



REPUBLIC OF KENYA



KENYA LAW
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**Mosomi v Republic (Criminal Appeal E023 of 2022)
[2025] KEHC 7011 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E023 OF 2022
HI ONG'UDI, J
MAY 28, 2025**

BETWEEN

DERRICK MONGARE MOSOMI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the Judgment of Hon. E. Soita Resident
Magistrate in Nakuru Sexual Offences Case No. E116 of 2021)*

JUDGMENT

1. Derrick Mongare Mosomi hereinafter referred to as the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on diverse dates between August, 2020 and August 2021 in Kuresoi North sub county within Nakuru county intentionally caused his penis to penetrate the vagina of JM a girl aged 15 years.
2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
3. The appellant denied the charges and the matter proceeded to hearing and the complainant testified on 7th December, 2021. However, when the case came up for further hearing on 2nd February, 2022 the appellant informed the court that he wanted to change his plea. The trial Magistrate gave him time to re-think his decision of change of plea. When the matter came for hearing on 23rd February, 2022 the Appellant confirmed his position on change of plea.
4. The charge was read to him afresh in Kiswahili language to which he responded saying:

“True/ukweli”



The prosecutor read out the facts to which the appellant responded saying:

“Ukweli/true”

He was thereafter convicted. He was then given an opportunity to mitigate, after which he was sentenced to serve fifteen (15) years imprisonment.

5. The appeal was canvassed by way of written submissions.

Appellant’s submissions

6. These were filed by Nyagaka S. M. & Company advocate and are dated 6th February, 2025. Counsel raised two issues. On whether the plea was unequivocal he submitted that no ingredients of defilement were explained to the appellant. Further that the appellant was not allowed to dispute or explain any facts or add anything to those facts. He relied on the case of Adan V Republic [1973] E. A. 445 to support his submissions.
7. On the next issue on sentence he repeated the appellant’s mitigation and submitted that the same was never taken into account by the trial court. He further contended that the ages of the appellant and victim was not clear. That the victim JM insisted she was 18 years old while her birth certificate showed she was 14 years old at the time of the offence. On the other hand, counsel submits that though the appellant underwent an age assessment no report in respect of that was ever produced in court.
8. It was thus his submission that considering the issue around the ages of the appellant and the victim who were both in school a sentence of five (5) years would have been most appropriate. Reliance was placed on the case of Niostick Buyanza Sumba V Republic Kakamega HCCR No. E036 of 2024 where Musyoka J set aside a seven (7) year sentence for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and substituted it with a probation sentence of three (3) years.

The respondent’s submissions

9. These are dated 24th April, 2025 having been filed by M/s E. Okok principal prosecution counsel who opposed the appeal. On whether the plea was unequivocal she submitted that the principles set out in the case of Adan V Republic (supra) on plea taking had been observed. Thus, the plea was unequivocal.
10. On sentence, counsel submitted that section 8(3) of the *Sexual Offences Act* provides for a minimum sentence for the offence the appellant was charged with. The sentence was meted out on 23rd February, 2022 before the Supreme Court case of Republic V Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) Petition E018 of 2023 [2014] KESC 34 (KLR), which requires the courts to adhere to the minimum sentences as provided for under the *Sexual Offences Act*. It is her submission that the sentence of fifteen (15) years meted out on the appellant was sufficient.

Analysis & determination

11. I have carefully considered the evidence on record, the grounds of appeal, and the submissions by both counsel. I find the two issues falling for determination to be as follows:
 - i. Whether the plea was unequivocal
 - ii. Whether the sentence imposed on the appellant was illegal/unlawful



12. This being a first appeal this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. See *Okeno V Republic* 1972 E.A. 32, – *Simiyu & another V Republic* 2005(1).
13. The appellant’s submission is that the plea was not unequivocal. The Court of Appeal in the case of *Adan V Republic* (supra) set out the principles to be adhered to when a plea of guilty is being taken. Both counsel have referred to the said decision. It is the submission by Mr. Matoke H. for the appellant that the appellant was not given a chance to dispute or explain the facts or add any relevant facts.
14. The record herein is very clear on what transpired. There is no issue about the language used meaning the appellant understood the charge.
15. The charge itself spells out the ingredients which were admitted by the appellant. The next stage which is now the explanation stage is the reading of facts. This was done in Kiswahili and the appellant was asked to confirm whether they were correct or not. It is at this point that an accused person raises issues and/or asks questions if he/she is not in agreement with the facts.
16. The appellant herein did not raise any questions/issues, on the facts. Upon conviction he was given an opportunity to mitigate. I have gone through the same and it is nowhere shown that the appellant did not understand the facts nor had any issues with the plea and facts.
17. My finding is that the plea was unequivocal and does not require further or any interference by this court
18. I now move to the issue of sentence. I have noted that both the victim and appellant had been students before taking off with each other. Before the court was the victim’s birth certificate (EXB3) showing she was born on 7th November, 2006 meaning at the time of offence she was aged approximately 15 years. The age assessment conducted on 8th December, 2021 showed she was approximately sixteen (16) years old. She had told the court she was eighteen (18) years old which was disapproved by the age assessment by the Ministry of Health – department of health services Nakuru county. It is understood why she lied, she was 18 years old.
19. Coming to the appellant he told the court at one point that he was a minor. The court on 18th December, 2021 ordered for an age assessment to be done on him. On 3rd January, 2022 the appellant told the court that his age assessment was done and he was found to be 18-25 years which is not correct. Later he said the age assessment showed he was 18 years old. Unfortunately, the age assessment report was never availed before the trial court. In view of the contradictory ages given by the accused, it’s not clear what his age was at the time of commission of the offence.
20. Secondly and more critical is that after conviction the trial Magistrate never called for a pre-sentencing report before meting out the sentence which was a serious omission.
21. As a result of the above analysis my finding is that the conviction was proper and is upheld. The issue of sentence has to be sorted out.
22. I therefore direct as follows:
 - i. The appellant to be presented to Naivasha sub-county hospital by the officer in charge of the Naivasha Maximum Prison for age assessment. The report should be filed within 14 days
 - ii. A detailed pre-sentence report to be filed within 30 days by the Probation office Nakuru.
 - iii. Mention on 21st July 2025 to confirm filing of the reports and further directions.



23. Orders accordingly

**DELIVERED DATED AND SIGNED THIS 28TH DAY OF MAY, 2025 IN OPEN COURT AT
NAKURU**

H. I. ONG'UDI

JUDGE

