



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**HCCRREV. E016 OF 2025**

**MARTIN KINOTI KABURU .....**

**APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION .....**

**RESPONDENT**

**RULING**

1. Martin Kinoti Kaburu, the Petitioner herein, was charged in the Lower Court with the offence of defilement, contrary to **Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006.**

2. The particulars of this offence are that on the 23<sup>rd</sup> day of December, 2021 at Gaturi village, Abogeta Location in Imenti

South Sub County within Meru County, the Petitioner intentionally and unlawfully caused his penis to penetrate the vagina of Irene Makena (I.M), a child aged 15 years old.

3. The Petitioner also faced an alternative charge of indecent act with a child, contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars hereof being that on the 23<sup>rd</sup> December, 2021 at Gatari Village, Abogeta Location in Imenti South Sub-County within Meru County, the Petitioner intentionally and unlawfully caused his penis to come into contact with the vagina of I.M, a child aged 15 years old.

4. The trial Court heard the case and found the Petitioner guilty of the offence in the main count. He was consequently convicted of it and sentenced to serve 20 years imprisonment.

5. Dissatisfied with the said conviction and sentence he appealed to this Court and in a finding by Hon. Justice L. Kassan, the Appeal was dismissed on 17<sup>th</sup> of July, 2024.
6. He has now preferred a petition before this Court under **Article 50(6)(a)(b) of the Constitution of Kenya 2010**, on the grounds that he has come into possession of new and compelling evidence in form of an Affidavit, which was not there during the trial and Appeal at the High Court.
7. The said Affidavit is sworn by one Makena Irene the victim in the case and is dated 11<sup>th</sup> day of April 2025. She has in it recanted her previous evidence in the trial of which she had offered evidence as PW-1.
8. At paragraph 5 and 6 of her affidavit, she avers that she had a love relationship with a boy called Dennis Munene who was schooling then at Kiriana Boys High School, in form 2.
9. During the December Holidays, on 21/12/2021 the said boyfriend visited her home area and they met at a

neighbouring farm owned by the father of the Petitioner, where they had sexual intercourse. She became pregnant out of it.

10. Her parents had a boundary dispute with the father of the Petitioner and when they learnt about the incident urged the victim to state it is the Petitioner who defiled her.

11. The Petitioner, given the disclosure, now urges this Court to order that the victim records afresh statement and the matter goes to retrial.

**Article 50(6)(a) and (b) of the Constitution of Kenya 2010** reads:-

**(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if:-**

**(a) the person's appeal, if any, has been dismissed by the highest Court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal;**

**(b) new and compelling evidence has become available.**

12. In making a determination on the issue, I have noted that the Petitioner in his defence had raised an alibi which was supported by his wife. It's also a fact that the victim conceived out of the alleged incident. However in her new sworn affidavit she does not indicate whether she gave birth or what happened about the said pregnancy. She has also disclosed the real culprit, one Dennis Munene.

13. In **JWM & Another -vs- AG and Another (2012) eKLR.**

The High Court recognized that recanted testimony by key witnesses could be compelling if:

- 1) It was not available at trial,
- 2) It is believable and credible, and
- 3) It cast serious doubt on the safety of the conviction.

15. To avoid making an order that may end up wasting relevant parties time and other resources, and probably yield no different outcome, I do direct that:-

**1)The victim, Makena Irene of ID. No. 639788582, do records afresh statement with the police at**

**Murugurene Police station within 14 days from the date hereof.**

**2) If the statement conforms with her newly sworn Affidavit, the Police do investigate as to whether there was a boy known as Dennis Munene who was schooling then at Kiriana Boys High School in form 2.**

**3) If there was, make effort to trace him and find out whether he was a boyfriend to the victim, and if he is the one who made her pregnant. Whatever the case, he be urged to record a statement.**

**4) The Police will also find out what happened with the alleged pregnancy and if the born child is available, the Petitioner, victim and the child be subjected to DNA to determine fatherhood.**

16. The purpose of the fresh investigation is not aimed at opening charges against any other person, but to establish the truth about the Petitioners case and the fresh claim by the victim.

17. The outcome of the investigations be recorded and availed in Court on the next mention date, 28<sup>th</sup> April, 2026 for further directions.

18. Mention on 28/4/2026.

**DATED AND DELIVERED AT MERU THIS 29<sup>TH</sup> DAY OF JANUARY, 2026.**

**S.M. GITHINJI**  
**JUDGE**

**APPEARANCES:**

Ms. Thuo now for the Petitioner

Ms. Adhi for the State

Petitioner present in Meru G. K. Prison