



REPUBLIC OF KENYA



**KENYA LAW**  
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**Simiyu v Republic (Criminal Appeal E094 of 2024)  
[2025] KEHC 3288 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E094 OF 2024  
DR KAVEDZA, J  
MARCH 18, 2025**

**BETWEEN**

**JOEL WEKESA SIMIYU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on  
3rd September 2024 by Hon. M. Maroro (SPM) at Kibera Chief Magistrate's  
Court Sexual Offences Case No. E053 of 2023 Republic vs Joel Wekesa Simiyu)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted by the Subordinate Court of two charges of offences. The main charge was defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006, while the alternative charge was the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment for the main charge, and ten (10) years imprisonment for the alternative charge. The sentences were to run consecutively.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution called seven (7) witnesses in support of their case. PW3, the complainant PN gave a sworn evidence after a voir dire examination. She recalled that on 4<sup>th</sup> April 2023, she had accompanied her mother to her workplace to assist her in selling arrowroots. She excused herself to go to the



washroom, and as she was buttoning up her trousers, she saw the appellant who had opened the door and pushed her to the ground. He proceeded to pull her trousers back down as he pulled his down, after which he inserted his penis into her vagina where she felt excruciating pain and screamed. One of his colleagues, PW2 Mafat Kairo Ndaba went to the washroom and when he heard the scream, inquired from the appellant on what was going on. He replied that she was his wife then put his clothes back on threatened her to stay silent and left. When she went back to her mother, she told her that she had been gone a long while since she fell in the toilet.

5. While she was with her mother on 13<sup>th</sup> April, the appellant told her that he did not want to see her in Kangemi. She heeded his warning and told her father about it and since he lived far away, she left to live with another woman. On 18<sup>th</sup> April, she called her mother who was in the company of her brother to pick her up from Odeon Stage in town. They arrived at 11 p.m. Her mother, PW1, NMC had reported her daughter's disappearance at Kangemi Police Station on 16<sup>th</sup> April after she came back home from Murang'a. After meeting her, she narrated the whole ordeal. They proceeded to Nairobi Women's Hospital where the complainant received medical care. Thereafter, they recorded statements at the police station. The complainant averred that she was born on 1<sup>st</sup> October 2007. Further, the complainant's mother produced the complainant's birth certificate in court. PW1 her mother, PW2 the appellant's colleague, and PW3 the complainant all identified the appellant in court.
6. PW4, JM the complainant's brother gave a testimony that corroborated that of PW1 his mother, further stating that they found the appellant in his house on the day of his arrest. He identified the appellant in court.
7. PW5, John Njuguna produced the complainant's PRC form dated 19<sup>th</sup> April 2023 on behalf of his colleague whose handwriting and signature he was familiar with. It was observed that her outer vagina was normal, she had white discharge, and that her hymen was torn but had healed. Further, all tests were negative and she was not given any medication since time had lapsed.
8. PW6, PC Jerald Omuse recounted that on 18<sup>th</sup> April 2023 while working at Kangemi Police Station he received a report from the complainant's mother concerning an alleged defilement by the appellant to her daughter. Accompanied by his colleagues, he proceeded to arrest the appellant. He identified the appellant in court. His testimony was corroborated by that of PW7, PC Hellen Moroka the investigating officer, who further produced the complainant's birth certificate in court. The birth certificate ascertained that the complainant was born on 1<sup>st</sup> October 2007.
9. When placed on his defence, the appellant stated that on 18<sup>th</sup> April 2023 at around 11 pm, he heard a knock on his door while he was fast asleep. He opened the door after which he was arrested and taken to the police station. He denied committing the offence.
10. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
11. Further, section 8(1) and (2) of the *Sexual Offences Act*, No. 3 of 2006 provides thus:

8. Defilement

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.



12. The court has carefully reviewed the evidence to determine whether the prosecution established the offence of defilement against the appellant to the required standard of proof, beyond reasonable doubt. The essential elements—penetration, the complainant's age, and the appellant's identity—were scrutinised in light of the trial record.
13. Firstly, the element of penetration was convincingly substantiated. The complainant gave a clear account, testifying that while she was relieving herself in a washroom, the appellant forcibly entered by pushing the door open. He then proceeded to insert his penis into her vagina, an act she described vividly during her sworn evidence. This testimony was materially corroborated by the clinical findings of John Njuguna, who examined the complainant and noted a perforated hymen, a physical indication consistent with penetration. This medical evidence aligned with her narrative, providing a robust foundation for this element of the offence.
14. Secondly, the complainant's age was established beyond dispute. She testified that she was born on 1st October 2007, a fact affirmed by her birth certificate, which was tendered in court by the investigating officer, PW7. At the time of the offence, she was 15 years old, indisputably a minor under the law. The trial court's conclusion that she was a child within the legal definition was therefore sound and supported by documentary evidence, leaving no room for ambiguity.
15. The identification of the appellant was equally resolute. The complainant had prior interactions with him, including an incident where he warned her to leave Kangemi, causing her to flee and reside elsewhere. This familiarity underpinned her confident identification of him in court. Her mother (PW3), the appellant's colleague (PW2), an arresting officer (PW6), and the investigating officer (PW7) also identified him, reinforcing the certainty of his identity. Such consistent recognition from multiple witnesses eliminated any doubt.
16. The appellant contended in his appeal that the prosecution's evidence was contradictory and uncorroborated. This court finds these assertions untenable. The trial proceedings reveal a coherent case, with the complainant's testimony supported by medical evidence and multiple identifications.
17. In conclusion, the prosecution discharged its burden, proving penetration, the complainant's age, and the appellant's identity beyond reasonable doubt. The conviction for defilement is accordingly affirmed.
18. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba vs Republic* [2013] eKLR thus: -

“On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. -VS- Republic*, Criminal Appeal No. 342 OF 2008, this Court held,

“The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”
19. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative.



20. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006.
21. The primary objective of sentencing is not solely to punish but also to rehabilitate and reintegrate offenders back into society as responsible citizens.
22. The trial court sentenced the appellant to twenty years imprisonment, I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.
23. For the above reasons, I hereby affirm the sentence of twenty (20) years imprisonment imposed on the main charge.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF MARCH 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Ms. Chepkoech for the Appellant

Mutuma for the Respondent

Tonny Court Assistant

