



REPUBLIC OF KENYA



KENYA LAW
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**Nduku v Republic (Criminal Revision E085 of 2025)
[2026] KEHC 5436 (KLR) (24 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E085 OF 2025
FN MUCHEMI, J
APRIL 24, 2026**

BETWEEN

NICKSON MUTISO NDUKU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application coming up for determination is undated and it seeks for orders of review and setting aside of the lower court's orders directing the applicant to undergo a DNA test.
2. In opposition to the application the respondent filed grounds of opposition dated 19th February 2026.

The Applicant's Case

3. The applicant states that he is currently facing prosecution in Thika Chief Magistrate MCSO E001 of 2025 for the offence of defilement. The applicant further states that the complainant in her initial statement and testimony, denied knowing him and no credible identification evidence has been adduced to link him to the alleged offence. The applicant states that the prosecution is currently compelling him to undergo DNA testing to prove paternity despite Section 36 of the *Sexual Offences Act* prohibiting DNA testing to be used as a substitute for proper investigations or to cure evidentiary gaps.
4. The applicant argues that compelling him to undergo DNA testing under the said circumstances would amount to a fishing expedition, violate his constitutional right to a fair trial and offend the principle of non self incrimination. Further, the applicant argues that the matter before the trial court is one of defilement with its independent elements that are bound to be proved and not paternity of the child. The applicant further states that paternity alone does not prove commission of a sexual offence.



5. The applicant states that he stands to suffer irreparable prejudice, including the violation of his bodily integrity and dignity without lawful justification.

The Respondent's Case

6. The respondent relies on Section 36 of the *Sexual Offences Act* and states that taking DNA samples is lawful and not contrary to a fair hearing. Further, the same does not amount to self incrimination as the law empowers the court to give such orders. The respondent argues that the applicant will not be prejudiced in any way as he will have an opportunity to cross examine the forensic evidence.
7. Parties put in written submissions.

The Applicant's Submissions

8. The applicant relies on Section 36 of the *Sexual Offences Act* and the case of Republic vs Kithyululu [2016] KEHC 5990 and submits that the DNA request is speculative and amounts to a fishing expedition. The applicant submits that the prosecution has not demonstrated the necessity of the DNA testing and there was no clear evidentiary foundation laid out before or when the said application was made in the trial court.
9. The applicant further relies on the case of Kagunya vs Republic [2024] KEHC 5394 and submits that the unwarranted application for DNA testing undermines fair trial rights as it is being conducted after his arrest and arraignment and after hearing the complainant which means that he will not have an opportunity to cross examine the alleged test.
10. The applicant submits that calling for a DNA test currently will be used to implicate him in the case therefore infringing his right under Article 50(2)(1) of *the Constitution*. The applicant further submits that the respondent has failed to demonstrate necessity or proportionality of their application.

The Respondent's Submissions

11. The respondent relies on Section 36 of the *Sexual Offences Act* and the cases of Republic vs Timothy Mwenda Gichuru & 2 Others [2017] eKLR and Stephano Ngigi Maigwa vs Republic [2022] eKLR and submits that where a link between the accused and the offence is not clearly established, failure to conduct DNA testing may be fatal to the prosecution case.
12. The applicant filed further submissions and argued that the court in Republic vs AML [2019] eKLR underscored that while Section 36(1) empowers courts to order DNA sampling, such direction must be exercised cautiously and in conformity with Article 50.

The Law

13. The High Court's power of revision is set out in Article 165 (6) and (7) which provides:-
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.



14. Section 362 of the Criminal Procedure Code provides:-

The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

15. Section 364(1) of the Criminal Procedure Code provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may -

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - b. In the case of any other order other than an order of acquittal alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

16. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

17. Section 36(1) of the *Sexual Offences Act* provides:-

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.

18. In the case of *Boniface Kyalo Mwololo vs Republic* (2016) eKLR the accused was charged with defiling a girl aged 11 years. He denied committing the offence and the trial dragged for sometime and in the course of the trial, the victim gave birth as a result of the alleged defilement and the prosecution, like in the present case made an application seeking an order that the applicant be subjected to a DNA test to be carried out to ascertain if he was the biological father of the victim's baby. The application was disallowed by the trial court but on review, the High Court allowed the application holding that when an accused person in a sexual offence is required to provide DNA sample, it is not a breach of his constitutional right to a fair trial. The Court of Appeal upheld the High Court's decision and 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.

19. I have carefully perused the lower court record and noted that the order by the learned magistrate was made in a case of defilement where the accused is charged with defiling the complainant aged 15 years at the time of the offence. The complainant is said to have become pregnant as a result of the sexual encounter and given birth to a baby a few months ago. The complainant has already testified before the court. The purpose of the trial court in ordering DNA is for prosecution to present the DNA results



in court as evidence in their case. The said test could not have been ordered before the baby was born considering the normal pregnancy term of nine (9) months.

20. The record shows that the applicant objected the application by the prosecution saying it was too late to bring in the additional evidence. The court nevertheless, gave orders for conducting the test.
21. It is my considered view that the hearing of the case had to commence during the term of the pregnancy and that such evidence would not have been procured earlier given the normal pregnancy term of approximately nine (9) months. I disagree with the applicant that sending him for a DNA test is a fishing expedition by the respondent. He further argues that the test, if carried out will be a violation of the constitutional rights of fair hearing.
22. It is imperative to note that the DNA test is drawn from the fact that a baby resulted from the sexual encounter that forms the subject of the charge. I find the case of Boniface Kyalo Mwololo (*supra*) directly applicable herein where the Court of Appeal declined to set aside the trial court's orders for a DNA test to be conducted. The order of the magistrate is not a fishing expedition, in my view. Neither is it a violation of the right of fair hearing in that, once the said evidence is presented, the applicant will be allowed to cross-examine the expert witness on the report. Should the court find that the applicant has a case to answer, the applicant will be entitled to give his defence and challenge the entire evidence of the prosecution.
23. I come to the conclusion that the orders for the DNA test made by the trial court on 24/9/2025 are proper and are within the law in that the case the accused is facing is of a criminal nature and that such evidence was not available at the time the trial commenced. The nature of the case against the accused is such that he is not protected from his rights of privacy under *the Constitution* of Kenya.
24. Consequently, I find no merit in this undated application and I hereby dismiss it with no order as to costs.
25. The original file Thika Criminal (S.O.) case No.E001/2025 shall be returned forthwith to the trial court for further hearing.
26. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF APRIL 2026.

F. MUCHEMI

JUDGE

