



**HFM (Suing through his next friend and father FM) v Attorney
General; Director of Public Prosecution (Interested Party) (Petition
E001 of 2025) [2025] KEHC 17520 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

PETITION E001 OF 2025

JN ONYIEGO, J

NOVEMBER 28, 2025

**IN THE MATTER OF ARTICLES 1,2,10,19,20,21,22,23,27,28,29,50,53,157
AND 165 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA
AND IN THE MATTER OF VIOLATION OF THE RIGHTS TO EQUALITY AND FREEDOM
FROM DISCRIMINATION, FAIR TRIAL AND BEST INTEREST OF THE CHILD**

AND

**IN THE MATTER OF JUDICIAL INTERFERENCE WITH THE
PROSECUTORIAL MANDATE OF THE DIRECTOR OF PUBLIC
PROSECUTION UNDER ART 157 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CRIMINAL CASE NO. SO E002
OF 2025 AT THE MAGISTRATE'S COURT AT WAJIR**

BETWEEN

**HFM (SUING THROUGH HIS NEXT FRIEND AND FATHER FARAH
MADEY) PETITIONER**

AND

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY



JUDGMENT

1. The petitioner herein was charged before Wajir principal magistrate's court vide criminal case No. e002 of 2025 with the offence of defilement of a girl aged 15 years. The petitioner allegedly at the age of 16 years then, denied the charge thus necessitating the matter to go to full trial. During the hearing, the victim in her testimony denied having been sexually assaulted by the petitioner.
2. Consequently, the ODPP applied to withdraw the case under Section 40 of the *Sexual Offences Act* on grounds that there was no sufficient evidence to sustain a conviction. The trial court however rejected the application and instead ordered the matter to proceed. The court went further to direct the subject (accused), victim and the child born out of the alleged defilement be subjected to extraction of blood samples for DNA examination and analysis to ascertain paternity of the child.
3. It is this direction which prompted the subject through his father to file the subject petition dated 13-08-2025, seeking;
 - a. A declaration that charging the petitioner (a minor) for purported defilement of another minor is discriminatory and unconstitutional.
 - b. A declaration that the trial court's refusal to permit the DPP's withdrawal is unconstitutional and in violation of Article 157
 - c. A declaration that compelling the petitioner to undergo DNA testing in these circumstances violates his constitutional rights.
 - d. An order of prohibition restraining further proceedings in S.O. Case NO.E002 of 2025 at the resident magistrate's court Wajir.
 - e. An order restraining the enforcement of the DNA testing order issued on the 11-8-2025 in Cr. Case No. S.O E002 of 2025 by honourable Francis Xavier Baraka
 - f. Any other relief the honourable court deems fit
 - g. Costs of the petition.
4. Contemporaneously filed with the petition is a notice of motion of even date seeking for orders as follows:
 - i. Spent.
 - ii. That pending hearing and determination of this application and the petition herein, a conservatory order be issued staying further proceedings in CR No. So E002 of 2025 at the Resident Magistrate's Court at Wajir.
 - iii. That pending the hearing and determination of this petition, an order be issued restraining the police, medical institutions or any other person from proceeding with or conducting the DNA tests ordered in CR No. So E002 of 2025 on 11.08.2025.
 - iv. That costs be provided for.
5. The application is supported by the affidavit of FM deponing that he is the father of the petitioner, H.F.M., a minor aged 16 years who was charged in CR No. So E002 of 2025 at the Wajir Law Courts. That the petitioner was charged with the offence of defiling a 15-year-old girl. It was averred that during



the trial, all prosecution witnesses, including the complainant testified that the alleged perpetrator was an adult male and not the petitioner herein. Following this testimony, the prosecution moved the court to withdraw the charges under Section 40 of the *Sexual Offences Act* but the trial court declined the application and instead ordered a DNA test on the petitioner, victim and the child allegedly born out of the alleged defilement.

6. The petitioner/applicant averred that the continued prosecution violated several of his constitutional rights, including the right to equality and non-discrimination under Article 27, the independence of the DPP under Article 157, the right to a fair trial under Article 50 and the best interests of the child under Article 53. The petitioner contended that the order compelling him to undergo DNA testing despite exonerating witness testimony was oppressive and degrading, and that the trial court's refusal to honor the DPP's decision undermined prosecutorial independence.
7. Upon certifying the application urgent, the court granted the second prayer thus staying the trial court's proceedings pending the hearing and determination of the application interpartes.
8. The respondent the Hon. Attorney General did not file any response.
9. Mr. Benard Owuor, a Prosecution Counsel appearing for the interested party, swore a replying affidavit stating that the DPP had instituted defilement charges against the subject on 10.06.2025, and that the accused pleaded not guilty prompting the matter to proceed to hearing. He affirmed that the application to terminate the proceedings had been made in good faith, guided by public interest, the administration of justice and the need to prevent abuse of legal process. Owuor supported the petition, asserting that the trial court's actions were unconstitutional and carried out in bad faith.
10. The court directed that parties file written submissions in disposing of the application. However, when the matter came for interparties hearing, parties compromised hearing of the application and instead opted to hear the petition. Consequently, the petitioner filed his submissions dated 9-10-2025 while the ODPP opted to submit orally.
11. The petitioner in his submissions contended that the ODPP properly sought termination of proceedings after ascertaining from witnesses that the person who defiled the complainant was an adult and not a minor in this case the petitioner. That the refusal to terminate proceedings and ordering for DNA testing was unconstitutional. The Petitioner maintained that such judicial interference violated the doctrine of separation of powers and amounted to an abuse of court process.
12. The petition further asserted that the DNA order infringed on the minor's rights under Articles 28, 29, and 53(2), arguing that it subjected him to degrading treatment and violated his bodily integrity and dignity. He emphasized that the best interests of a child, a paramount constitutional principle, had been ignored especially, given the absence of incriminating evidence. The order was deemed neither necessary nor proportionate, thus failing the constitutional test under Article 24.
13. Additionally, the petitioner contended that the trial court's actions violated his right to a fair trial and the presumption of innocence under Article 50(2)(a), as well as the right to equal protection under Article 27.
14. In support of the petition, reliance was drawn from the Supreme Court decision in the case of Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR where the court emphasized that judicial intervention must uphold constitutional values and structural integrity. The petition concluded by seeking declarations that the trial court's actions were unconstitutional, an order prohibiting further proceedings in the criminal case and an injunction against the enforcement of the DNA testing order.



15. The respondent did not enter appearance. The DPP submitted orally thus adopting the content in their replying affidavit. Basically, they supported the petition.

Analysis and determination

16. I have considered the petition herein and the response thereof together with submissions. Issues that germinate for determination are;
- a. Whether the petition herein seeking to overturn a decision made in a criminal case is the proper procedure seeking to challenge the same.
 - b. Whether the order for DNA testing was unconstitutional
 - c. Whether refusal to terminate the criminal proceedings was unconstitutional
 - d. Whether prosecution of the petitioner a minor for an offence committed jointly with another minor is discriminatory hence unconstitutional
 - e. Whether the prayers sought can issue.
17. The crux of the matter before this court is the refusal by the trial court to allow termination of criminal proceedings in S.O. case No.E002 OF 2025. The ideal process would have been to challenge the decision either through appeal or revision to the high depending on the grounds cited. In my view, the procedure adopted is not the right procedure to challenge a decision made in a criminal case.
18. On the question of ordering Parties in the criminal case and the minor born out of the alleged defilement for DNA, one has to ascertain the objective of conducting DNA. Under section 36 of the [Sexual Offences Act](#), a court is empowered to order for samples to be taken from an accused person if in the opinion of the court it will enable it ascertain whether the accused person committed the offence.
19. In the case of *Evans Wanjala Wanyonyi v Republic (2019)e KLR*, the court held that an essential ingredient in the offence of defilement is penetration and not impregnation.
20. Further in the case of *Williamson Sowa Mbwanga v Republic (2016)e KLR* the court of appeal held as follows;

“As regards the first ground of appeal, it is patently clear to us that whilst paternity of PM’s child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM’s child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See *Twehangane Alfred V. Uganda, CR. APP. NO. 139 OF 2001*)”.

21. The court went further to state thus;

“It is partly for this reason that section 36(1) of the [Sexual Offences Act](#) is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed



the offence, to order that samples be taken from him for forensic, scientific, or DNA testing,. In Robert Mutungi Mumbi V. Republic, Cr. App. No. 5 OF 2013 (Malindi), this Court stated thus regarding section 36(1) of the Act:

“Section 36(1) of the (Sexual Offences) Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

22. Similarly, in the case of R.K. vs J.K.& another (2016)e KLR the court held that a DNA test will not be ordered unless there are clear circumstances that justify the making of such an order.
23. From the above quoted provision and case law, it is apparent that an order for DNA is not perse unconstitutional. It will depend on the circumstances under which such order is made. Where appropriate, DNA can be done as a lawful procedure to unearth certain hidden issues. DNA tests are commonly ordered for in cases relating to, succession (inheritance), child maintenance and sex related offences. It is therefore not a general rule that DNA cannot be done in any event. In sexual related offences it is common for courts to order for a DNA test to be done if the interest of justice demands.
24. In the circumstances, I do not find any wrong committed in ordering for DNA testing hence nothing unconstitutional.
25. As to the unconstitutionality in refusing to allow termination of the proceedings, this court cannot determine that ground under this petition. It can only be canvassed as an appeal question. I will therefore not delve into the merits of this ground as it may jeopardize the likely outcome incase an appeal is preferred.
26. As to the prosecution of the subject(accused) being a minor while the victim with whom it is alleged the act of defilement was committed, the law is clear. It is upon the prosecution to determine whom to charge even when two persons commit the same offence. The prosecution chose to charge one suspect and treated the other suspect as a prosecution witness. There is no discrimination as the same is within the law.
27. As to whether the prayers sought can issue, none has been proven to the required degree. Consequently, although not opposed this court is duty bound to make a finding on merit. See Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchellah & 2 others [2018] KECA 419 (KLR). Accordingly, it is my finding that the petition herein is devoid of any merit hence dismissed. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER 2025

.....

J. N. ONYIEGO

JUDGE

