



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.69 OF 2015

BONIFACE KYALO MWOLOLO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Boniface Kyalo Mwololo is facing several charges under the **Sexual Offences Act** at Makadara Chief Magistrate’s court. He has been charged with two counts of **defilement** under **Section 8(1)** and read with **Section 8(3)** of the Act. He was alternatively charged with two counts of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The prosecution’s case has been substantially heard. The prosecution applied for the Applicant to provide a DNA sample with a view to ascertaining whether the Applicant was the father of the child that was born out of the alleged defilement. The Applicant objected to the application. The trial court upheld the objection by the Applicant and disallowed the prosecution’s application. The prosecution, teaming up with the victim, was aggrieved by the decision and moved this court pursuant to **Section 362** of the **Criminal Procedure Code** for an order of revision and to revise the said decision. The Applicant is opposed to the decision of the trial court on the issue being overturned.

During the hearing of the application for revision, this court heard oral rival submission made by Ms. Owuor for the victim, Ms. Atina for the State and Mr. Kamwendwa for the Applicant. This court has carefully considered the said submission. Having considered the arguments made, this court took the following view of the matter. **Section 36** 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 the offence

...

...

(5) *Where a court has given directions under subsection (1), any medical practitioner or*

designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5):-

(a) shall consist of 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; and

(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with the accepted medical practice."

The Applicant alleged that if he is compelled to give his DNA sample for the purpose of ascertain who the father of the child that was the product of alleged defilement, then it would infringe on his right to be accorded fair trial. He further argued that it would not be in the best interest of the child for such a procedure to be undertaken several years after the alleged defilement. He submitted that the application by the prosecution was belatedly made. He particularly stated that the application was made more than three years after he was charged. He insisted that if he is compelled to provide the DNA sample this would amount to the Applicant being forced to provide evidence which may incriminate him and which is contrary to his constitutional right to fair trial.

On the other hand, it was the prosecution's and the victim's position that if the Applicant is compelled to provide DNA sample, then the issue as to the father of the child will be resolved once and for all. The DNA results may even exonerate the Applicant. They argued that the reason given by the trial court in refusing to allow the prosecution's application for the Applicant to provide a DNA sample was not tenable if the broader interests of justice were to be taken into consideration. They further argued that the law granted the court power to require the Applicant to provide his DNA sample.

This court has carefully considered the rival submission made by the parties to this application. It was clear to this court that the trial court erred when it disallowed the prosecution's application to have the Applicant provide his DNA sample for the purpose of determining the paternity of the child that is the result of the alleged defilement. Sexual offences, particularly where it is alleged there was penetration, are a special category of offences where the prosecution may prove penetration by use of DNA. In the present case, it was alleged that the Applicant left his semen inside the victim that resulted in the conception of the child. The Applicant denied penetration. **Section 36(1)** of the **Sexual Offences Act** (cited above) 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. The trial court therefore erred by refusing to grant the prosecution's request for the Applicant to provide his DNA sample on the flimsy ground that the application by the prosecution had belatedly been made. This court agrees with the prosecution and the victim that the DNA will settle once and for all who the father of the child that was a result of the alleged defilement is. 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 fair trial.

In the premises therefore, the order made by the trial court on 27th March 2015 is set aside and substituted by an order of this court requiring the Applicant to provide his DNA sample within fourteen (14) days of today's date. The results of the DNA analysis shall be produced into evidence by the prosecution. The criminal file that is the subject of this application is remitted back to trial magistrate's court for hearing and final disposal. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE