



**Director of Public Prosecution v Munga (Sexual Offence
E044 of 2023) [2023] KEMC 281 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEMC 281 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E044 OF 2023
ZK KAGENYO, RM
JULY 3, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

HAMISI SALIM MUNGA ACCUSED

RULING

1. The accused person is facing an indictment of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence [Act No. 3 of 2006](#).

The facts are that on the diverse dates between 1st May 2023 and 26th May 2023 at [Particulars withheld] village, Waa location, Matuga sub-county, Kwale county within Coast region, intentionally and unlawfully caused his penis to penetrate the vagina of A.M a girl child aged 11 years.

2. He is facing an alternative count of committing an indecent act with a child contrary to section 11 (...) of the [Sexual Offences Act](#) No. 3 of 2006.

The facts of the case are that on the diverse dates between January 2023 and 7 June, 2023 at [Particulars withheld] village, Golini location, Matuga sub-county, Kwale county within Coast region, intentionally and unlawfully caused his penis to touch th vagina of A.M a girl child aged 11 years. (sic)

3. The accused denied the charges and as is his right, through his counsel Mr. Mbwiza, applied to this court for release on reasonable bond/ bail terms.
4. When Mr. Mbwiza rose to make the application, he told the court that he had had the occasion to talk to the complainant/ victim through her mother who is the wife to the accused person, and they have shown the intention to have this matter resolved as soon as possible because they live together as a family.



5. He urged this court to release the accused person on bond as it is his first time to come into friction with the law and it is only for the rigidity of the law that this court cannot at this stage be seized with full information surrounding this matter which otherwise would be a game changer in its decision making.
6. On its part, the prosecution opposed the accused from being released on bond pending trial. The prosecution gave their reason against the release on bond as due to fear of witness interference. It was the prosecution's position that the victim is just but 11 years old and there was apprehension that if the accused is released on bond, as the step-father to the victim would interfere with the minor by way of among others intimidating her.
7. The prosecution however proposed that if the accused person was to be released on bond, the court do so only after the recording of the evidence of the minor victim.
8. In response thereof the accused through his counsel told this court that the child's mother is not married to the accused person and that he is not a father in any way to the child as the love affair, if any existed, between the accused and the complainants father started just some five months ago.
9. Mr. Mbwiza told this court that the genesis of the charges before this court is vengeance and spite on the part of the complainant's mother against the accused for the accused's slackness in marrying her. After the dispute herein, it was the submissions by the Defence that the accused never lives together with the complainant and her mother.
10. As he concluded, Mr. Mbwiza prayed the court to grant the accused bail/ bond but urged the court that if the same cannot be granted at this stage, the court could only delay the same pending the taking of the minor victim's evidence wherefrom the court could grant bond. However, he urged the court to, in the unlikely event that it delays the granting of bond as proposed, expedite the matter to the earliest date possible.

Analysis and determination

11. The right to bail and bond pending trial is a constitutional right under Article 49 (1) (h) of *the Constitution* which provides that,

An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.
12. It is my view that the reasons need not be multiple, but one reason could be sufficient. Further, this being an interlocutory application in a criminal case, it is my view that the standard of proof is on a balance of probabilities as opposed to beyond reasonable doubt. The court in other words, has to just be persuaded that it is more probable than not that something may or may not happen.
13. The prosecution has submitted that they have fears that the witness shall be interfered with by the accused person. This court takes with great emphasis the position of witnesses in any trial. Without a witness, any case is as good as dead.
14. On one part, the prosecution states that the accused is the step father to the victim a position which is contested by the defence and submits that the same was neither substantiated nor proven.
15. However, on the other hand, the defence admits that there was a relationship between the accused and the victim's mother even though it was just 5 months old and continuing only to be put into a halt by the present charges. The defence maintained that the charges are fabricated and motivated by vengeance. Further, I note that in the first court appearance, the defence described the complainant's mother as the wife of the accused.



16. This court is alive to the possibility of fabrication of charges against another to achieve whatever motive by abuse of the criminal justice system. The drafters of our laws were equally alive to that fact and that is why such sections as are to be found in Chapter XI of the *Penal Code* on Offences Relating to the Administration of Justice were developed. I therefore cannot rule out that these charges were fabricated or not as at this stage my mind is a vacuum as far as the facts of the case are concerned and I cannot pre-empt a case of either party.
17. On the other hand, as much as I am alive to the possibility of fabricating the charges, I am equally alive to the possibility of witness interference and the drafters of our laws were equally alive to that possibility by over and above the provisions of Chapter XI of the *Penal Code*, as early as 2006, enacted the *Witness Protection Act*, 2006 for such purposes. In essence therefore, it would be unjust to favour either version by the two antagonistic parties at this stage.
18. However, taking into account the centrality of a witness in a criminal case, and appreciating that there is undisputed evidence that the accused and the complainant's mother had an intimate relationship however fleeting, it is my view that it is more expedient to temporarily sacrifice the liberty of the accused person with the hope of maintaining the sanctity of the victim's evidence.
19. As such, the bail/ bond of the accused person shall be held in abeyance pending the taking of the evidence of the complainant child herein.
20. As requested by the defence, this case shall be expedited. The case has a hearing date of 22nd day of August 2023 and holding all factors constant, the evidence of the child shall be recorded thence.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 3RD DAY OF JULY 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Archibald Kimbada - Court Assistant.

Ms. Mwaura, PPC, for the State

Mr. Mbwiza for the accused person.

Hamisi Salim Munga – The Accused Person

