



**Ndung'u v Republic (Criminal Revision E115 of 2023)
[2025] KEHC 9037 (KLR) (Crim) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL REVISION E115 OF 2023
KW KIARIE, J
JUNE 26, 2025**

BETWEEN

JOHN NGERE NDUNG'U APPLICANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case NO. E047 of 2023 of the Senior Principal Magistrate's Court at Ol Kalou by Hon. Judicaster Nthuku – Principal Magistrate)

RULING

1. The applicant approached the court by way of Notice of Motion under sections 362, 364(1)(b), and 367 of the [Criminal Procedure Code](#), as well as Articles 25(c), 50, 159, and 165(6) & (7) of [the Constitution](#) of Kenya. He is seeking the following orders:
 - a. This honourable Court be pleased to certify this Application as urgent, dispense with service in the first instance, and the same be heard ex parte in the first instance.
 - b. This Honourable Court is pleased to call for the Ol Kalou Magistrate's Court record in Sexual Offences Case No E047 of 2023- Republic versus John Ngere Ndungu for purposes of revising and/or vacating the orders made on the 20th November, 2024, dismissing the Accused/ Applicant's application dated the 19th November 2024.
 - c. That the Honourable Court be pleased to review and set aside the ruling of honourable Judicaster Nthuku PM issued on 20th November 2024 dismissing the accused/applicant's application dated 19th November and subsequently directing the Accused/ Applicant to proceed with the defence hearing of the case despite being re and close his defence case.



- d. That this Honourable Court be pleased to issue orders staying farther proceedings in Olkalou Magistrate's Court Sexual Offences Case No E047 of 2023- Republic versus John Ngere Ndungu before the Principal Magistrate Court in Olkalou (Honourable Judicaster Nthuku PM) pending the hearing and determination of this application.
 - e. That this Honourable court be pleased to order Re-taking of DNA sampling and testing in respect of the Accused/ Applicant herein, the complainant MNT and the complainant's child, KKN in another government lab other than the Nairobi Government Chemist.
 - f. That this Honourable Court be pleased to set aside the defence hearing proceedings of the 20th November, 2024 in Olkalou Court Magistrate's Sexual Offences Case No E047 2023- Republic versus John Ngere Ndungu and order fresh hearing of the defence case upon acquisition of the second Government analyst report regarding the DNA test in respect of the Accused/ Applicant herein, the complainant MNT and the complainant's child, KKN as shall be directed by this Honourable court.
 - g. That this honourable court be pleased to order the Magistrate court No. I to recuse herself from hearing the matter on the ground that she is biased.
 - h. That the Court be pleased to grant any other order in the circumstances to protect the Constitutional rights of the Applicant.
2. The application is premised on the following grounds:
- a. The accused person herein has been charged with the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* 2006, with corresponding alternative charge of Committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* 2006.
 - b. During the hearing of the prosecution case on the 8th April 2024, when the accused person challenged the testimony of the complainant in cross-examination, the court on its own motion ordered that DNA test between the accused person and the minor allegedly born out the instant offence.
 - c. Subsequently, the accused person, the complainant and the minor, subject of the alleged gang defilement were escorted to government chemist Nairobi for taking DNA samples and testing.
 - d. During the samples taking process aforementioned, the accused person was locked out from the process as his samples were collected separately form the other two parties.
 - e. The collection of the samples in respect of the complainant and her child was not done transparently to intentionally and unlawfully manipulate the results to the accused person's disadvantage.
 - f. There are reasons to believe that the collection of DNA samples was manipulated by the Investigating officer and the government chemist official who collected the samples to influence the result to the accused person's detriment.
 - g. On July 9, 2024, the accused person applied orally for resampling and re-testing of the DNA samples for the Accused person, the complainant, and the complainant's child. The trial court completely and without any reason disregarded and dismissed his application.



- h. On September 17, 2024, when the Government analyst was called to testify, the accused person again applied to have a second DNA testing at his own cost, but the court verbally declined and asked the accused person to make a formal application for it.
 - i. The accused person subsequently sought the services of an advocate and on the 19th November, 2024, the firm of Langat Odoyo & Co Advocates filed the application dated 19th November, 2024.
 - j. On the 20th November 2024, the trial court dismissed the application stating that DNA results was not required to prove the offence of gang defilement despite the court having ordered for the same and went ahead and ordered the accused advocate to proceed with the defence hearing.
 - k. When counsel sort time allocation to prepare for defence hearing, the trial court denied counsel the opportunity citing that in the court's ruling dismissing the application, she directed that the matter proceeds and therefore hers was *funtus officio*. The matter therefore proceeded for defence hearing and a judgment date was set as 11th December, 2024.
 - l. The trial court's conduct in this matter was grossly unjustified and unfair to the accused person and call for this honourable court to intervene in order to accord justice to the accused/ applicant herein.
 - m. The true and accurate DNA test result will completely absolve and vindicate the accused person who had robustly challenged the testimony of the complainant in trial
 - n. The accused person will need to rely on the true and accurate DNA test result for his defence
 - o. It is in the interest of justice that this application be certified urgent and heard without further delay.
3. Respondent opposed the application on the following grounds:
- a. That no plausible explanation has been tendered.
 - b. That DNA is not an ingredient for the proof of gang rape.
 - c. That the application lacks merit.

4. The *Criminal Procedure Code* provides the High Court with jurisdiction to revise criminal matters decided by lower courts under section 362 in the following terms:

The High Court may call for 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.

Therefore, the court's revision is limited to ensuring the correctness, legality, and propriety of any findings, sentences, or orders made by the subordinate court.

5. Section 364 (5) of the *Criminal Procedure Code* restricts the revisional jurisdiction in the following as follows:

When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.



6. In the instant case, the applicant should have submitted his application along with the impugned ruling of the trial court. This would have clarified to this court whether the application for review is merited and whether the ruling is in the purview of an appeal.
7. Reading the applicant's submissions shows that this application challenges the adduced evidence. It therefore offends section 364 (5) of the *Criminal Procedure Code*. I find that the application has no merits, and it is dismissed.

DELIVERED AND SIGNED AT NYANDARUA THIS 26TH DAY OF JUNE 2025

KIARIE WAWERU KIARIE

JUDGE

