RNS v Republic (Criminal Appeal 52 of 2016) [2025] KECA 373 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 373 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 52 OF 2016

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

RNS .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal fromt he j udg ment of t he Hi gh Court at Nai vasha (C. Meoli, J. dat ed 17th Nove mber, 2016 in H. C. CR. A No. 6 OF 2015)

JUDGMENT

1. On t he 25th November 2013, JW, a minor aged 6 years old, was playing out side with her brother Emanuel when the appellant, whom she identified as " baba Natasha"- a family friend and a neighbour, called her, gave her money and sent her to " ma ma Jimmy' s- the local shop for cigarettes, sweets and Mandazi. When she and her brother delivered the items to the appellant's house, he instructed Emmanuel to get out. The appellant then carried the minor to a bed, removed her clothes and proceeded to defil e her. He war ned her not to tell anyone and pr o mi sed to buy her a toy t he next day.

2. Five days later, N.N.N (PW1) who was the minor' s mother, received a call from a neighbor while she was at work, and was informed that the minor was unwell and had been found crying in the toilet whil eurinating. When P W1 went home, the minor reluctantly informed her that the appellant had defiled her. Messa Sylvester, a clinical Officer, who examined the minor on 30th November 2013, observed that the minor' s private parts were bruised, her labia was tender, her hymen was broken and epithelial cells were present. He concluded the minor had been defil ed.

3. Conseque ntl y, the appellant was charged with one count of defilement contrary to Section 8(1) & 8(2) of the Sexual Offences Act and an alternative count of committing an indecent act with a child contrary to Secti on 11(1) of the Sexual Offences Act.

4. The appellant pleaded not guilty to both charges. In his unsworn statement he denied committing any of the offences; he maintained that on the material day, he went to work in the morning and as he was leaving at 4. 30 p.m. , the controller called him and told to report to the security office. He went to Kongoni police station, told them he was baba Natasha and he was charged with the stated offence. He maintained that the charges were fabricated because he often settled disputes between P W1 and her husband and that PW1's husband had asked him to assist her to carry charcoal.

5. Convinced that the appellant's defence was asham, the tri al court convicted the appellant of defileme nt and sentenced him to life imprisonment. The appell ant pref erred an appeal in the High Court against his conviction which was dismissed. Unrelenting, the appellant has now fil ed the current appeal which is predicated on the grounds that the learned Judge erred by failing to find -

   a. that the prosecuti on case was not proved beyond reasonabl e doubt .

   b. that the appell ant's defence was not considered.

   c. that the sentence was contrary to the Constitution and the sentencing policy guidelines.

6. At the hearing of the appeal, the appellant appeared in person while the State was represented by Mr. Omutelema, Senior Prosecution Counsel.

7. The appell ant relied on hi s wri tten sub mi ssi ons whi ch were on recor d. He sub mi tted t hat t he age of t he mi nor was not proved and t hat even t hough an i mmuni zati on car d was pr oduced to pr ove her age, its ma ker was not avail ed. He al so submi tted t hat pe netrati on was not proved si nce t he mi nor was exa mi ned fi ve days after t he all eged i nci dent and t here was no bl ood or di scharge f ound, nor was t here evi de nce t yi ng hi mto t he all eged off ence. Lastl y, the l ear ned Judge was f aul ted f or f aili ng to consi der hi s def ence and uphol di ng an ill egal sent ence.

8. On his part, Mr. Omutelema submitted that there was over whelming evidence against the appellant. Firstly, the medical officer testified that the minor had injuries on her genitalia and her hymen was not intact. Secondly, the complainant herself had testified as to having been defiled by the appellant and thirdly the age of the complainant had been ascertained, as it was evident from the immunizati on card submitted that she was 6 years old at the time of the incident.

   With respect to sentence, the respondent submitted that the sentence of life imprisonment is lawful, and the court had no power to interfere with said sentence.

9. We have consi dered t he recor d of appeal as well as sub mi ssi ons ma de by t he appellant and the respondent. We appreciate our role as a second appellate court and our jurisdicti on, which is limited to matters of law. (See David Njoroge Machari a v Republic[2011] eKLR).

10. The appellant attacks the decisi on of the first appellate court on three grounds: failure to ascertain the age of the child; failure by the respondent to prove its case beyond reasonable doubt and upholding anunl awful sentence.

11. The ingredients to be proved in a charge of defilement are; that there was an act of penetrati on that is, the partial or compl ete insertion of male genital organs into that of the minor complainant; that the minor complainant was a child under el even years of age; and that t he appellant had been positively identified as the person who committed the act of penetrati on.

12. The evidence of PW3, who exa mi ned t he complainant albeit, after five days, confirmed that there was penetration. The minor's hymen was broken, her vaginal canal was red, her labia majora and labi a were bruised and the presence of epithelial cell s was proof of penetrati on. As for the age of the minor, the report produced by P W3 assessed her age to be 6 years old. I n addition, her mother P W2,

produced an immunization card which stated that she was born on 10th January 2007. In our view, the appellant' s allegati on that the maker of the immuni zati on card was not called cannot hold by virtue of section 77 of the Evidence Act Cap 80 Laws of Kenya, which allows courts to use as evidence any documents purporting to be a report under the hand of a medical practitioner. In any event the age of the complainant was still proved by the testimony of her mother and the medical officer' s own assess ment of her age. In any case, the age of t he complainant was not disputed throughout the proceeding before the trial court and not challenged before the first appellate court. We therefore think the challenge mounted before us is an afterthought and unmerited. We al so agree wi th the Learned State Counsel that the evidence led by the prosecution in respect to the age was conclusive, cogent, consistent and satisfied the requirements of section 8(2), in that the complainant was below 11 years.

13. As regards the identity of the person who committed the offence, the appellant was i dentified by the complainant who knew him well. The identification was one of recognition, P W2 testified that the appellant was well known to the complainant, who referred to him as " Baba Natasha". He frequently visited their house, watched television and often bought the children toys. In addition, the offence occurred in broad dayli ght. Both the trial court, and t he first appellate court believed the evidence of the complainant and were satisfied that the appell ant, was properly identifi ed as the perpetrat or of the offence. As for the appellant' s defence, he only gave an account of the day of his arrest and did not explain his whereabouts on the day inquestion; which leaves the evidence of the minor intact and uncontroverted.

14. There i s no doubt in our mind that the appellant is the one who committed the off ence, as he was properly and correctly identified. In our view, the defilement the fact of penetration, the age of the victim and the identity of the perpetrator were proved beyond any reasonabl e doubt and we see no justifiable reason to disturb the concurrent findings of the two courts below. We wholly agree that the appellant was properly convicted on sound and over whelming evidence.

15. The last ground of appeal is on the legality of the sentence imposed. The appellant cont ends that t he mandat ory nat ure of t he life sent ence is illegal. Section 8(1) as read with Section 8 2) of t he Sexual Offences Act is very clear and provides " A person who co mmi ts an off ence of defil e ment with achild aged eleven years or less shall upon convicti on be sentenced to imprisonment for life". From the evidence on record, the trial court was satisfied, as was t he High Court, that the age of the complainant was below 11 years. So our reading of section 8(1) and 8(2) manifestly shows the disposition of life imprisonment is provided in mandatory terms. This was settled in Republic v Mwangi;Initiative for Strategic Litigati on in Africa (ISLA) & 3 Others(Amicus Curiae) [2024] KESC 34 (KLR) where the court held that so long as Section 8 of the Sexual Offences Act remains vali d the sentence imposed under Section 8(1) of t he Sexual Offences Act is within the law and we so find. The appeal before us therefore lacks merit and it is accordingl y dismi ssed.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSA ME

JUDGE OF APPEAL

....

J. MATI VO

JUDGE OF APPEAL

....

M. GACHOKA CI ARB. , FCI ARB

JUDGE OF APPEAL

....

I certify t hat t hi s is a tr ue copy of t he ori gi nal.

Si gned

DEPUTY REGI STRAR__