



REPUBLIC OF KENYA



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**Simiyu v Republic (Criminal Appeal E063 of 2022)
[2025] KECA 1497 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1497 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E063 OF 2022
JM MATIVO, PM GACHOKA & WK KORIR, JJA
SEPTEMBER 19, 2025**

BETWEEN

PATRICK SIMIYU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kitale (H.K. Chemitei, J.) dated 15th June 2017 and Republic Respondent in HCCRA No. 129 of 2014)

JUDGMENT

1. This is a second appeal arising from the conviction and sentence of the trial court in Kitale CMC Criminal Case No. 3451 of 2013. The appellant, Patrick Simiyu, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 14th December 2013 at within Trans Nzoia County, the appellant intentionally caused his penis to penetrate the vagina of NNW, a child aged 7 years old.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally touched the vagina of NNW, a child aged 7 years old, with his penis.
3. The appellant was arraigned before the trial court. He pleaded not guilty to both counts. After a full trial, the appellant was convicted on the main charge and sentenced to life imprisonment on 3rd December 2014. The appellant challenged those findings at the Kitale High Court in HCCRA No. 129 of 2014. His appeal was dismissed on 15th June 2017 by Chemitei, J.
4. Resolute, the appellant has filed a second appeal before this Court. He filed his notice of appeal dated 23rd June 2017. He also filed his memorandum of appeal, similarly dated which raised six grounds



impugning the findings of the first appellate court. In summary, the appellant lamented that the aspect of penetration was not proved beyond reasonable doubt; the prosecution's evidence was marred by contradictions and inconsistencies, rendering the conviction unsafe; the evidence adduced did not establish that he was the perpetrator; and his defence was not considered.

5. In view of the foregoing, the appellant urged this Court to allow his appeal, quash his conviction and set aside his sentence. He further prayed that he be set at liberty.
6. The appeal was canvassed through written submissions on 7 May 2025. The appellant was present and appeared in person while the respondent was represented by Prosecution Counsel I Miss. Kirui, holding brief for Miss Gachau.
7. The appellant relied on his written submissions dated 4th February 2024 to argue that penetration, a crucial ingredient to establish a conviction for the offence of defilement, was not proved in line with section 2 of the *Sexual Offences Act*. He fortified by arguing that the six-day period that lapsed between the commission of the offence and the complainant's visitation at the Hospital cast doubt on whether the appellant committed the offence.
8. On the complainant's age, the appellant submitted that it was not proved since no documents were adduced in evidence to corroborate that she was seven years old when the offence was committed. He further lamented that the trial court improperly admitted the age assessment report and P3 forms yet they were not produced by their makers.
9. Citing several decisions, the appellant submitted that his right to a fair hearing was violated because he was not supplied with the witness statements in good time. In the circumstances, the entire trial violated the dictates of Article 50 (2) (j) of *the Constitution*.
10. Finally on the sentence of life imprisonment, the appellant submitted that the sentence was harsh, excessive and failed to align with jurisprudential pronouncements that the mandatory nature of sentence of life imprisonment was unconstitutional. He urged this Court to consider that he had a family, had since reconciled with the complainant and was remorseful. He prayed that his appeal be allowed.
11. The respondent opposed the appeal. It filed its undated written submissions, a case digest and list of authorities both dated 28th February 2024 to urge this Court to dismiss the appeal. The respondent pointed out that the appeal raised issues of fact and not of law and was therefore incompetent. On the merits of the appeal, the respondent submitted that all the ingredients of the offence of defilement were proved beyond reasonable doubt.
12. It added that there were no contradictions and if there were so, they were too minor as to disturb the findings of the trial court and the first appellate court. It continued that it furnished all witnesses statements and documents in good time to the appellant. That ground was therefore unmeritorious. Turning to the appellant's defence, it submitted that the same was not cogent and was properly rejected. Finally, it submitted that the sentence meted out was lawful. For those reasons, the respondent urged this Court to uphold the conviction and affirm the sentence.
13. This is a second appeal. Our duty as a second appellate Court is elaborately set out in section 361 of the Criminal Procedure Code. In *Karani v R* [2010] 1 KLR 73, this Court held:

“This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider



matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”

14. The facts before us have been captured in the record of appeal as follows: 7-year-old PW1 NNW, the complainant herein, testified that she knew the appellant as a tailor from their area of residence. On 14th December 2013, PW1 had been sent by her mother PW2 JN to take her father’s trousers to the appellant for repairs. The appellant asked her to wait outside. Thereafter, the appellant grabbed her hand and took her to his house. He placed her on his bed and removed her clothes. He then removed his clothes and sexually assaulted her. PW1 tried to scream but the appellant covered her mouth with his hands.
15. After he was done, the appellant returned back to his tailor station, leaving PW1 behind. PW1 later joined the appellant and was given back her father’s trousers. The appellant threatened that if she told anyone about what had transpired, he would kill her. Fearing for her life, PW1 kept the incident to herself. However, PW1’s parents discovered that she had been defiled when they saw that she was walking with a funny gait. PW1 was escorted by her parents to Kitale District Hospital where she received treatment. Thereafter, the incident was reported at Maili Nane police station.
16. PW2’s evidence was that PW1 was born on 11th February 2006.
She knew the appellant who was their tailor. She recalled that on the fateful day at 2:00 p.m., she had sent PW1 to take her father’s trouser to the appellant to install a zipper. PW1 later came back home with the trouser at 2:50 p.m.
17. A few days later, PW2 noticed that her daughter was walking abnormally. When she inquired from PW1, she was not informed what had transpired. PW2 called her friend Violet Cherotich PW3 to help her unearth what could have happened to her daughter PW1. On observation of PW1’s private parts, PW2 saw bruising. She took PW1 to hospital. They also reported the incident at the police station. She maintained that she held no grudge against the appellant.
18. PW3 testified that on 18th December 2013, she was at home when PW2 informed her at 5:00 p.m. that PW1 was walking in a funny gait. Together with PW2, they examined PW1 and discovered that she had some discharge and bruising on her private parts. That was when they were informed that the appellant defiled her. She knew the appellant who was a tailor in the area.
19. PW4 JNW, the complainant’s father, knew the appellant as his friend and tailor. He testified that on 19th December 2013, his wife, PW2 informed him that the appellant had sexually assaulted PW1. The incident occurred when PW1 took his trouser to the appellant. He reported the incident at Sibanga Police Station in Maili Nane. Come 20th December 2013, PW4 was issued with a P3 form that was filled in Kitale District Hospital. He denied that any grudge existed between him and the appellant.
20. PW5 PC Monica Sisa received the report on 19th December 2013 at 5:30 p.m. in Sibanga Police Station. The complainant was accompanied by PW4. PW5 interrogated the witnesses, recorded witness statements and collected the evidence. He then had the appellant arrested. PW5 produced the minor’s clinic card indicating that she was born on 11th February 2006.
21. PW6 Kirwa Labatt, a clinical officer based at Kitale District Hospital testified that the complainant was brought to the facility with a P3 form on 20th December 2013. On observation, PW6 noted that the complainant had lacerations around her vulva. Her vagina was hyperemic. Her hymen was torn and fresh looking. She had also developed an infection. He filed the P3 form that was produced in evidence as well as the treatment notes.



22. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that he was a tailor by profession. On 21st December 2013, he was visited by PW4 and a Kenya police reservist called Martin in the morning hours. The appellant was then escorted to Sibanga Police Station where he discovered that he was under arrest for the offence of defilement. The appellant denied committing the offence. He confirmed that indeed PW1 brought trousers for a zip installation. He stated that he had been framed because of a grudge over trees. He opined that had the complainant been truly defiled, then she would not have stayed that long without disclosing the offence.
23. Were the findings of the trial court and upheld by the first appellant court proper? That question remains the crux of this appeal. In addressing this question, we must establish whether the prosecution proved beyond reasonable doubt the following ingredients: the age of the complainant, penetration and the identification of the perpetrator.
24. On the age of the complainant, PW1 and PW2 both testified that the complainant was seven years old at the time of the offence. PW2 testified that she was born on 11th February 2006. PW1's clinic card and P3 form were adduced in evidence corroborating her date of birth. We find that the age of the complainant was proved beyond reasonable doubt.
25. Section 2 of the *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. According to PW6, the complainant had lacerations around her vulva. Her vagina was hyperemic. Her hymen was torn and fresh looking. PW1 also testified that she was sexually assaulted on 14th December 2013. Having examined the record of appeal, we are convinced, just like the courts below, that the ingredient of penetration was proved to the required standard.
26. Lastly is the identity of the perpetrator. The evidence led by the prosecution to persuade the trial court to find that the appellant was the assailant was that of PW1. Her evidence was that on the fateful day, she had been sent by PW2 to take PW4's trouser to the appellant for a zipper installation. The appellant, PW1, PW2, PW3 and PW4 all confirmed that the appellant was a tailor by profession.
27. Shortly after her arrival at his station, the appellant grabbed her hand and took her to his house. He placed her on his bed and removed her clothes. He then removed his clothes and sexually assaulted her. PW1 tried to scream but the appellant covered her mouth with his hands. She felt pain. After he was done, the appellant returned back to his station. He cautioned her with threats against disclosing what had transpired. Fearing for her life, PW1 kept the incident to herself. However, PW1's parents discovered that she had been defiled when they saw that she was walking with a funny gait.
28. Section 124 of the *Evidence Act* provides that the evidence of a single identifying witness shall not sustain a conviction except in sexual offences as long as the witness is deliberately telling the truth. In this case, the appellant was well known to the complainant. The offence occurred during the day and there is no case for mistaken identity. The complainant was cross examined by the appellant. The complainant gave a detailed description of the appellant's house and the transpirations when the offence occurred. At no point was she hesitant or flinched. We find that the complainant was telling the truth as her evidence was not shaken.
29. Though the appellant sought to accuse the complainant of framing him, that allegation was not persuasive enough to dislodge the prosecution's evidence which we find was watertight. We do not think that the appellant had been framed for the offence that he was convicted of. The two courts below arrived at a proper finding that the appellant committed the offence that he was charged with. Accordingly, we find that his appeal on conviction must fail and is hereby dismissed.



30. The appellant was sentenced to life imprisonment. This sentence was upheld by the High Court. Under section 8 (2) of the Sexual Offences Act, a convicted person shall be sentenced to life imprisonment. Taking into account the binding decisions of the Apex Court Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) and Republic v Manyeso [2025] KESC 16 (KLR), where mandatory sentences were affirmed to be lawful, we see no reason to disturb the findings on sentence. In the circumstances, we find that the appeal on sentence lacks similarly merit. It is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF SEPTEMBER 2025.

J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

