



REPUBLIC OF KENYA



KENYA LAW
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**WE v Republic (Criminal Appeal E016 of 2023)
[2025] KEHC 6631 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E016 OF 2023
WM MUSYOKA, J
MAY 23, 2025**

BETWEEN

WE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief
Magistrate, CM, in Busia CMCSOC No. 164 of 2019, of 17th July 2023)*

JUDGMENT

1. The appellant, WE, had been charged before the primary court, of the offence of attempted defilement, contrary to section 9(1)(2) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 8th December 2019, at Teso North Sub-County, within Busia County, he intentionally attempted to cause his penis to penetrate the vagina of SIO, a girl aged eleven years. The appellant pleaded not guilty to the charge, on 16th December 2019. A trial was conducted, where five witnesses testified. He was convicted on 17th July 2023, and was sentenced the same day, to serve ten years in prison.
2. He was aggrieved, and brought the instant appeal, against both the conviction and sentence. The grounds of appeal, in the petition of appeal, dated 26th July 2023, revolve around the trial court relying on uncorroborated evidence which had been obtained from the appellant through coercion; the trial court failing to comply with section 210 of the *Magistrates' Courts Act*, Cap. 10, Laws of Kenya, when a new magistrate took over conduct of the matter; the evidence adduced not being adequate to sustain a conviction for the offence charged; the age of the complainant not being proved; and failing to consider that the appellant suffered from a rare venereal disease which could not be treated in prison.



3. Directions were taken on 4th May 2024, for canvassing of the appeal by way of written submissions. By 24th February 2025, the appellant had not filed his written submissions, and he was given more time.
4. Come 4th April 2025, the appellant had not filed his written submissions. He elected to address the court orally. He urged that he be allowed to serve out his remaining portion of the sentence outside custody, as he had not distributed his land amongst his children, and he wished to be afforded a chance to do so. He also submitted that his years in prison were troubling, as he was on AIDS medication.
5. I shall treat the statement made by the appellant as an indication that he was abandoning his appeal against conviction, and that he was only arguing the portion of it on sentence.
6. Should the appellant be released to serve the remainder of his sentence outside, in the sense of a non-custodial sentence? I do not think so.
7. Firstly, he was sentenced to serve ten years imprisonment, on 17th July 2023. He has hardly served two years of that ten-year sentence. Secondly, the victim was a child of tender years, given that her age was only eleven years. Children of such age require protection from predators, like the appellant herein, and committing the appellant to a non-custodial sentence would be to send a very wrong message. Thirdly, from the 2½ years that I have served here, at Busia, I have noted that defilement of minors, of tender years, by elderly men, in excess of sixty years, the age bracket that the appellant is in, is prevalent in the Teso region of Busia, from where the appellant hails, and custodial treatment is the only way of keeping these elderly men away from these very young girls.
8. Fourthly, the appellant is not even expressing remorse for what he did to the minor. Fifthly, although the appellant claims to have AIDS, no proof has been provided, and, even if that were the case, the more the reason he should remain in prison custody, to deter him from infecting children of tender years with HIV/AIDS. Sixthly, the principle is that where a statute imposes a minimum sentence for an offence, the court would have no discretion to consider alternative sentences. Ten years imprisonment is the minimum sentence prescribed, under section 9(2) of the *Sexual Offences Act*, for attempted defilement of a child, of any age.
9. I find no basis to interfere with the sentence imposed by the trial court. Consequently, it is my finding and holding that the appeal before me has no merit. I shall, as I hereby do, dismiss it. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. WE, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

