Lucy v Republic (Criminal Appeal 3 of 2018) [2025] KECA 843 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 843 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 3 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

JOHN MURAYA LUCY ..... APPELLANT

AND

REPUBIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyahururu (Wendoh, J.)dated 6th June, 2017 in HC.CRA No. 72 of 2017)

JUDGMENT

1. This is an appeal against the judgment of the High Court (Wendoh J.), delivered on 6th June 2017, wherein it affirmed the judgment of the lower court which convicted and sentenced the appellant to life imprisonment for the offence of defilement.

2. The facts of the case are that on or about 24th November 2013, CW , left her daughter MMW aged (6 years), and her three siblings at home while she went to deliver milk to xxxxxx Center. On her return at about 11. am, she met three of her children coming from the appellant's neighbouring plot. MMW was nowhere in sight. Her son informed her that the appellant, had sent the three of them to look for cow fodder, leaving MMW behind with the appellant. CW ran to her house to look for the minor but did not find her. She then set off to the appellant's house while calling her daughter's name.

3. MMW emerged slowly from the maize crops behind their house.

   As CW approached the minor, she noticed that the child had both her legs in one side of her shorts and that she was walking with difficulty. When she asked what had happened, MMW refused to speak. It was only upon beating her that MMW divulged that the appellant had asked her siblings to look for fodder, carried her to the maize plantation and defiled her. Apparently, the appellant stopped the assault when he heard her mother calling her name, dressed her and threatened her not to divulge what had happened.

4. Upon inspection, CW found that her daughter's underwear was wet with white discharge and her vagina was bruised and red. She took the minor to Olkalou District Hospital on the same day for examination, and PW2, Peter Nginyo, a clinical officer who examined her at around 2p.m., found that the minor had difficulties walking and that her genitalia was tender, with bruises, tears, lacerations and a foul smelling white discharge. A High Vaginal Swab (HVS) test revealed the presence of spermatozoa, red blood cells-indicating microscopic bleeding and pus cells which were indicative of an infection and. He concluded that there had been penetration.

5. In his defence, the appellant alleged that on 20th November 2014, the complainant's father sent one Njuguna to ask whether he would work for him. The appellant refused, which displeased the complainant's father. Again, on an undisclosed date, he heard a woman ask MMW, "Who did this to you?" to which she allegedly replied, "Njuguna." The woman stated that she would instigate a case against Njuguna. The appellant claimed he warned Njuguna and urged him to be careful. Again, on the evening of 20th November 2014, the same woman asked him why he had refused to marry her, and he informed her that he already had a wife. He lamented that the same woman, on 29th November 2014, accused him of defiling her daughter.

6. He maintained that on the day in question he went to a hotel in Kasuku, where he found the complainant's father who told him

> "you will see". A few minutes later, the complainant's father returned with police officers who arrested him without cause. He denied committing the alleged offence.

7. In the end, the learned trial magistrate found that the prosecution had proved its case to the required threshold, and convicted the appellant, and sentenced him to life imprisonment.

8. The appellant was aggrieved and appealed to the High Court. As we have stated, his appeal was dismissed and the appellant is now before us on a second appeal. He has raised three (3) grounds of appeal, namely, that the learned appellate Judge erred in law:

   a. By failing to appreciate that the prosecution did not prove its case beyond reasonable doubt

   b. By failing to find that the appellant's defence was not considered

   c. By failing to find that the sentence imposed was both harsh and excessive since it was applied without considering the appellant's mitigation and the unique circumstances in the case.

11. The appellant who appeared in person relied on his written submissions in support of his appeal. In these, the appellant submits that the two courts below failed to consider his defence, that the offence of defilement of MMW was not proved; that proof of the age of the complainant was doubtful in the absence of production of a birth certificate, vaccination card or school enrolment form-and in any case, the complainant's mother was not qualified to produce the age assessment report in court as she was neither the author of the document or an expert; and lastly, he submitted that the indeterminate nature of his sentence was unconstitutional, harsh and excessive.

10. In response to the appellant's submissions, Mr. Omutelema, the learned Senior Assistant Director of Public Prosecutions submitted that the appellant's conviction was safe, as it was based on sound evidence of the complainant and her mother as corroborated by the clinical officer and the resulting sentence was in accordance with the law. In his view, MMW's age was proved by the testimony of her mother who stated that she was born on 12th December 2007, her own statement that she was in Standard 1 in [Particulars Withheld] School and was fortified by the trial court which had the benefit of seeing the minor and was dully satisfied that she was 6 years old.

11. The respondent further submitted that there was no case of mistaken identity, the minor clearly identified the appellant as "Muraya" - a neighbor well known to her who lived in a house next to theirs. The appellant's defence that he was framed by the complainant's parents, did not oust MMW's evidence that she had been defiled by the appellant. He added that the prosecution tendered evidence through all relevant witnesses, which established the appellant's guilt beyond reasonable doubt.

12. This is a second appeal and this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R, [1984] KLR 611. In Kaingo v R, (1982) KLR 213 at p 219, this court said:-

> "A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact 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 C/O Karanja v R, (1956) 17 EACA 146)".

13. Three main issues turn for our consideration in this appeal: Whether the offence of defilement was proved, whether the defence of the appellant was considered by the trial court and whether the sentence imposed was legal.

14. First, the appellant argues that the prosecution failed to prove its case beyond a reasonable doubt. However, the evidence presented against the appellant was compelling. The complainant, MMW, who was six years old at the time, identified the appellant as the person who defiled her. She stated that he was a neighbor and referred to him as "Muraya". MMW gave a detailed and consistent account of the assault. Pw3 stated as follows in her evidence:-

> "Muraya came home...I was left behind with Muraya.He told me not to go with them. I was left at home with him. He carried me and took me to the maize. He removed my short and panty. He also removed his trouser. He lied on top of me and did tabia mbaya to me in between my legs."

15. Her testimony was corroborated by her mother, CW , who upon returning home on 24th November 2013, found MMW missing. After a search, she discovered her daughter in distress, walking with difficulty and wearing her shorts improperly. MMW eventually disclosed that the appellant had taken her to a nearby maize plantation and defiled her. This testimony linked the appellant directly to the crime.

16. The medical evidence presented by Peter Nginyo, a clinical officer, further supported the complainant's account. MMW's genital injuries including— bruising, lacerations, and a foul- smelling discharge, were consistent with sexual assault. A HVS test showed the presence of spermatozoa, red blood cells (indicating bleeding), and pus cells (indicating an infection), all of which confirmed penetration and strongly supported the prosecution's case. The trial court relied on this medical evidence to conclude that the minor had indeed been defiled.

17. The appellant also singled out the element of the complainant's age, questioning the adequacy of the evidence presented to establish that she was under the age of 11, as required by law for the offence of defilement. The appellant specifically challenges the admissibility of the mother's testimony regarding MMW's birthdate pointing out the absence of official documents like a birth certificate, vaccination card, or school enrolment form. He also contended that the complainant's mother was not qualified to produce the age assessment report, as she was neither its author nor an expert witness.

18. Indeed, the age of the victim is an important element as it not only determines the nature of the charge, but the sentence imposed. (See Kaingu Elias Kasomo v. Republic, Malindi Criminal Appeal No. 504 of 2010).

19. This Court in MW v .Republic [2020] KECA 944 (KLR) has also stated that the age of a victim can be established by medical evidence, birth certificate, the victim himself or herself, parents or guardian through their testimony before the trial court. In this case, the complainant's mother testified that her daughter was born on 12th December 2007, placing her at six years old at the time of the incident in November 2013.Further, the trial court had the benefit of observing the complainant during testimony and was satisfied that she was indeed a child under eleven years old. The complainant herself stated that she was a Standard One pupil at [Particulars Withheld] School, corroborating the age assessment report. In our view, the appellant's argument that the maker of the age assessment report 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. The evidence presented was sufficient to establish MMW's age, and both courts below rightly concurred on this point. Rightly so. Accordingly, the complaint that the ingredients of the offence were not proved also fails.

20. As for the second ground of appeal, the record shows that the trial magistrate and the High Court both duly considered the appellant's defence. His claim that he was framed due to his refusal to work for the complainant's father and later rejecting advances from a woman—whom he suggested might be the complainant's mother, was found to be unconvincing. Additionally, the appellant argued that the complainant had initially accused another individual, Njuguna, but was later coerced into implicating him. However, the two courts below weighed his defence against the consistent evidence of the complainant and the overwhelming medical evidence, which clearly implicated him. The appellant failed to provide any independent evidence to substantiate his claims, and as such, his defence was dismissed as shambolic and mere assertions. Consequently, this Court finds no merit in this ground of appeal.

21. The final ground of appeal is on the legality of the sentence imposed. The appellant contends that the indeterminate nature of the life sentence is illegal. Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* is very clear and provides "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life". From the evidence on record, the trial court was satisfied, as was the 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 affirmed in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) where the Supreme Court held that so long as Section 8 of the *Sexual Offences Act* remains valid the sentence imposed under Section 8(1) of the *Sexual Offences Act* is within the law. Again, In Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) and Republic v Manyeso [2025] KESC 16 (KLR) the Supreme Court has emphasized that it is not for the courts to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole; as this is a function within the realm of the Legislature.

22. In light of the foregoing, we come to the conclusion that the appellant was properly convicted of the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, 2006, as read with section 8(2) of the *Sexual Offences Act*. Accordingly,

we confirm the appellant's conviction and sentence and dismiss his appeal in its entirety. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 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