



JMW & another v Republic & another (Miscellaneous Criminal Application E008 of 2025) [2025] KEHC 6050 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2025**

**M MUYA, J
MAY 15, 2025**

BETWEEN

JMW 1ST APPLICANT

CMW (A MINOR) 2ND APPLICANT

AND

REPUBLIC RESPONDENT

AND

SIMON MAINA WERU ACCUSED

RULING

1. The Notice of Motion application dated 31st January, 2025 seeks the following orders:-
 1. Spent
 2. Spent
 3. That the court do call for and examine the subordinate court record in Mukurweini Magistrates Criminal Case No. MC. SO. E006 of 2024 Republic –Vs- Simon Maina Weru and to check and satisfy itself of the correctness, propriety and legality of the trial process and the findings therein with particular reference to the victims’ rights, participation and representation in the trial, their testimony, their views and concerns therein, any consideration or lack of it accorded thereto by the trial court and the impact thereof on the propriety or otherwise of the entire trial.
 4. That the court be pleased to set aside the entire proceedings of the subordinate court including the judgment and conviction dated 14th January, 2024 in Mukurweini Magistrates Court



Criminal Case No. MCSO E006 of 2024, Republic –Vs- Simon Maina Weru and to order for a retrial of the said case or such other relief as the court may deem just and expedient.

2. In Mukurweini Magistrates Court Criminal Case No. MCSO E006 of 2024, Republic –Vs- Simon Maina Weru, the accused therein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* number 3 of 2006.
3. The particulars being that on the 16th day of April, 2024 at around 11.00 p.m. at Igana Sub-location, Giathungu Location of Mukurweini Sub-County within Nyeri County of the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of CMW, a child aged fifteen years.
4. The accused pleaded not guilty to the charge and the case proceeded to full hearing and determination. The prosecution called seven witnesses to buttress their case. The accused gave a sworn statement and opted to call no witness in his defence.
5. In her judgment dated, the 14th January, 2025, the learned trial magistrate proceeded to convict the accused for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
6. In this application, it is not denied that the minor recanted her evidence in court by denying that it was the accused who had defiled her and insisting that it was somebody else whom she had met outside their home while escaping her grandmother's wrath. She was stood down by the court upon an application by the prosecution. On 29th May, 2024, she reiterated her version of evidence principally based on denial. She denied that it is the accused who had defiled her and pointed a finger at a tall slender man who she had met and who had offered to take her home on the material night.
7. Her grandmother who testified in the lower court as PW2 did not believe that the minor was not defiled by the accused.
8. In her judgment at page 14 last paragraph she did observe that the minor's recantation of her evidence was a mere fabrication for reasons known to herself. She also questioned the minor's character of severally wanting to flee from the accused and her grandmother and also from her other relatives where she spent the night on the material day.
9. When this application was placed before the court it did order for summons to issue to the victim and her grandmother.
10. Before this court the victim testified that on the 16th day of April, 2024, at about 11.00 p.m. her grandfather who is the accused in this case arrived home while drunk. As it was the norm she served him with food in his room which was adjacent to that of her grandmother. She went and picked the phone of the accused and started watching Tiktok videos. At about midnight her grandmother called and asked her why she had not gone to sleep in her room. Meanwhile her siblings were at the sitting room watching cartoons. Her grandmother called out her name in a loud voice and put off the lights and threatened to beat up the victim. The victim opened the main door and came out running to the roadside. She met a tall man who got hold of her, took her to the bushes and proceeded to defile her. Afterwards she ran and met her uncle who took her to a relative's house where she spent the night. The following day she met her grandmother who quarreled her demanding to be told what happened the previous night. Her grandmother told her to implicate the accused with the offence of defilement. She recorded her statement to police implicating the accused. The accused was later arrested and charged with this offence.



11. During the trial she denied that it was the accused who had defiled her. When she was interrogated by a probation officer she insisted that the accused did not defile her.
12. The 2nd Applicant, JM is the victim's grandmother. Her daughter J had entrusted her with her children as she was away in Nairobi. The accused is her brother who had relocated to USA and acquired dual citizenship. He would occasionally visit his relatives and stay in Kenya. On the 16th day of April, 2024, she cooked food as usual and took it to his room but he was not present. At about 11.00 p.m. she went and called her granddaughter but she did not answer. She went and opened the door to the accused room and called him. He asked her why she was very angry with the complainant as she was only watching videos. The girl ran out and she started searching for her. A relative reported to her that he had taken her to a relative's house. The following day she decided to report the matter to the area chief and police. The accused was later arrested and taken to court where he was charged with the offence of defilement. She testified that she did not catch the accused and the victim red handed but she was suspicious that the accused had defiled the victim. The victim had insisted that she had not been defiled by the accused. She even told her own mother what had transpired that night and denied the allegation that she had been defiled by her grandfather (the accused). She denied that she was compromised by the accused to bring this application and to deny that he had defiled the victim.

The Law

13. Under Section 362 of the *Criminal Procedure Code* the High Court is clothed with powers to call for records thus:- "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"
14. Section 364(1) of the *Criminal Procedure Code* Provides:- "In the case of proceedings in a subordinate court, the record of which has been called for or which has been reported for orders, or which, otherwise comes to its 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 the sentence,
 - b. In the case of any other order than an order of acquittal, alter or reverse the orders.
 - c.
15. The gist of this application for revision is that the two applicants in this case who are the victim and her grandmother have consistently denied that the accused person defiled the alleged victim. The two have also denied that they were compromised by the accused so as to testify favourably in his case and on his behalf.
16. In her judgment the learned trial magistrate dismissed the evidence of the victim in which she denied the accused to have defiled her, as mere fabrication and proceeded to convict the accused for the offence of defilement. In the present case, the learned trial magistrate relied on circumstantial evidence largely based on the evidence of the victim who herself had recanted her evidence.
17. It is trite that it would be unsafe to rely on recanted evidence which is basically unreliable and of little evidentiary value as it carries very little weight.
18. The conviction appears to have been based on suspicion. In the case of Joan Chebichii Sawe – Vs- Republic (2003) eKLR, it was held:- "Suspicion, however, strong cannot provide a basis for inferring guilt which must be proved by evidence"



The victim's Protection Act does provide for the rights of a victim during a trial.

19. Section 13 Provides:- "Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to:-
 - a. Subject to the provisions of the Evidence Act, adduce evidence that has been left out'
 - b. Give oral evidence or written submissions"
20. The learned trial magistrate appears not to have been impressed by the victim's character and she did state so in her judgment. Her views were not give any weight by the trial court and she was not given a chance to adduce further evidence which may have been left out.
21. The prosecution does not oppose this application and rightly so, I am in agreement from the reasons given above. This application for revision is merited, the conviction of the accused for the offence of defilement is hereby set aside/revised and an order for acquittal substituted instead. I find no good reason to order for a retrial.

The accused is set at liberty unless otherwise lawfully held.

RULING READ AND DELIVERED IN OPEN COURT THIS 15TH DAY OF MAY, 2025 IN THE PRESENCE OF:-

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M. MUYA

JUDGE

Waiganjo holding brief for Magana for the Applicant/Victim

Musembi for the Accused

Miss. Kaniu for the Prosecution

