interest of the child should be of paramount consideration.

6. Having carefully considered the record of the Lower Court and the submission of the Applicant’s Counsel in his letter aforesaid, I find that the order of the learned trial Magistrate was in accordance with the law. It is not intended to intimidate the Applicant/Accused. She acted per the discretion bestowed upon her which cannot be viewed as assisting the Prosecution to investigate the case.

7. In the premises I decline to grant the order sought and direct as follows:

i. The file shall be placed before **Hon. G. W. Kirugumi Senior Resident Magistrate, Mwingi** on the **12th February, 2018** for further hearing.

ii. The Applicant/Accused shall submit himself for purposes of DNA Sampling on a date and a place to be directed by the Judicial Officer.

8. It is so ordered.

Dated, Signed and Delivered at Kitui this 1st day of February, 2018.

L. N. MUTENDE

JUDGE