



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & G.B.M. KARIUKI, JJ.A)**

**CRIMINAL APPLICATION NAI 1 OF 2016**

**BETWEEN**

**BONIFACE KYALO MWOLOLO.....APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An application for stay of the orders of the High Court of Kenya*

*at Nairobi (Kimaru J.), dated 9<sup>th</sup> day of January 2016*

*in*

*Cr. Misc. Application No. 69 of 2003)*

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**RULING OF THE COURT**

[1] On 30<sup>th</sup> August, 2011, Boniface Kyalo Mwololo, (applicant) was arraigned before the Chief Magistrate's Court at Makadara where he was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the Sexual Offences Act. The particulars of the charge stated that on the 29<sup>th</sup> day of June 2011, at Kyangombe in Embakasi, Division within Nairobi County, he intentionally caused his penis to penetrate the vagina of C.A a girl child aged 11 years. The applicant also faced an alternative count of indecent assault of a child contrary to **Section 11 (1)** of the Sexual Offences Act. He pleaded not guilty to both charges. Almost 5 years down the line, the hearing of the criminal case is yet to be concluded. We were told during the hearing of this application that further hearing is scheduled for October 2016. The delay in finalizing this case is a clear demonstration that access to justice of victims of alleged sexual offences is a huge challenge. It is indeed burdensome to a child victim or indeed any other victim to attend court continuously for 5 years to testify about an alleged sexual abuse as the inordinate delay may present a different scenario; this victim will be 5 or more years older by the time the matter is concluded.

[2] Be that as it may, the record of proceedings shows that the criminal trial was adjourned on several occasions, there were applications for adjournment by defence; the minor victim also gave birth as a result of the alleged defilement, but what caused the major delay that has now snowballed into the present application was an application made by the prosecution on 2<sup>nd</sup> September 2013 seeking an order that the applicant be ordered to provide DNA samples. At that point in time, counsel for the applicant told the trial

magistrate, Hon. C.A Otieno, that a similar application was made before Hon. Kinaro and it was declined. The hearing seemed to have stalled further until the 2<sup>nd</sup> February 2015, when it was before another magistrate, Hon. C.A Ocharo and the prosecutor intimated that the prosecution still needed a DNA testing to confirm the father of the victim's child. The issue of the applicant providing DNA samples was finally argued on 20<sup>th</sup> February 2015. The application was disallowed by a ruling delivered on 27<sup>th</sup> March 2015.

[3] A request for revision of the above order was made by James X. Kironji, Advocate for the victim by a letter dated 18<sup>th</sup> May, 2015, which fell for hearing before Kimaru J. in exercise of the powers granted to the High Court vide Section 362 of the Criminal Procedure Code. This is what the learned trial judge held in a pertinent portion of the ruling which is the subject of this application;

**“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 DNA will settle once and for all who the father of the child that was a result of the alleged defilement is. The court holds 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.”**

[4] Pursuant to the aforesaid ruling, the applicant is desirous of appealing against the said orders and he filed a Notice of Appeal on 22<sup>nd</sup> February 2016, which was followed hot on its heels by an interlocutory application by way of a Notice of Motion brought under the inherent jurisdiction of the Court, but during the hearing, Mr. Kamwende told us the motion is predicated under **Rule 5 (2) (b)** of the Court of Appeal Rules. He also told us prayer No. 2 was overtaken by events as the applicant has already been subjected to DNA testing. Counsel however argued the application in regard to prayer No’s 4 and 5 which seek the following;-

**“1. That pending the hearing and determination of the applicant’s intended appeal and /further orders this honourable court, the orders made on 9/2/2016 in Nairobi High Court criminal Misc. application no 69 of 2015 requiring the results of DNA analysis aforesaid to be used as evidence by the prosecution in Makadara Chief Magistrate’s criminal case no 4083 of 2011 (Republic v Boniface Kyalo Mwololo) be stayed.**

**2. That this honourable court be pleased to issue an order of stay of proceedings or any further proceedings in Makadara Chief Magistrate’s criminal case no 4083 of 2011 (Republic v Boniface Kyalo Mwololo) pending hearing and determination (sic) applicant’s intended appeal and/or further orders of this honourable court.”**

5. In his address to us, Mr. Kamwende for the applicant submitted that under the inherent jurisdiction, the Court has unfettered discretion to order a stay of criminal proceedings so that the intended appeal is not rendered nugatory; the intended appeal raises serious constitutional issues torching on the applicants rights to a fair trial if he is forced to give samples for DNA testing which would otherwise be incriminating in a criminal trial; the judge was also faulted for failing to find that a victim cannot usurp criminal proceedings and file an application under **Section 362** of the Criminal Procedure Code, whereas the powers of prosecution are granted only to the office of the Public Prosecution who should act independent of any body or person. Further counsel submitted that under **Section 36 (1)** of the Sexual Offences Act, the trial court has the discretion to either order or decline to order an accused person to provide DNA sample; in this regard the trial magistrate was justified to find there was inordinate delay which was a reasonable ground to decline to accede to the request for DNA testing.

[6] This application was opposed by Mr. Murithi, learned Principal Prosecuting Counsel and Mrs Owour learned counsel for the victim. Mr. Murithi submitted there was no basis for stopping criminal proceedings slated for further hearing on 24<sup>th</sup> October 2016. According to him after the victim testified on 16<sup>th</sup> August 2012, between that date and 2<sup>nd</sup> September 2013, when the prosecution made the initial application for DNA testing, there was no delay; further the trial magistrate was transferred and time passed as the matter moved from one magistrate to another. Counsel went on to submit that under Section

36 (1), of the Sexual Offences Act, a court has discretion to order DNA testing, and that evidence can be used to ascertain whether or not the accused person committed an offence under the Act. In this case, there is no violation of the applicant's constitutional right to fair trial as the law provides for forensic testing which is the surest way of ascertaining the truth. Those provisions do not give an accused person an option to refuse to give DNA samples. Moreover, the prosecution is yet to close its case in which case any witness can be recalled.

[7] The applicant thus cannot claim that he will suffer prejudice as he can apply to recall any witness. Counsel went on to submit that proceedings under the Children Act are inquisitorial in nature as the best interest of the child is always of paramount consideration. On the allegation that the application for review of the order declining to grant an order for DNA testing was made by counsel for the victim, counsel for the State submitted that did not cause any prejudice to the applicant as the application was made in the interest of justice and in furtherance of the best interest of the child.

8. Ms Owuor for the child victim made reference to the provisions of **Article 50 (9)** of the Constitution that provided for an Act of Parliament to Protect Victims, and there was enacted the Victim Protection Act, 2014 which makes provisions for the court to take into account the views of the victim, which can also be brought to court on behalf of the victim by a representative and in this case counsel for the victim applied for the review of the order by the magistrate in the High Court. The fair trial principle does not only protect an accused person, but also the victim, the court is bound to observe the rules of evidence regarding evidence that is admissible. When trial began, the victim was not represented, along the way the victim gave birth and counsel drew our attention to a portion of the proceedings where the victim was stood down because she had just given birth and was breast feeding a child aged 45 days. Counsel urged us to disallow the application that is only meant to frustrate the hearing and determination of the criminal case facing the applicant.

[9] In a brief rejoinder, Mr. Kamwende emphasized that should the DNA results be positive, that evidence that was taken against the will of the applicant is incriminatory and it violates the rights of the applicant; the evidence should be excluded by dint of the provisions of **Article 50** of the Constitution, as DNA will infringe on the applicants right to privacy which is also a fundamental right guaranteed under **Article 31 (1)** of the Constitution. Counsel urged us to allow the application as the appeal raises arguable points of law.

[10] This is an interlocutory application, pending the hearing and determination of the appeal. Although the provisions of the law under which it is brought is not indicated, it is for all intent and purposes an application under **Rules 5 (2) (a)** of the Court of Appeal Rules that provides;

“...**The Court may-**

a. **In any criminal proceedings, where notice of appeal has been given in accordance with Rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal.”**

11. During the hearing of the application counsel for the applicant told us this is an application under **Rule 5 (2) (b)** of this Court Rules. The jurisdiction of this court under **Rule 5 (2) (b)** is civil in nature and therein this Court can grant three kinds of orders to wit;

- A stay of execution of the decree or order appealed from;
- An order of injunction
- An order of stay of any further proceedings.

On the other hand, an application under **Rule 5 (2) (a)** the court can issue bail or a stay of execution of a warrant of distress. Clearly the orders sought by the applicant is specifically seeking to stay proceedings in **Makadara Chief Magistrate's Criminal Case No. 4085 of 2011 Republic vs Boniface Kyalo**

**Mwololo** pending the hearing and determination of the applicant's intended appeal and/or further orders of this honourable court.

[12] In our humble view, there is no clear provision under the Court of Appeal Rules to stay criminal proceedings in a magistrate's court; whenever that has been done, it is so sparingly done to avert a blatant breach of the Constitution within the inherent powers of the court to ensure ends of justice. This Court has grappled with the issue in a very long line of authorities. For example in the case of; **Mary Ngechu vs. Attorney General & KACC Civil Application No. NAI 157 of 2012**, a differently constituted Bench of this Court declined an application under **Rule 5 (2) (b)** of the Rules to stay criminal proceedings that were pending before the magistrates court. Mary Ngechu was charged with various criminal counts under the Anti- Corruption and Economic Crimes Act and the Penal Code before the magistrates' court. She filed a constitutional petition seeking the termination of the criminal proceedings on the grounds that the prosecution violated her fundamental rights that are enshrined in the constitution. That petition was dismissed by the High Court. The applicant filed a Notice of Appeal, and an application under **Rule 5 (2) (b)** in which she sought a stay order of the criminal proceedings that were pending before the magistrates' court in Anti- Corruption cases Nos 19 of 2010 and 20 of 2010.

[13] In the Mary Ngechu ruling, this court reviewed several past decisions, the provisions of **Article 164 (3)** of the Constitution and the Appellate Jurisdiction Act, this is what the judges stated;-

**“The jurisdiction of this Court is derived first and foremost from the Constitution and the Appellate Jurisdiction Act as follows;-**

**The Court of Appeal has jurisdiction to hear appeals from-**

- a. **The High Court**
- b. **Any other court or tribunal as prescribed by an Act of Parliament See Article 164 (3) of the Constitution.**

**The Act of Parliament alluded to above, the Appellate Jurisdiction Act, on the other hand provides;-**

**“3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law”**

**By Rules 58, 59 and 75 dealing with both civil and criminal appeals a notice of appeal lodged under these Rules must relate to an appeal from the High Court or the Courts created under Article 162 (2) (c) and (b) of the Constitution...**

**As a creature of the Constitution and statute, this court can only exercise the jurisdiction conferred on it by law. Its jurisdiction to grant orders of stay of execution or further proceedings or injunction or release of an appellant on bail or suspension of execution of any warrant of distress is circumscribed by Rule 5 (2) (b) of the Court's Rules.**

**There cannot be any doubt that his Court cannot stay criminal proceedings in the magistrate's courts in the manner sought in this application because there is no jurisdiction to do so. This court will issue and has issued as demonstrated by decisions we were referred to orders prohibiting magistrate's courts from proceeding with criminal trials where it found evidence that the trial was actuated by malice and abuse of process; where such prosecution was in derogation of the applicants constitutional rights and instituted with the predominant and improper intent to harass and exert pressure on the appellant.”**

14. We are in agreement with the above findings, that each case is considered according to its own merits. It is only in instances where an applicant is charged with offences not known in law, or the prosecution is

not undertaken according to the law, or it is blatantly actuated by malice and meant to harass the applicant, that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice and prevent the abuse of the process. The interests of the applicant and the victim must also be considered within the law and within the overarching parameters that judicial authority is exercised according to the purposes and the principles set out in the Constitution. Justice is like a double edged sword, an instrument that cuts both ways and protects both the accused and the victim in the sense that each and every piece of evidence is subjected to court room processes of examination and cross examination and any dissatisfied party has the liberty to appeal.

15. Is the applicants appeal arguable and if so will it be rendered nugatory? In answering this question we have to exercise abundant caution that we are dealing with an interlocutory application pending the hearing of the appeal which is yet to be filed. Whatever we state in this ruling must not prejudice the determination of the aforesaid appeal or the criminal trial and must not cause any embarrassment to the judges or magistrate who will determine them. The High Court in its supervisory jurisdiction can check the excesses of power that impinge on party's rights that are enshrined in the Constitution. It is in that context the applicant is claiming his fundamental rights to privacy and fair trial were violated by the order of the High Court compelling him to undergo a DNA testing. The applicant in the instant motion is challenging the constitutionality of the order that he be subjected to DNA testing and that the results should not be used in evidence during the criminal trial where he is facing charges of defilement of a child.

**[16] Article 259 (1)** of the Constitution requires the Constitution be interpreted in a manner that promotes, its purposes, values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance. In the instant case, the judge was satisfied in the circumstances of this case, the magistrate was wrong for failing to order DNA testing as provided for under **Section 36 (1)** of the Sexual offences Act. The said law provides where a person is charged with an offence of sexual nature, a court may direct an appropriate sample for purpose of forensic and other scientific testing, including a DNA test. The allegations in the instant case involved a minor, and this is why the aforesaid **Section 36 (1)** should be read together with **Article 53 (2)** of the Constitution which underscores that in every matter involving a child, the child's best interest is of paramount consideration. Also **Section 4 (2)** of the Children Act provides;-

**“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of primary consideration.”**

**[17]** In the face of the above provisions of the Constitution and the law, is applicant's constitutional right to a fair trial going to be breached before the appeal is heard and determined if the trial proceeds. That is obviously a question to be answered in the appeal but on our part at this preliminary stage, we are not convinced. This is because even in ordinary criminal matters, investigations are normally carried out and the outcome is used in evidence. Such investigations include, mentioning just a few; finger printing, sometimes items belonging to a suspect are taken away for further scrutiny which may include forensic examination, this is not always done with the approval of an accused person, but it is gathering of evidence to be used in a criminal trial. In this scenario it has never been alleged that, by a suspect availing their fingerprints, they incriminate themselves in the trial. As we pen off this ruling, we may also add, all courts of law are created by the Constitution and unless a party can point out very blatant breach of the Constitution, a court of law that is mandated to undertake a prosecution cannot merely be stopped.

**[18]** In conclusion, we find this application lacking in merit and we order it dismissed.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of July, 2016.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**MAR THA KOOME**

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**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**