



**Omoke alias Jamaa v Republic (Criminal Appeal 13 of 2019)  
[2026] KECA 162 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KECA 162 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 13 OF 2019  
P NYAMWEYA, LA ACHODE & JM MATIVO, JJA  
JANUARY 30, 2026**

**BETWEEN**

**TOM OTONYI OMOKE ALIAS JAMAA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court at Kisii  
(Majanja J) dated 17th December 2018 in HCCRC NO 109 OF 2018)*

**JUDGMENT**

1. This is a second appeal against the decision of the High Court at Kisii in Criminal Appeal No. 109 of 2018, which upheld the conviction and sentence imposed by the Senior Resident Magistrate's Court at Ogembo in Criminal Case No. 175 of 2013.
2. The appellant was charged with two counts of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. It was alleged that on 12<sup>th</sup> February 2013, at [Particulars Withheld], Nyamecheo sub- location of Gucha Sub-county in Kisii County, the appellant unlawfully caused his penis to penetrate the vagina of JKO, a minor aged 6 years.
3. The appellant pleaded guilty before Hon D. Ogola, Principal Magistrate and was convicted. Consequently, he was sentenced to life imprisonment.
4. Dissatisfied with that outcome, the appellant lodged an appeal before the High Court against both conviction and sentence, alleging that his plea of guilty was entered without warning him of the consequences of pleading guilty. Further, that the Court did not give him time to prepare his defence, and lastly, that the sentence imposed was harsh, inhuman disproportionate and arbitrary. Majanja J,



considered the appeal and on 17<sup>th</sup> December 2018, he dismissed it upholding both conviction and sentence.

5. The appellant was still dissatisfied with the decision of the superior court and he preferred the present appeal against both conviction and sentence. He filed a memorandum of appeal and written submissions date 21<sup>st</sup> August 2025, contending that the plea of guilty was not properly entered in accordance with Section 207 of the Criminal Procedure Code, (CPC), as he was not warned of the grave consequences of the offence, which carries a mandatory life sentence. He argued that this omission rendered the entire trial irregular, prejudicial, and contrary to Articles 25(c), 27(1), 47(1), and 50(1) of *the Constitution*.
6. The appellant relied on the principles enunciated in *Gatirau Peter Munya v Dickson Kithinji & 3 Others* (2014) eKLR, emphasizing the distinction between matters of law and fact in a second appeal. He also cited the case of *David Macharia Kamau v Republic* (Criminal Appeal No. E021 of 2022) and *Simon Gitau Kinene v Republic* (HCCRA No. 9 of 2016) to support the position that failure to follow the proper procedure in plea taking renders a conviction unsafe.
7. The appellant also challenged the fairness of the trial, arguing that the High Court failed to re-evaluate the evidence as required under Sections 329 and 362 of the CPC and Section 11 of the *Evidence Act*. He relied on comparative jurisprudence, including *Condron v United Kingdom* (2000) Crim LR 679 and *R v Togher* (2001), where the courts underscored that fairness of trial is the cornerstone of justice and an unfair trial necessarily renders a conviction unsafe. The appellant faulted the trial and appellate courts for failing to consider his mitigation, contrary to Article 50(1) and Sections 216 and 329 of the CPC, and for upholding a disproportionate sentence in breach of the Sentencing Policy Guidelines. He drew support from the case of *John Njoroge Njuguna v Republic* (Criminal Appeal No. 55 of 2014), where failure to consider mitigation warranted a remittal for resentencing, and from English authorities of *R v Lowe* [1977] 66 Cr App R 122, *R v Haley* [1983] 5 Cr App R (S) 9, and *R v Howells* [1998] Crim LR 836, to emphasize leniency toward first offenders of good character.
8. Finally, the appellant submitted that the sentence of life imprisonment is unconstitutional, citing *Francis Matonga Ogeto v Republic* [2019] eKLR and *Mileke v Republic* (Criminal Appeal No. 46 of 2014), where life sentences were reduced to ten years. He further referred to *R v Bibi* (1980) and *R v Ollershaw* [1998] Crim LR 515, where the courts held that when loss of liberty is inevitable, the sentence must be kept to the minimum possible. He urged us to find the conviction unsafe, quash it and set him at liberty or, in the alternative, order a retrial to remedy the miscarriage of justice.
9. Ms Kitoto, the learned Principal Prosecution Counsel, filed submissions dated 26<sup>th</sup> August 2025 on behalf of the respondent, in opposition to the appeal. Counsel maintained that the conviction and sentence of the appellant were lawful and properly founded. That the appellant was convicted on his own plea of guilty, and sentenced to life imprisonment and his appeal before the High Court was dismissed. She urged that under Section 361 of the CPC the jurisdiction of the Court on second appeal is limited to matters of law only, as affirmed in *Karingo v Republic* [1982] KLR 219.
10. It was counsel's argument that the plea of guilty was properly taken in accordance with the procedure laid down in *Adan v Republic* [1973] EA 445, and later affirmed in *Obedi Kilonzo Kevevo v Republic* [2015] eKLR. According to counsel the record shows that the charge and every element of the offence were read and explained to the appellant both in Kiswahili and Ekegusii, and he responded each time by saying "it is true." The respondent emphasized that the facts presented in court disclosed the offence of defilement as defined in law and that the age of the complainant, being six years, was adequately proved through treatment notes, consistent with the decisions in *Francis Omuroni v Uganda* (Criminal



Appeal No. 2 of 2000) and Fappyton Mutuku Ngui v Republic [2012] eKLR, which held that proof of age may be established through medical records or credible testimony.

11. On the issue of sentence, the respondent submitted that both courts below acted within the law. The trial court considered the appellant's mitigation in compliance with Sections 216 and 329 of the CPC, but the mandatory life sentence prescribed under Section 8(2) of the SOA left no discretion for a lesser punishment. The respondent relied on the Supreme Court decisions in Petition No. E018 of 2023 [2024] KFSC 34 and Republic v Evans Nyamari Ayako (Petition No. E002 of 2024), which upheld the constitutionality of mandatory life sentences. Consequently, the respondent urged the Court to find that the appeal is devoid of merit and dismiss it in its entirety.
12. The respondent submitted that the role of this Court as a second appellate court is limited to matters of law as provided under Section 361 of the CPC. Reliance was placed on the cases of John Gikonyo v Republic [2019] eKLR and David Njoroge Macharia v Republic [2011] eKLR, where the court emphasized that a second appellate court will not ordinarily interfere with concurrent findings of fact by the two lower courts unless it is shown that such findings were based on no evidence, on a misapprehension of the evidence, or that the courts acted on wrong principles. The respondent therefore, urged this Court to confine itself strictly to legal issues.
13. The appeal came before us for plenary hearing on 1<sup>st</sup> September, 2025. The appellant appeared in person and clarified that he was no longer contesting the conviction and was only urging for the review of the sentence. He pleaded for leniency and urged the Court to consider releasing him so that he could return home and provide for his family. Mr. Njeru Senior Assistant Director Public Prosecution appeared for the respondent and relied entirely on their submissions.

In this appeal the appellant pegged the allegation of unfairness in his trial on three grounds being:

- i. That the plea of guilty entered against him was not unequivocal;
  - ii. That the trial and appellate courts failed to consider his mitigation, contrary to Article 50(1) and Sections 216 and 329 of the CPC; and,
  - iii. That the sentence of life imprisonment was disproportionate and in breach of the Sentencing Policy Guidelines, and is therefore, unconstitutional.
14. We evaluated the record of appeal to establish whether the plea of guilty that was entered in relation to the appellant was in any way equivocal. The appellant submitted that the plea of guilty was not properly entered in accordance with Section 207 of the CPC, as he was not warned of the grave consequences of the offence, which carries a mandatory life sentence. He argued that this omission rendered the entire trial irregular, prejudicial, and contrary to *the Constitution*.
  15. According to the respondent however, the record shows that the charge and every element of the offence were read and explained to the appellant both in Kiswahili and Ekegusii languages which he understood, and he responded each time by saying "it is true." The respondent emphasized that the facts presented in court disclosed the offence of defilement as defined in law and that the age of the complainant, being six years, was adequately proved through treatment notes.
  16. The appellant threw his net wide in to *the Constitution* citing Articles 25(c), 27(1), 47(1), and 50(1) hoping to avail himself of the protection in any of them. Article 25 (c) protects fundamental rights and freedoms that cannot be limited and include the right to fair trial. Article 27(1) addresses equality and freedom from discrimination stating that every person is equal before the law. Article 47 (1) guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, while Article 50(1) guarantees the right to have any legal dispute decided in a fair and public hearing



before a court or an independent and impartial tribunal. This includes the right to fair trial which encompasses aspects like the presumption of innocence, the right to be informed of the charges and the right to legal representation.

17. However, the specific law that governs the recording of plea is stipulated under Section 207(1) and (2) of the CPC as follows:

1. The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
2. If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

18. This procedure was succinctly set down in the locus classicus case of *Adan v Republic* [1973] EA 445, by the Court of Appeal as follows:

- i. ...the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- ii. ...the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- iii. ...the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- iv. ...if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- v. ...if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

19. We subjected the plea taking proceedings in the appeal before us to the provisions of Section 207 (1) and (2) and the principles in *Adan v Republic* (Supra). The record clearly demonstrates that the charge was read to the appellant in both Kiswahili and Ekegusii languages which he understood as follows:

“The substance of the charge and every element of the charge... It has been explained to the accused who on being asked whether he admits or denies every element of the charge replies. ‘Kiswahili.’

Count 1:

Accused: it is true.

Court: Plea of guilty entered for accused in count 1.

The charge sheet has been read out to the accused 2 times in both Kiswahili and Ekegusii languages. He has maintained and stated:-

Accused: It is true.

Court: A plea of guilty entered against the appellant.



Court: Case to be mentioned for facts and sentence. Mention 19<sup>th</sup>/2/2013.”

20. It is pertinent that the plea was read to the appellant two times and the case was adjourned to the following day for the prosecution to avail the facts of the charge. The appellant had until the following day to ponder over the situation he found himself in and to change plea if he was so minded. We however, note that he admitted the prosecution facts without qualification, when they were read to him the following day.
21. Accordingly, we find that the plea was properly recorded, satisfying the principles in *Adan v Republic* (supra) and the provisions of Section 207 of the CPC and was therefore, unequivocal.
22. On the second issue, the appellant faulted the trial and the first appellate courts for failing to consider his mitigation, contrary to Article 50(1) and Sections 216 and 329 of the CPC. He drew support from the case of *John Njoroge Njuguna v Republic* (Criminal Appeal No. 55 of 2014), where failure to consider mitigation warranted a remittal for resentencing. In rebuttal the respondent urged that the trial court considered the appellant’s mitigation in compliance with the stated sections, but the mandatory life sentence prescribed under Section 8(2) of the SOA left no discretion for a lesser punishment.
23. Section 216 CPC allows a court to receive evidence before sentencing an accused person to help determine the proper sentence. However, the case before us carries a mandatory sentence. There is therefore, no room for the court to consider any other sentence to determine the proper sentence. A look at the record shows that the appellant was given a chance to mitigate and he told the court as follows:

“I am asking the court for leniency. I admit I made a mistake. I shall not repeat.”

And the court considered his mitigation as follows:

“I have noted the mitigation of accused. This is a serious offence committed against an innocent six year old girl. Accused deserves a custodial sentence thus would act (sic) as deterrence to other like minds.”

Consequently, we are satisfied that the appellant’s mitigation was considered and nothing turns on this ground.

24. Lastly, the appellant challenged the decision of the learned Judge for upholding what he termed as a disproportionate sentence in breach of the Sentencing Policy Guidelines.  
He urged that the mandatory life sentence prescribed by Section 8(2) of the SOA is unconstitutional for removing judicial discretion and occasioning a disproportionate penalty. He cited the decisions of *R v Lowe* (1977) 66 Cr App R 122, *R v Haley* (1983) 5 Cr App R (S) 9, and *R v Howells* (1998) Crim LR 836, to urge for leniency toward first offenders of good character. The respondent on their part relied on the Supreme Court decisions in *Petition No. E018 of 2023 [2024] KFSC 34* and *Republic v Evans Nyamari Ayako* (Petition No. E002 of 2024), to emphasize the constitutionality of mandatory life sentences.
25. The jurisprudence emerging from the Supreme Court has clarified the matter of the unconstitutionality of mandatory sentences. In *Francis Karioko Muruatetu & Another v Republic* (2017 KESC 2), the apex Court held that the mandatory death sentence for murder under Section 204 of the Penal Code was unconstitutional as it wholly deprived the court of discretion and violated rights to dignity and fair trial. Nevertheless, the same Court subsequently limited the reach of that principle.



- 26. In Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34, the Supreme Court expressly declared that the reasoning in Muruatetu (supra) does not automatically extend to mandatory or minimum sentences provided in other statutes such as the SOA, unless the provision itself is shown to be unconstitutional. The Court emphasised that where Parliament has prescribed a sentence, courts are bound to apply it, and appellate interference therewith would contravene the doctrine of separation of powers.
- 27. Similarly, in Republic v Julius Kitsao Manyeso (Petition E013 of 2024) [2025] KESC 16, the Supreme Court held that the Court of Appeal had acted ultra vires in substituting the life sentence under Section 8(2) with a fixed-term sentence, affirming that appellate courts have no jurisdiction to alter a statutory sentence, unless the statute is first declared unconstitutional.
- 28. In the present appeal, the trial court imposed the statutory life sentence after a valid plea of guilty. The High Court, exercising its appellate jurisdiction, affirmed the conviction and sentence. It has not been demonstrated that Section 8(2) has been declared unconstitutional, nor is there any evidence of misdirection by the trial court in its application. Following the guidance in Mwangi and Manyeso (supra) the mandatory nature of the sentence alone does not render it unconstitutional. Consequently, the sentence imposed remains lawful, proportionate within the statutory scheme, and binding upon this Court.
- 29. Section 361 (1) (a) of the CPC confines second appeals to matters of law. The question of severity of sentence, unless tainted by illegality or unconstitutionality, is largely one of discretion and fact, not of law. The Supreme Court in Manyeso (supra) reiterated that the Court of Appeal cannot substitute a sentence prescribed by statute, for to do so would amount to rewriting the law and infringing the constitutional mandate of Parliament. This Court is therefore, without jurisdiction to vary or reduce the statutory life sentence imposed and affirmed by the courts below.
- 30. In the result, we find that the plea of guilty was unequivocal, the mitigation was considered and the sentence of life imprisonment was lawfully and constitutionally imposed under Section 8(2) of the SOA. Reasons wherefore, the appeal is found to lack merit and is dismissed in its entirety.
- 31. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2025**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

