

IN THE COURT OF APPEAL
AT KISUMU
[CORAM: NYAMWEYA, ACHODE & MATIVO J.J.A.]

CRIMINAL APPEAL NO. 119 OF 2020

BETWEEN

ANEYA NIMROD OKOTH.....APPELLANT
AND

REPUBLIC.....RESPONDENT
(Being an appeal against conviction and sentence passed by the High Court of Kenya at Homa Bay (Omondi J. (as she then was)), dated 9th May 2019 in HCCRA No. 50 of 2017).

JUDGMENT OF THE COURT

1. **Aneya Nimrod Okoth** (the appellant), was charged, tried, convicted and sentenced to a prison term of 15 years for the offence of attempted defilement contrary to section 9 (1) and (2) of the Sexual Offences Act (the Act) at the Principal Magistrate’s Court at Mbita in **Criminal Case No. 508 of 2014**. His appeal against both conviction and sentence at the High Court of Kenya at Homa Bay being **HCCRA No. 50 of 2017** was dismissed by **Omondi J.** (as she then was) on 9th May 2018 for being devoid of merit.
2. Aggrieved by the said decision, the appellant appealed to this Court challenging both the conviction and sentence. However, during the virtual hearing of this appeal on 3rd September 2025, the appellant abandoned his appeal against conviction and informed this court that he was only proceeding against the sentence and urged this Court to reduce the sentence of 15 years imposed by the trial court and upheld by the High Court. He also stated that the 29 days he was in remand pending trial were never factored while computing the sentence.

3. Learned prosecution counsel *Mr. Njeru* appearing for the respondent urged this court to uphold the sentence.
4. This being a second appeal, our mandate is confined to matters of law only. Section 361(1) of the Criminal Procedure Code is explicit that the Court of Appeal shall not entertain appeals on matters of fact, and severity of sentence is generally a matter of fact. However, where the courts below have acted on a misapprehension of the law, or where the sentence imposed is illegal or based on wrong principles, this Court is entitled to intervene. (See *Njoroge vs Republic* [1982] KLR 388; *Karingo vs Republic* [1982] KLR 213). The Supreme Court in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] *KESC 34 (KLR)* emphasized that the scope of this Court's jurisdiction in second appeals is limited only to matters of law as clearly provided in section 361 of the Criminal Procedure Code.
5. Section 9 (2) of the Act states that a person convicted of the offence of attempted defilement with a child is liable to a minimum of ten years imprisonment. This section applies to the offence described in Section 9(1), which defines attempted defilement as an attempt to commit an act that would result in penetration with a child.
6. Severity of sentence is categorized under section 361(1) as a matter of fact, and this Court's jurisdiction to hear an appeal against sentence is only limited to where the High Court enhanced the sentence or where the trial court had no power to pass the sentence. These two pre-requisites for this Court to intervene in an appeal against sentence have not been demonstrated to exist in this appeal. (See *Sichei vs*

Republic (Criminal Appeal 8 of 2020) [2025] KECA 152 (KLR)
(7 February 2025) (Judgment)

7. ***Sentencing Policy Guidelines (2016)***, at paragraphs 4.1 – 4.3 underscore that sentencing is a discretionary judicial function, to be exercised in a manner that is fair, just, and proportionate. Sentences must reflect the seriousness of the offence, the culpability of the offender, and the harm caused to the victim. Notably, paragraph 23 of the ***Guidelines***, which lists aggravating factors that warrant the most severe sentences provides:

“The sentence may be more severe where the offence was committed against a particularly vulnerable victim such as a child, an elderly person, or a person with disability; where there was abuse of a position of trust; or where the offender deliberately transmitted a terminal illness to the victim.”

4. This case falls squarely within the aggravating factors listed in the above provision. The victim was a child aged 7 years. While passing the sentence, the learned magistrate was categorical that he considered the complainant’s age and the appellant’s mitigation. In his mitigation, the appellant only said, “this is my first offence. I will not repeat.” Therefore, we cannot say that the appellant’s mitigation was not considered.
5. Considering the complainant’s age and the nature of the offence, we are persuaded that the circumstances of the offence justified the sentence imposed. Mitigating factors such as being a first offender or expressing remorse cannot, in these circumstances, displace the imperative of deterrence, denunciation, and protection of children.

6. Accordingly, we find no merit in this appeal against sentence and the same is hereby dismissed. The sentence of 15 years imprisonment for the offence of attempted defilement is hereby upheld. However, while computing the said period, the period of 29 days the appellant was in custody before he was released on bond will be taken into account.
7. It is so ordered.

Dated and delivered at Kisumu this 30th day of January, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

Signed
DEPUTY REGISTRAR