



REPUBLIC OF KENYA



KENYA LAW
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**Ruto v Republic (Criminal Appeal 37 of 2017)
[2025] KECA 488 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 488 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 37 OF 2017
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 28, 2025**

BETWEEN

JOSEPH KIPKOECH RUTO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nakuru (Odero, J.) dated 20th March, 2017 in Criminal Case No. 55 of 2015)

JUDGMENT

1. The appellant was charged with defilement Contrary to Section 8(1) and 8(2) of the [Sexual Offences Act](#). The particulars of the offence were that the appellant, on 22nd December 2013 within Nakuru County caused his penis to penetrate the vagina of SC, a child of 8 years.
2. The complainant testified that her mother had travelled to a circumcision ceremony when the appellant came to their home and instructed her and three of her siblings to go and collect onions from his house. He however took her to a shamba, defiled her and ran off.
3. PW5, Simon Langat testified that he had been mending the roof at the complainant's house when he saw the appellant approach the children at about 5p.m. He left the home and when he came back the children were gone. He and the complainant's older sister PW7, Mercy Kipsang went to search for the children in the direction of the appellant's house, where they met the complainant emerging from a maize plantation crying. She subsequently informed them that the appellant had defiled her.
4. When PW1, the complainant's mother, returned the following day, she was informed that the minor had been defiled. She examined the child and found that her vagina was bruised and bloodied. PW7, Margaret Gathongo, a nurse at Kimamui dispensary who examined the minor found that her hymen had been broken and her vagina was bruised.



5. The appellant in his unsworn statement denied committing the offence and stated that at the time of the incident he was at Chepseoni. He also stated that PW5 had a grudge against him because they had quarreled over land and that PW5 had also stolen timber from his employer.
6. In a Judgment dated 13th February 2015, the trial court convicted the appellant of the charge of defilement contrary to section 8(1) and section 8(2) of the *Sexual Offences Act*. He was consequently sentenced to serve life imprisonment.
7. Aggrieved by the conviction and sentence, the appellant preferred a first appeal to the High Court at Nakuru. The High Court (Odero, J.) found the appeal to be devoid of merit and dismissed it, provoking the instant appeal on the following grounds:
 - a. The prosecution case was not proved beyond reasonable doubt
 - b. The appellant's defence was not considered
 - c. The mandatory life sentence is contrary to the sentencing policy Guidelines and the Contrary to *the Constitution* of Kenya
8. Undeterred, the appellant preferred the current Appeal before us, seeking to overturn the concurrent findings of the court below. In written submissions dated 16th April 2024, the appellant submitted that penetration and his identity as the perpetrator were not proved beyond reasonable doubt. The Court was urged to note that the complainant's testimony was that the appellant "did 'tabia mbaya' in her private part" however it was his view that the words were not indicative of penetration. Moreover, PW5's testimony that the minor had informed him that the appellant "had tried to do tabia mbaya to her" also did not signify penetration.
9. On identification, the appellant submitted that even though the alleged incident seemed to have occurred around 6p.m at night, the two courts below failed to analyze whether the conditions were ripe for his identification and that the possibility of error could not be ruled out.
10. With regards to the complainant's age, the appellant submitted that the minor's age was not proved nor was PW1's testimony on her age corroborated. He contended that the age assessment report offended section 77 of the *Evidence Act* because it was not submitted by its maker and consequently, he was denied an opportunity to cross-examine its author.
11. Lastly, the appellant submitted that the mandatory nature of the life sentence meted upon him was unconstitutional and offended Article 27 and 28 of *the Constitution*. The case of *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) was cited in support of this submission.
12. Mr. Omutelema, Senior Assistant Director of public prosecution opposed the appeal. He submitted that the two courts below evaluated the evidence and came to the right conclusions; that the identification of the appellant was satisfactory since he was a neighbor, well known to the complainant and her family. Furthermore, the appellant's contention that the age of the complainant was not proved is not supported by the evidence on record, since the complainant's mother testified that she was born on 16th August 2015 which was corroborated by an immunization card, that the appellant's alibi defence was displaced by witnesses who placed him at the scene of the crime and lastly on the issue of sentence, counsel submitted that it was common ground that the Supreme Court had clarified that the mandatory sentence of life imprisonment was lawful and therefore, the sentence was proper.



13. We have considered the record of appeal, the written submissions by the appellant and by the State. This is a second appeal which is confined to matters of law. In *Chemagong v Republic* [1984] KLR 213 this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (*Reuben Karari s/o Karanja v. Republic* 17 EACA146)”.

14. The main elements of the offence of defilement under Section 8(1) as read with 8(2) of the *Sexual Offences Act* 2006 are first; proof of penetration (partial or complete) and second, proof that the complainant was a child below the age of 11 years.

15. In *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR this court emphasized that credibility and reliability are the cornerstone of whatever nature of evidence that may be presented before the courts in proof of a victim's age. The Court stated thus:

“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”

16. From the record, the complainant's mother testified that she was eight years old when the offence was committed and that she was born on 16th August 2005. The immunization card produced corroborates this date and the medical report produced by PW7 assessed the complainant to be 8 years old. The offence was committed on 22nd December, 2013 making the complainant 8 years old at the time of the incident. We note that at the trial, the appellant had the opportunity to cross-examine PW1, on the complainant's age and PW7 who authored, prepared and produced the P3 form that was properly admitted into evidence in respect to the minor, but failed to do so. The appellant cannot now, be heard to complain that he was denied his right to cross-examine the evidence adduced against him with regards to the age of the complainant.

17. As for the second ingredient of the offence, it is evident that the evidence of penetration was established from the complainant's unsworn evidence, and was corroborated by the medical evidence. The complainant told the court that “the appellant did tabia mbaya to me in my private part, the front one.” As was stated in the case of *Muganga Chilejo Saha v Republic* [2017] eKLR the courts in this country have generally accepted the use of euphemism, “alinifanyia tabia mbaya” as an apt description of acts of defilement. In this case the complainant adamantly stated that the appellant defiled her. The complainant's mother, PW1, examined her and noted that her vagina was bruised and bloody, in addition medical evidence confirmed that her labia majora and her vagina were bruised and her hymen was broken. The appellant's submission that penetration was not proved therefore has no weight. The medical evidence, considered together with the evidence of the complainant, established beyond any reasonable doubt that the complainant was defiled

18. As for the identity of the appellant as the perpetrator, this issue comes to nothing. The appellant was a person well known to the complainant and the various witnesses as a neighbor, the complainant referred to him as “Jose” which connotes familiarity. The appellant himself admitted that he knew the complainant and her family consequently the issue of mistaken identity does not arise. His identification was one of recognition. Again, just like the courts below, we find that the appellant's alibi defence that he was in Chepseoni at the time of the offence to be unsubstantiated and an afterthought



just like his alleged grudge with PW5 on land. No evidence was put forth to displace the strong evidence against the appellant as the perpetrator of the offence.

19. Lastly, the appellant has faulted the Learned Judge for failing to find that the sentence of life imprisonment meted on him is unconstitutional. As rightly stated by counsel for the state, the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)* has held that the sentence of life imprisonment is lawful and remains lawful as long as Section 8(2) of the *Sexual Offences Act* remains valid. Therefore, the sentence imposed was within the limits permitted by law and we find no legal reason to interfere with the imposition of the said sentence, which is lawful and in accordance with the law.
20. In the circumstances, we are satisfied that the High Court addressed itself correctly on the law and that there are no grounds for interfering with the concurrent findings of fact. Consequently, this appeal has no merit and is hereby dismissed

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

M. WARSAME

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JUDGE OF APPEAL

J.MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

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JUDGE OF APPEAL

