



REPUBLIC OF KENYA



**Republic v IRUNGU (Criminal Revision E188 of 2022)  
[2024] KEHC 10676 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 10676 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E188 OF 2022  
DO CHEPKWONY, J  
MAY 17, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JULIUS IRUNGU ..... RESPONDENT**

**RULING**

1. This is a Ruling in respect of a Revision filed herein vide a letter dated 1<sup>st</sup> April, 2022 and filed on 7<sup>th</sup> April, 2022 seeking to have the orders issued by the Trial Magistrate in Kikuyu SPMCC No. 14 of 2018 revised.
2. The Accused herein was charged with the offence of Defilement contrary to Section 8 (1) and (3) of the *Sexual Offences Act* No. 3 of 2006.

The particulars of offence were that;

“On 21<sup>st</sup> March, 2018 at 1600hrs at [Particulars Withheld] of Kiambu County within Central Region, the accused/applicant intentionally caused his penis to penetrate the vagina of MW aged 12 years without her consent.”

3. The case was originated vide the Kikuyu SPMCC No. 14 of 2018 and the trial case commenced. On 15<sup>th</sup> November, 2018. When the matter was coming up for further hearing of the prosecution case on 14<sup>th</sup> March, 2022, Dr. Gerald Mutiso of Wangige Sub County Hospital was not present as it was stated that he was away on official duties but had requested the matter be fixed for 17/3/2022. The Accused objected to an adjournment being granted and stated that the said Doctor had not been coming to court since 2019 and it was becoming expensive for him to come to court from Muranga. He prayed that the court to terminates the proceedings.



4. The State through the Prosecuting Counsel, Ms Abogo indicated that the investigating officer had given an undertaking while oath to avail the witnesses left and that it would be in the interest of the victim and justice to call the Doctor. She even undertook to pay the accused person fare.
5. The Trial Court ruled that the accused was opposed to further adjournment and noted that the prosecution had been granted a last adjournment. He noted that the Doctor and the Investigating Officer had not been coming to court despite being served with summons, which had caused the accused to lament that he had the orders to attend court severally. The trial court held that the state having been aware of the last adjournment and had not availed their witnesses, it declined the application so that justice could be seen to have been done. The court then disallowed the prayer for another adjournment and the prosecution closed its case. The matter was then slated for Ruling on a case to Answer on 31<sup>st</sup> March, 2022.
6. In a letter dated 1<sup>st</sup> April, 2022 and filed on 7<sup>th</sup> April, 2022, the state wrote to court urging that this Court invokes its supervisory jurisdiction over the trial court and review the court orders of 14<sup>th</sup> March, 2022. The state gave the grounds for revision as being that it was not allowed to call an expert witness and the investigating officer who were the remaining witnesses which compelled the prosecution to close the case prematurely.
7. According to the state counsel, the trial court disregarded the explanation given by the investigating officer for the reason of nonattendance of the witnesses and thus disregarded Section 283 of the [Criminal Procedure Code](#) which provides for adjournment and postponement where good cause is shown.
8. The State Counsel contends that the trial court disregarded the fact that the complainant was a minor who was aged twelve years old at the time of the incident and whose interests ought to be protected under the [Children Act](#) and Article 53 of the [Constitution](#). The State Counsel goes on to contend that the trial court's process offended the right of the state and the complainant to fair hearing as provided for under the Constitution.
9. It has therefore urged the court to stay the Ruling on a case to answer and order for the prosecution's case to be re-opened to enable the remaining witnesses, being the doctor and the investigating officer testify.
10. When the application for revision was placed before this court, it was adjourned on several occasions from the time of filing to enable the trial court file be availed, proceedings to be typed, the Accused to be served with the application so he can respond to the same.
11. On 19<sup>th</sup> September 2023, the State Counsel informed the court of his application to reopen the prosecution's case and call the remaining witnesses in the trial court as explained in the application.
12. In response, the accused stated that he was informed by trial court that Hon Musyoka had gone on transfer and there was a new magistrate. That he was then advised that the case had already been concluded. With respect to the application by the State, the accused holds that it was not his fault that the witnesses did not attend court on all those occasions. He stated that the matter had taken long, the trial having commenced in 2018 and it had not been concluded by March, 2022 due to the several adjournments and it had been very expensive for him since he was staying in Muranga. He urged the court to dismiss the application and have the trial court conclude his trial.
13. In rejoinder, the prosecuting counsel told the court that the explanation given to the trial court by the investigating officer was that the doctor was away on official duties and could be available the following



Thursday, which was three days away. He urged the court to consider the rights of the child and holds that it will not be prejudicial to have the matter heard expeditiously.

### **Determination**

14. Having listened to the applicant, State and the Third Respondent/accused in their argument and sentiments on the application for the decision by the Trial Court on 14<sup>th</sup> March, 2022. I have also read through the original proceedings of the Trial Courts record. It is trite the power to determine an application of this nature is made in exercise of the supervisory jurisdiction of the High Court in criminal cases which power is provided donated by the provisions of Sections 362 to 366 of the *Criminal Procedure Code*. The relevant section with regard to the instant case is Section 362 as it provides that:-
  362. 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.
15. In this case, the state is seeking to have the decision of the Trial Magistrate where he declined to grant them another adjournment to call evidence if the doctor who they say was away but had undertaken to attend court in three days time.
16. Given the nature of the case, particularly since it involves a minor child who was allegedly defiled by her own father, someone who is required to protect and raise her, it would have been prudent to give the prosecution a chance to call the remaining witnesses since they are crucial witnesses. The evidence of the doctor was particularly so crucial in that it would assist the court to determine whether the complainant had been defiled or not from the medical evidence that was to be availed.
17. While the court acknowledges that cases should be heard expeditiously, it is more unjust to shut out the prosecution from calling crucial witnesses such as a Doctor, all in a bid to save court's time. The medical evidence is one of the primary factors to be considered in cases of defilement which requires three ingredients of age, penetration and identification/recognition to be proved and so lack of it is prejudicial to the case of a victim, more so if she is a minor. Therefore, the court finds that the trial court erred in denying the prosecution an adjournment especially since the Doctor had requested for a date when he would be availed and the same was simply three days away.
18. For that reason and in the interest of justice to the minor, whose rights ought to be protected at all time, this Court directs that the prosecution's case be reopened and for the hearing of the two remaining witnesses to proceed expeditiously and on priority basis.
19. At this juncture, the court acknowledges that the Trial court may have been transferred and hence directs the file to be taken back and placed before the Chief Magistrate in Kikuyu Law Courts for allocation before another Magistrate of competent jurisdiction to proceed with hearing the case to finality.
20. It is hereby ordered.

**RULING DATED AND SIGNED AT KIAMBU THIS 17<sup>th</sup> DAY OF MAY,2024.**

**D.O. CHEPKWONY**

**JUDGE**

In the presence of;



M/s Ndeda counsel for the Applicant

Non-appearance for Respondent

Martin - Court Assistant

