



**Republic v Githinji (Criminal Miscellaneous Application E077 of 2023)  
[2024] KEHC 12042 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12042 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL MISCELLANEOUS APPLICATION E077 OF 2023  
DKN MAGARE, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MATHEW NDEGWA GITHINJI ..... RESPONDENT**

**RULING**

1. This is a Ruling over a Notice of Motion application dated 18/12/2023 by the Applicant seeking to review sentence.
2. The Application seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. The orders of the trial magistrate delivered on 5/12/2023 by Hon. Anastasia Ndungu Principal Magistrate allowing the defence to call a witness who has already testified for the State to also testify for the defence be revised.
3. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
  - a. The Prosecution closed its case with 4 witnesses on 27/7/2023.
  - b. The trial court found a prima facie case against the Respondent.
  - c. The Respondent gave sworn testimony and called Julia Muthoni Githinji who was the second witness of the prosecution.
  - d. The prosecution objected but the objection was overruled.



- e. The trial magistrate was grossly erroneous and could cause miscarriage of justice.
4. The Applicant filed submissions dated 8/7/2024 and submitted that the trial court was grossly erroneous in allowing the witness to testify both for the prosecution and the defence and this would prejudice the prosecution's case.
5. Reliance was placed on *Republic v Jane Muthoni & Another* (20121) eKLR based on which it was submitted that it was prejudicial to the prosecution's case as it would also prejudice the ruling of the court on prima facie case against the Respondent herein.

### Analysis

6. The issue is whether the decision of the trial court permitting the defence to call a witness who earlier testified for the state should be reviewed.
7. The revisionary powers of this court are set out under the law. Under Section 362 of the [Criminal Procedure Code](#) it is provided as follows:

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.
8. Further, Section 367 of the [Criminal Procedure Code](#), on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.
9. I note that the Respondent was charged of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#).
10. The particulars of the offence were that on diverse dates between December 2020 and May 2021, at Kingongo Area in Nyeri Central Sub-County within Nyeri County, intentionally and unlawfully caused his penis to penetrate the vagina of HWM, a child aged 14 years.
11. The Applicant was charged on the second count with the offence of committing an indecent act with a minor contrary to Section 11(1) of the [Sexual Offences Act](#).
12. The trial court considered the evidence by the Prosecution and established a prima facie case against the Respondent who was placed on his defence. The Respondent was also allowed to call one Julia Muthoni Githinji. However, the prosecution objected to calling the said witness on the ground that the same witness had earlier testified for the prosecution as PW2. The trial court however allowed the Respondent to call the witness on the condition that she files and serves her witness statement and documents if any in advance of her testimony. Aggrieved the Applicant filed for revision of the finding of the trial magistrate.
13. In the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohammed Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal



or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.”

14. The Applicant submitted that the finding of the trial magistrate for the witness to testify for both the Prosecution and the Defence case was contrary to law and justice and grossly prejudicial to the prosecution’s case.
15. I have to consider whether there is injustice in the trial magistrate allowing the Respondent to call Julia Muthoni Githinji who testified earlier for the prosecution to again testify for the defence. In my evaluation, the trial magistrate did not commit any prejudice to the prosecution’s case. This was not a case for recalling a witness. The witness was not a commodity to be claimed by either party.
16. The case relied upon by the Applicant Republic vs Jane Muthoni (supra) is distinguished as it related to recalling a witness who had earlier testified for the prosecution to testify against after a case to answer had been established.
17. In the circumstances, I find no reason to interfere with the finding of the trial magistrate.
18. I consequently decline the prayer for revision.

#### **Determination**

19. I therefore make the following order: -
  - a. The Application for revision dated 18/12/2023 be and is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Ms. Kaniu for State

No appearance for the Respondent

Court Assistant – Jedidah

