



**Mose v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 23992 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E015 OF 2022
GMA DULU, J
OCTOBER 24, 2023**

BETWEEN

ISAAC KIMONGE MOSE APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E002 of 2020 at Taveta Law Courts delivered on 21st October 2021 by Hon. C. L. Adisa (RM))

JUDGMENT

1. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of offence were that on unknown date in the month of September 2019 and January 2020 at unknown time of the night at [particulars withheld] village in Taveta Sub County within Taita Taveta County, intentionally caused his penis to penetrate the vagina of MAK a child aged 12 years.
2. In the alternative, he was charged with committing an indecent act with a child act contrary to Section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same unknown dates and at the same place intentionally touched the vagina of the same child aged 12 years with his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to twenty (20) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court through counsel on appeal, on the following grounds:-
 1. The learned Magistrate erred in law and fact in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain a conviction and sentence of the appellant and in convicting the appellant herein against the weight of the evidence.



2. The Magistrate erred in law in convicting the accused on unreliable and uncorroborated evidence of the prosecution witnesses without evaluating it and making a finding.
 3. The learned Magistrate erred in law in not considering the reasonable doubts available in the case against the appellant and erred in law in not giving the appellant the benefit of those doubts.
 4. The learned Magistrate erred in law in convicting the accused without the prosecution having proved all the ingredients of the offence.
 5. The learned Magistrate erred in law and fact by convicting the accused person without taking into consideration of crucial medical treatments notes which were never tabled before court.
5. The appeal was canvassed through written submissions and in this regard I have perused and considered the submissions filed by Machora Motuka & Company Advocates for the appellant, as well as the submissions filed by the Director of Public Prosecutions.
 6. In determining this appeal, I have to bear in mind that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences.
 7. I also have to bear in mind that the burden was on the prosecution to prove each of the elements of the offence beyond reasonable doubt. I will cite here only the case of *Joan Sawe v Republic* (2003) eKLR wherein the Court of Appeal stated as follows:-

“The prosecution must prove the case against the accused beyond any reasonable doubt. Suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”
 8. At the trial, the prosecution called four (4) witnesses, while the appellant tendered sworn defence testimony and did not call any additional witnesses.
 9. The element of the offence of defilement are the age of the complainant who should be below 18 years. Secondly, the fact of sexual penetration. Thirdly, the identity of the perpetrator. Each of these elements is to be proved by the prosecution beyond any reasonable doubt.
 10. With regard to the age of the complainant, she was PW1. She tendered evidence on oath and stated that she was 12 years old. Her mother PW2 SKP also testified that PW1 was 12 years old, and said that she did not have a birth certificate. She also did not rely on any other documents, but said that PW1 was born on 24th March 2008.
 11. There was no medical evidence that age assessment was done. No evidence from school on PW1’s record on age was produced. The investigating officer Felistus Bahati also did not testify to the age of PW1 but stated that PW1 was taken by the Children’s Officer to the children orphanage, but the Children Officer did not testify in court.
 12. In my view, from the evidence on record, the age of the complainant PW1 was not proved by the prosecution beyond reasonable doubt.
 13. Was sexual penetration proved? The evidence on sexual penetration was that of the complainant PW1, that she had been sexually penetrated severally. PW3 GO, the Clinical Officer at Taveta Sub-County hospital stated that he examined PW1 on admission at the hospital and noted that she had a partial miscarriage of a pregnancy.
 14. In my view, sexual penetration was proved beyond any reasonable doubt.



15. With regard to the identity of the culprit, PW1 knew the appellant well as her step father, so there could be no mistaken identity if indeed he was the person who did so.
16. However, the evidence on record confirms a family rift between the appellant and PW2 the mother of the complainant PW1. It was also instructive that PW1 initially stated in court that the incidents of intercourse occurred with electricity lights on, but on later further cross-examination she stated that the lights were off, which was a serious contradiction.
17. In my view, with those major contradictions, the evidence of PW1 was not believable with regard to the identity of the appellant as the perpetrator. Thus the prosecution did not prove beyond reasonable doubt that the appellant was the perpetrator. The appeal will therefore succeed.
18. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF OCTOBER 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Sirima for the State

Appellant

