



**Mosonik v Republic (Criminal Appeal E016 of 2024)
[2026] KEHC 3551 (KLR) (16 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E016 OF 2024
JK NG'ARNG'AR, J
MARCH 16, 2026**

BETWEEN

DAVID KIPKEMOI MOSONIK APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case Number
E057 of 2023 by Hon. Michuki M. in the Magistrate's Court at Bomet)*

JUDGMENT

1. David Kipkemoi Mosonik (now Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 24th March 2023 at [Particulars Withheld] in Bomet East Sub-county within Bomet County, he intentionally caused his penis to penetrate the vagina of M.C, a child aged 16 years.
2. The Appellant faced 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 24th March 2023 at [Particulars Withheld] in Bomet East Sub-county within Bomet County, he intentionally touched the vagina of M.C, a child aged 16 years with his penis.
3. The Appellant pleaded not guilty to the charge before the trial court and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave unsworn testimony and did not call any witness in aid of his defence.
4. At the conclusion of the trial, the Appellant was convicted of the offence of defilement and sentenced to serve twenty (20) years in prison.



5. Being dissatisfied with the Judgment of the trial court the Accused, David Kipkemoi Mosonik appealed against his conviction and sentence.
6. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court and come to my own independent conclusion and decision. I now proceed to summarize the Prosecution's case and the Appellant's defence in the trial court and their respective submissions in the present Appeal.

The Prosecution's/Respondent's Case.

7. It was the Prosecution's case that the Appellant defiled M.C (PW1) on 24th March 2023. RC (PW2) testified that on the material day, she heard noises in her house and upon going to see what the noise was, found the Accused naked. PW2 further testified that when she went to the victim's (PW1) she found clothes belonging to a man and PW1 was naked. It was PW2's testimony that PW2 asked for forgiveness.
8. Julius Magut (PW5) who was the clinical officer at Longisa County Referral Hospital testified that he examined PW1 on 25th March 2023 and found that she had a broken hymen and normal genitalia with no bruises or lacerations. PW5 further testified that upon a high vaginal swab, he found numerous epithelial cells. PW5 further testified that the numerous epithelial cells indicated friction consistent with vaginal penetration and that the old broken hymen indicated PW1 was sexually active.
9. Through their written submissions dated 19th November 2025, the Respondent submitted that PW1 was a minor at the time of the commission of the offence. That a Birth Certificate (P.Exh 1) was produced as evidence and indicated that PW1 was born on 4th April 2007 which meant that PW1 was aged 15 years 11 months at the time of the commission of the offence.
10. It was the Respondent's submission that they had proved penetration and identification of the Accused. That the victim in this case had become hostile and the only reliable witness was PW2 who saw the Accused in her house on the material night. It was the Respondent's further submission that the Accused's defence comprised of denials and that the 20-year sentence was proper.

The Accused's/Appellant's Case.

11. The Appellant, David Kipkemoi (DW1) gave unsworn testimony and testified that on the material day, he was at work. That sometime in August 2023, he was arrested and was shocked when he was informed of the charge. DW1 testified that he did not know PW1 and only met her at the police station. DW1 further testified that PW1 had denied telling anyone of the offence.
12. Through his written submissions filed on 6th November 2025, the Appellant submitted that the charge sheet indicated that the victim was 16 years old. That the fact that the victim was aged 15 years old made it difficult for him to properly defend himself as he failed to understand which charge he faced. The Appellant further submitted that he was not properly identified. That PW2's testimony was untrustworthy and could not properly identify him as she had just woken up from sleep. He relied on *Abdalla bin Wendo & another v R (1953) 20 EACA 166*.
13. It was the Appellant's submission that there was no single evidence that showed the recovered clothes belonged to him. That the Respondent's case was not proved beyond reasonable doubt and his conviction ought to be set aside. It was the Appellant's further submission that the trial court ought to give him the least severe sentence.



14. I have gone through and given due consideration to the trial court's proceedings, the Record of Appeal, Appellant's written submissions filed on 6th November 2025 and the Respondent's written submissions dated 19th November 2025. The following issues arise for my determination: -
- i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Defence placed doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellant was harsh.

Whether the Prosecution proved its case beyond reasonable doubt.

15. From the onset, it is salient to note that the trial court allowed the victim (PW1) to be treated as a hostile witness. The net effect of such a declaration, which I agree with the trial court, was that the victim (PW1) became an unreliable witness and her testimony was of little probative value. The Court of Appeal in *Mutai v Republic* [2025] KECA 940 (KLR) held: -

“If a witness becomes hostile or refuses to testify, the court may consider their previous statement, but its value will be assessed considering the witness's changed stance or reluctance. This

Court of Appeal in the case of *Daniel Odhiambo Koyo v Republic* [2011] eKLR had this to say on the probative value of evidence of a refractory and hostile witness;

“...The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In *Maghenda v Republic* [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”

Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or his reluctance to testify.....”

16. That said, it is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

17. On the issue of age, Rule 4 of the Sexual Offences Rules of Court 2014 provides that: -

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

18. M.C (PW1) produced a Birth Certificate as P. Exh1. I have looked at the Birth Certificate and it indicated that PW1 was born on 4th April 2007. This would make PW1 15 years old at the time of the commission of the offence. The production and authenticity of the Birth Certificate was not challenged by the Appellant during cross examination. It is therefore my finding that PW1 was aged 15 years old at the time of the commission of the offence.

19. With regard to the issue of identification, RC (PW2) testified that she knew the Appellant as a boda boda rider within Kemu and on the material night, she found the Appellant naked in her house. PW2



- further testified that there was light in the house and when the Appellant saw her, he got out of the house.
20. It was PW2's testimony that when she went to PW1's bedroom, she found a t shirt, green jacket, polo neck, trouser, boxer, shoes and a smart phone and that the said clothes did not belong to PW1. It was PW2's further testimony that when she confronted PW1, PW1 asked for forgiveness. When PW2 was cross examined, she reiterated her testimony that she saw the Appellant naked and that the clothes belonged to him.
 21. BC (PW3) who was PW1's mother testified that when she got to PW1's room, she found shirt, green jacket, polo neck, trouser, boxer, shoes and a smart phone which did not belong to PW1. No. 251112 PC Jackline Chebet (PW4) who was the investigating officer produced the clothes and mobile phone in court as exhibits.
 22. From the above, it is clear that the Appellant was placed at the scene of the offence by RC (PW2) who testified that she saw him naked. This testimony was not controverted upon cross examination; I have also noted that the victim and BC (PW3) all testified that the victim lived with PW2 where the Appellant was spotted. According to the testimonies of PW2 and PW3, the clothes recovered in PW1's room belonged to a man and these testimonies remained uncontroverted upon cross examination. The circumstantial evidence above leaves me in no doubt that the Appellant was positively identified and placed in the scene of crime. It is my finding therefore that the Appellant was positively identified as the perpetrator of the offence.
 23. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
 24. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, the victim's evidence was found to be unreliable and I shall rely on the medical evidence tendered.
 25. Julius Magut (PW5) a Principal Clinical Officer based at Longisa County Referral Hospital testified that he examined PW1 on 25th March 2025 and found that PW1 had an old broken hymen and normal genitalia with no bruises. PW5 further testified that upon a high vaginal swab, he found numerous epithelial cells which was consistent with vaginal penetration. PW5 produced a P3 Form, treatment notes and a PRC Form as P. Exh 9, 10 and 11 respectively. I have looked at the exhibits and I have confirmed that the contents corroborate PW5's testimony. I accept PW5's professional opinion that there was evidence of penetration.
 26. Having considered the medical evidence tendered by PW5, it is my finding that the victim was penetrated by the Appellant on the material day.
 27. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

Whether the Defence placed doubt on the Prosecution's case.

28. The Appellant's (DW1) defence was aptly captured in detail earlier in this Judgment. The Appellant denied committing the offence and testified that on the material day, he was at work. DW1 further testified that he did not know the victim (PW1).



29. It is my finding that the Appellant's defence as a whole was a denial and did not displace the Prosecution case which I have already found proven.

Whether the sentence preferred against the Appellant was harsh.

30. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.

31. The penal section for this offence is found in section 8(3) of the *Sexual Offences Act* which states that: -
A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

32. I have considered the circumstances of this case and the fact that the victim was aged 15 years old at the time the offence was committed. I have also considered the Appellant's mitigation in the trial court.

33. As stated above, the minimum sentence for the offence of the present offence was 20 years. It is my finding therefore that the trial court did not err when it sentenced the Appellant to serve 20 years imprisonment.

34. For avoidance of doubt, I uphold the Appellant's conviction and sentence.

35. In the end, the Appeal filed on 14th November 2024 has no merit and is dismissed. Right of appeal 14 days.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 16TH DAY OF MARCH, 2026.

..... .

HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Ms Koech for the State

Appellant in person

