

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION
APPELLATE SECTION
CRIMINAL APPEAL NO E086 OF 2025

JOSEPHAT KITUVA MUSYOKI
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No 3369 of 2014 of the Chief Magistrates Court at Makadara)

JUDGEMENT

1. Sex with minors will be the down fall of the men kingdom as can be seen from this appeal. The complainant was a school going girl aged according to her evidence 12-13 years but according to the age assessment report 15 years living in Mathare North in class 6 as at the time of her testimony but had found her way to the appellants circle of influence making her at that tender age to be cheating both herself and her parents to be going to school yet ending up in the house of the appellant leading to the charge herein.
2. Her graphic testimony before the trial court on what the appellant or is it what they did is best left for the graphic Indian movies but it is a wakeup call for sex education both to the adults like the appellant and to the minors like the compliant. Otherwise as the statistics show sexual offence shall continue to take number on in our courts and offenders in prison like the biblical story of Sodom ang Gomora !
3. The appellant was convicted and sentenced to serve ten(10) years imprisonment for the offence of sexual assault contrary to section 1(1)(i) (2) of the sexual offences Act the Particulars of which were

- that on the 20th day of July 2014 at Mathare area 2 within Nairobi county unlawfully used his fingers to penetrate the vagina of MIN.
4. Being dissatisfied by the said conviction and sentence he filed this appeal initially at the High Court Criminal Registry as Criminal Appeal No E281 of 2023 following leave granted on 6/10/2023 in Misc. Criminal Application No E296 of 2023 and raised the following grounds of appeal :
 - A) The court erred in convicting the appellant without considering Article 50 of the Constitution
 - B) The prosecution case was not proved to the required degree
 - C) The prosecution case was full of contradiction and inconsistencies
 - D) The appellant defence was not considered .
 5. This appeal was transferred to this High Court registry by the directions issued on 13th February 2025 and upon admission directions were issued for its determination by way of written submissions.

SUBMISSIONS

6. The appellant acting in person submitted that section 200 of the Criminal Procedure Code was not complied with in that he was not informed of his right under the said section in support of which he submitted the following cases: Anthony Musee Matinge v Republic where the court stated that it is the accused and not his advocate who must be informed by the court the right to re-summon witnesses , Moses Mwangi Karanja v Republic where the court of Appeal stated that the court had to explain to the appellant his right to demand re-call and re-hearing of any witness. It was submitted that he was not informed of his said rights and that it was his counsel who took it upon himself to respond .

7. It was further contended that his trial took eight years which period was not considered by the court as was stated in the case of Moses Kaberia v Republic in which the court declined to order a re-trial having found that the trial was conducted in total disregard of the constitutional provision.
8. It was submitted that the court failed to comply with the provision of section 211 of the CPC by not giving the appellant a chance to address the court and further that the court failed to comply with the provisions of section 309 of CPC .
9. On behalf of the prosecution it was submitted that the prosecution case was proved through the evidence of the victim that she used to miss school to go to the appellants house who when punished fled from home and slept in the appellants house on the same bed where he inserted his fingers into her vagina which was confirmed by PW5 Dr Shako's evidence that there were old tears to her hymen thereby proving penetration. On the age it was proved to be 15 years through the age assessment whereas the charge sheet indicated 13 years.
10. On identification the appellant by identified through recognition. The complainant knew him and used to go to his house several times a fact which the appellant confirmed in his defence. It was submitted that whereas the appellant was charged under section 1(1)(i) (2) he was properly convicted under section 5(1)(i)(2) as the error did not prejudice the appellant as provided for under section 382 of the CPC. The appellants defence that he acted in good faith was considered by the court and dismissed. On sentence it was submitted that the same was not excessive or harsh as it was provided for in law.

PROCEEDINGS

11. This being a first appeal, the appellant is entitled to a re-evaluation of the evidence tendered before the trial court. The victim testified that she knew the appellant as Joseph who lived next to them. On 17th July 2014, he mother punished her for getting out late and she fled to her aunts where she met the appellant who invited her to his house and they slept on the same bed , the appellant promised to marry her upon completion of studies. The appellant then woke her up and started caressing her by touching her breasts and private parts. He then lowered her trouser and inserted his fingers into her vagina. In the morning as she was leaving the house, she met her father who took her to the police station. It was her evidence that the appellant used to meet her on the way to school and would take her to his house where she would spend the whole day and would leave at 5pm.
12. In cross examination she stated that every time she was with the appellant he used to insert his fingers into her vagina. PW2 the victim's father stated that she was born in 2002 and that on 17th July 2014 , he got a call from her headteacher to report that she had been missing from school and he decided to follow her the following day and she did not get to school. The following day she was sent to the shop and she took long and was punished by the mother causing her to flee, the following day they looked for her and when he found her playing he took her to the AP camp where she was disciplined by an officer and she opened up and told them that a man had been taking her to his house instead of going to school and they would then have sex, she took them to the appellants house where he was arrested from.
13. PW3 APC John Mwita interrogated the victim who then led them to the appellant's house whom she identified as the person who

had been having sex with her and had spent the night in his house. PW4 Barbara Salano Kere a clinical officer confirmed the date of birth of the victim and produced PRC form which confirmed that her outer genitalia was normal without any discharge and that she reported that the appellant inserted his fingers then penis into her vagina. PW5 Dr. Kizzy Shako examined both the victim and the appellant.

14. When put on his defence the appellant started that on the 19th July 2014 at around 8.45 pm he found the victim sleeping on the stairs and told her to go to her house. At 11.00pm she came to his house and told him that she had been beaten by her mother and wanted a place to sleep, since he did not have any bad intention, he allowed her to sleep and, in the morning, he told her to go home only to be arrested at 10.00am. He stated that he did not know the victim's parents but heard that they were living in the same area.

DETERMINATION

15. In this cause the appellant has only raised procedural violations in addition to the claim that the case was not proved beyond any reasonable doubt.

16. I shall therefore deal with the procedural issues raised by the appellant, starting with section 200 of the CPC which he claims was not complied with. In this matter the appellant was represented by an Advocate and as rightly pointed by the appellant, where a succeeding magistrate commences hearing in a matter which was partly heard the accused person has a right to recall any witness who had testified provided that this right is limited where the defence case is already closed. In this matter it is clear that the succeeding magistrate took over the matter at the stage where the appellant had been put on his defence and

the record shows that the appellant through his Advocate on record in the presence of the appellant opted for the matter to proceed from where it had reached and the court record clearly indicate that the rights under section 200(3) of the CPC were explained to the appellant who indicated through his advocate that he wished to proceed from where the matter had reached t, the court record also clearly confirm that section 211 CPC was explained to the appellant. I therefore find no merit on this ground of appeal.

17. As regards the appellant's contention that the trial took eight years to conclude , this would only be relevant had the court found as a fact that section 200 was not complied with and the court is desirous of ordering a retrial which is not the case herein. From the record of proceedings , the appellant took plea on the 22nd July 2014 and the appellants bond was approved on 25th august 2014 and therefore the eight years period of trial is also not relevant.
18. On the proof of the prosecution case, the appellant was identified by way of recognition. He was known to the complainant as Joseph in whose house she used to go to instead of going to school , this was corroborated by the circumstantial evidence as regards how the appellant was arrested. The complainant took the police and her father to the appellants house who was living in the same plot with the complainant's aunt and the appellant in his defence confirmed that on the fateful night he had accommodated the victim , not as a predator but as a good Samaritan having been beaten by her mother and wanted a place to sleep. As rightly pointed out by the trial court, the appellant was not known to the complainant's parents and therefore the issue of mistaken identity does not arise tasking into

account the fact that the complaint's father was notified by the school that the same used to miss school and acting on this same information he followed her, only for the same to do a disappearing act and when she was later disciplined by her mother she once again took off, only to land in the waiting hands of the appellant, who now claim to had been a good Samaritan..

19. The appellant was not charged with defilement but sexual assault based on the complaint's evidence that he inserted his hands into her vagina despite the fact that she had told the police that they used to have sex every time she did not go to school an act which caused the head teacher to reach out to her father. I therefore find no fault with the trial courts finding on sexual assault only to add that the complainant saved the appellant by eliminating the use of penis as the object of penetration. I further note that the prosecution did not file a counter appeal on the finding by the trial court and whereas this court as a first appellant court has the power to exercise the powers of the trial court, I shall give the appellant the benefit of a favourable finding.
20. Whereas the charge as drafted was in respect of section 1 and the court convicted the appellant on section 5 of the Act, the appellant did not raise the same and would agree with the submissions by the prosecution that the appellant was not prejudiced as the same understood the charge and was able to defend himself.
21. The appellants defence was considered and rightly dismissed by the court as if he was a good Samaritan as he claims, having advised the compliant to go to her home one wonders why he would at 11.00 pm open the door for her and invite her to share a bad with him.

22. I therefore find no merit on the appeal against conviction which I hereby dismiss and affirm the trial court determination thereon.
23. On sentence the same remains at the sole discretion of the trial court and would only be interfered with if the court acted in error. In this cause the court as pointed out by the respondent considered the appellants mitigation that he did not have bad intentions and was a first offender but noted that sexual assault with a minor is a very serious offence. I wish to add that she was a school going minor who instead of going to school would go to the appellants house where she would be until 5.00pm when she would walk home as if coming to school .
24. I would therefore not interfere with the sentence noting that even though the appellant according to the victim had promised to marry her upon completion of school, he would have encouraged her to complete school in style and not by constantly touching her and fingering her if it is true that he was not having sex with her as one wonders what a school girl in school uniform was doing in his house at the expense of her education.
25. In final analysis the appeal is dismissed both on conviction and sentence. The appellant has a right of appeal.

DATED SIGNED AND DELIVERED THIS 5th DAY OF MAY 2026

J. WAKIAGA
JUDGE

In the presence of

Irene - Court Assistant

Ms. Kariuki for the prosecution

The appellant in person from Nairobi west prison