



**Republic v Kinyanjui alias Mau (Criminal Case E018 of 2023)  
[2023] KEMC 311 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEMC 311 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CRIMINAL CASE E018 OF 2023  
PA NDEGE, SPM  
AUGUST 1, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOHN KAMAU KINYANJUI ALIAS MAU ..... ACCUSED**

**RULING**

1. A *Voire dire* examination is conducted when a child of tender years is called as a witness, to determine whether the child possesses cognitive skills of satisfactory intelligence as well as truthfulness of the proposed child witness, and whether they understand the nature of an oath in which case their sworn evidence may be received.
2. When a child of tender years is called as a witness it is up to the judge or magistrate to determine whether the child is competent to adduce evidence before the court of law. Sec 19 of the [Oaths And Statutory Declaration Act](#) (Cap 15) laws of Kenya provides that evidence of such children of tender years might only be received where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
3. In reference to the case law [Julius Kiunga M'birithia v Republic](#) (2011) eKLR the court held as follows as to the purpose of sec 19 of the [Statutory And Declaration Acts](#) where a child of tender age is called as a witness in a proceeding, there are two things the trial court must be severally satisfied about, namely;
  - a) whether the child understands the nature of an oath; or



- b) if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
4. The inquiry should graduate to the second level if the child does not understand the nature of the oath; then the trial court should determine if he possesses sufficient intelligence to justify the reception of the evidence, and he understands the duty of telling the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. But in both instances, the child is liable to cross-examination.
5. Competency of the witness embodies perception, recollection communication and appreciation of oath of affirmation. To test their intelligence, they should be able to understand questions put to them and answer the questions brought forth. Witnesses do not give evidence under oath if they do not have sufficient understanding and appreciation of the responsibility to tell the truth under oath. However, if they are competent but do not understand the nature of an oath they may give evidence unsworn.
6. The witness proposed herein (M. W.) could not answer some basic questions, I therefore find her level of intelligence wanting and insufficient for purpose of adducing evidence, whether sworn or unsworn. The witness does not possess the necessary capacity to adduce evidence. I therefore do hereby find it superfluous or unnecessary to have her in the dock as witness in this court of law. The prosecution to explore other avenues lawfully available to have the evidence which she was to present, presented herein, including and possibly by the use of intermediary or any other lawful means at its disposal.

**DATED, SIGNED AND DELIVERED AT NAKURUIN OPEN COURT 01<sup>ST</sup> DAY OF AUGUST 2023**

**HON A. P. NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of:

Accused present: Present

Prosecutor: Chinga

Court Assistant / Interpreter: Janet

Victim: n/a

Victim's guardian: n/a

