



**Ngeno v Republic (Criminal Appeal 12 of 2019)
[2024] KECA 1279 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1279 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 12 OF 2019
MA WARSAME, JM MATIVO & WK KORIR, JJA
SEPTEMBER 20, 2024**

BETWEEN

RONALD KIPKURUI NGENO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against the Judgment of the High Court at Nakuru
(Muya J.) dated 13th November, 2018 in Cr. Appeal No. 17 of 2018)*

JUDGMENT

1. This appeal is a classic illustration of how the continuous neglect of a child can lead to violation and defilement of a child on multiple occasions.
2. The Complainant, an eight year old girl, testified that on 8th March 2017, she was on her way from collecting onions when the appellant gave her ten shillings, took her to his house, removed both their clothes and defiled her. He then instructed her not to tell anyone about the incident.
3. RL, a neighbour testified that on 9th March 2017, the complainant came to her home begging for tea. She explained that she had slept at the accused's house, and he had made very little ugali and that she had not eaten. The complainant went on to narrate the harrowing ordeal she had undergone as she sipped the tea. The revelation prompted PW3, to call her neighbours, LL and EL who were related to the minor. According to R, the minor was chastised for going to the accused's house because it was an open secret that he had violated her on prior occasions. They subsequently decided to call the area administrator, Kagarwet area, Viola Cheptoo (PW2)
4. PW2 testified that the minor's mother was mentally handicapped and was not around. She admitted that she had been previously informed that the child would often sleep in the appellant's house at night, but she had not taken any action. However, upon learning about what transpired she took the child to Longisa County hospital for treatment and reported the matter to the police.



5. Dr. Ronald Kibet, who examined the minor concluded that she had been defiled. There were lacerations and bruises on her vaginal walls, her hymen which had been penetrated appeared old and a urine test confirmed she had a sexually transmitted disease.
6. The appellant was arrested, indicted and tried for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Upon consideration of all relevant factors, the Learned Magistrate rejected the appellant's one line denial- that he was not involved in the commission of the offence, found him guilty and sentenced him to Life imprisonment. The conviction and sentence were upheld by the High Court via a judgment delivered on 13th November 2018.
7. The Appellant, being aggrieved by that judgment has lodged the present appeal before us against his conviction and sentence. He has since filed amended grounds of appeal under Rule 67 of the Court of Appeal Rules, withdrawing the appeal against his conviction and is solely challenging the mandatory nature of his sentence on the grounds that:
 - a. He is remorseful and regrets the act.
 - b. He is rehabilitated and ready to reintegrate into society.
 - c. Mandatory Sentences are unconstitutional as they do not factor in mitigation.
 1. When the matter came up for hearing on 3rd July 2024, the parties opted to rely on their written submissions.
 2. The appellant urged the court to consider his mitigation and submitted that he was remorseful for the harm caused to the minor and was keen on reconciling with the family, he was a first- time offender with previous good character and that no substantial physical harm was reported in the medical report.
 3. Citing the cases of *Dismas Wafula Kilwake v Republic* [2019] eKLR and *Julius Kitsao Manyeso v Republic*, Criminal Application [*No.12 of 2021*](#) the appellant submitted that mandatory sentences were unconstitutional as they rob magistrates of their discretion to determine and award sentences depending on the circumstances. Relying on the case of *Joshua Gichuki Mwangi v Republic* where the appellant was found guilty of defiling a 15-year-old, he submitted that a sentence of 15 years was proportionate and just. He further asked that the duration of 8 months spent in custody be considered by the court in computing his sentence.
 4. In opposition to the appeal, the Respondent submitted that the sentence for an offence committed under Section 8(2) of the Sexual Offences Act is mandatory in nature hence it was proper, legal and legitimate.
12. We have considered the appellant's appeal against sentence to wit, whether the sentence imposed was unconstitutional and whether the learned magistrate was robbed of his discretion in sentencing the appellant to a mandatory sentence of life imprisonment. It is trite that our jurisdiction as a second appellate court is restricted to matters of law only and the Court cannot hear an appeal on the severity of sentence
13. Bearing the above in mind, we have perused the record of appeal and note that after conviction, the appellant was offered an opportunity to mitigate prior to sentencing but he stated that he had no mitigation to offer. The Appellant cannot now list an array of mitigating factors which were not presented before the trial court and implore this court to consider them anew. Nonetheless, we note



that in meting out the sentence of life imprisonment, the trial magistrate categorically stated that he had considered the circumstance of the offence and that the appellant was a first-time offender.

14. The Supreme Court in the recent case of Republic v Joshua Gichuki Mwangi, *Petition No. E018 of 2023* reiterated that as long as Section 8 of the *Sexual Offences Act* remains valid, life imprisonment is not unconstitutional. The court cited with approval, the case of Athanus Lijodi vs Republic [2021] eKLR on the issue of sentence where it was held:

15. Taking into consideration the circumstance of the case before us, we take keen cognisance of the fact that the appellant violated and abused a child of 8 years. He took advantage of the fact that the child's mother was mentally incapacitated, coupled with the fact that the minor had been neglected by her family and by society.

He chose to inflict unimaginable physical pain and psychological trauma on an impressionable young child.

16. For the foregoing reasons, and bearing in mind that the appellant was given an opportunity to mitigate and that the court considered the circumstances of the case and that he was a first time offender; we find that the sentence imposed was lawful, constitutional and justified. The appeal therefore lacks merit and we order that the same be and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

