Simiyu v Republic (Criminal Appeal E013 of 2022)
[2026] KECA 284 (KLR) (13 February 2026) (Judgment)

Neutral citation: [2026] KECA 284 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E013 OF 2022

MS ASIKE-MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA

FEBRUARY 13, 2026

BETWEEN

KEN SITATI SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment and sentence of the High Court of Kenya at Kisumu (J. Kamau J.) delivered on 25th October 2021 in Kisumu HCCr. App No. 23 of 2020)

JUDGMENT

1. Ken Sitati Simuyu, the appellant has challenged his conviction of defilement and sentence of life imprisonment that was initially imposed by the Winam Senior Principal Magistrate's Court (Hon. H. M. Nyaberi SPM) in *Criminal Case No. 45 of 2018* (hereinafter "the trial Court"), and upheld by the High Court at Kisumu (J. Kamau J.) in *Kisumu HC Cr. App No. 23 of 2020*. The particulars of the offence were that on 20th August 2018 in Kisumu East Sub County within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of PMJ a girl aged 8 years.

2. The prosecution called a total of five (5) witnesses to testify during the trial. The victim, PMJ, testified as PW1, after a voire dire examination. The gist of her evidence was that on 20th August 2018, while playing in a field not far from her home with her friends P and G, the appellant's friend, who was outside his house sent her to call appellant. PMJ went to the appellant's house, found the door open and stood at the door and called him. When he came to the door, he took her inside the house, locked the door, and told her to sleep on the bed. He then tied her hands and legs with a rope, and blocked her mouth with a cloth, andput his "dick in the organ that she uses to urinate When he finished, he untied her and told her to go out, whereupon she went and told his friend that he was coming and continued playing with her friends.

3. The next day PMJ's aunt sent her to buy tomatoes, and asked her if her skirt was tight, because PMJ was walking with her legs apart. When she went to play she also felt pain. Her mother also told her that a neighbour had asked if PMJ was having difficulty walking, and PMJ told her that she had problems urinating. PMJ did not tell her mother the truth because she feared that the appellant would "slaughter" her, and it is only when her aunt interrogated her further, that she disclosed that the appellant had defiled her, and her aunt then called her mother. When PW 1's mother came, PMJ told her what had happened, and she was then taken to Kibos hospital and thereafter Kondele police station. PMJ denied having any grudge with the appellant and during cross examination, she stated she had been to the appellant's house before and she would go daily, while the appellant also used to visit her aunt Mitty. She stated that their house was next to the appellant's house.

4. JLA, PMJ'S mother, (PW3) recalled that on 20th August 2018, she went home and found PMJ asleep in her bed with her legs apart. On 21st August 2018 EEA, an aunt to PMJ(PW2), also noticed that PMJ was walking with her legs apart. She stated that she had seen and taken water to PMJ and other girls on 20th August 2018 to take a bath at 1.00 pm, and PMJ was not having any difficulty walking then, and she noticed the difficulty at around midday on 21st August 2018. Upon further interrogation PMJ told PW2 that she had been defiled by someone in the bathroom, before stating that it was the appellant who defiled her. On 22nd August 2018, PW3 asked PMJ what was wrong, and PMJ answered that she was having difficulties in passing urine, and PW3 then checked PMJ's underwear and saw it was dirty. PW3 told PW 2 to take PMJ to the hospital in Kibos and PW2 thereafter called PW3 to inform her that she suspected PMJ had been defiled, and that they had been referred to Kondele police station. When PW3 went to Kondele police station she saw that PMJ had difficulties in walking, and PMJ told her that the appellant had defiled her. Both PW2 and PW 3 stated that they knew the appellant who was their neighbour, and had no grudges with him.

5. Brenda Luvembe (PW4), a clinical officer, physically examined PMJ on 22nd August 2018 and prepared and signed the post rape care "PRC" Form. Her findings were that PMJ's labia was swollen and hyperaemic/ reddish, there were bruises on the labia minora, she had a whitish yellowish discharge from the vagina while the anus was intact. It was her professional opinion that there was vaginal penetration on PW 1. PC George Oduor (PW5) was the officer who received the report of the defilement on 22nd August 2018 and referred PMJ and PW2 to hospital for medical attention. Later, he issued them with P 3 form which was filled by the doctor, and he asked PW 3 to avail certificate of birth which he produced in Court and which showed that PMJ was born on 9th March 2010. He recorded witness statements and charged the appellant with defilement and indecent act. Brenda Juma (PW6), a medical doctor, produced the P3 form which had been filled by Doctor Robert Sadia, who was on annual leave, and testified that the minor was sent to hospital on 23rd August 2018 on a case of alleged defilement, and upon examination of the genitalia, her labia majora was swollen both sides, the labia minora was swollen filled with fluid and blood, the hymen was absent and the anus was intact. There was vaginal discharge yellow in colour and foul smelling.

6. The appellant gave his sworn testimony as DW1 and called two witnesses to testify in his defence. He stated that he was a machine operator and knew PMJ as his neighbour's child. He recalled that on 20th August 2018 he had not gone to work because he was unwell. He gave an account of his movements on that day, being, having breakfast at 9.00 am with one Michael who lived with him; at 9.30 am he watched a movie at Kibos market; when he left the video shop, he met Nelson Nalianya, who was headed to the barber shop; he visited and had lunch with his friend, one Gaudencia at her Mpesa shop at Kibos Market and stayed there from noon to 3pm and interacted with Edgar Moyundo at the 1.00 pm at the Mpesa shop; met his girlfriend Irene at the market at about 3.00pm and stayed with her for about 30 minutes; and went back to, and arrived at his house at 5.00pm on the same day. He stated

that PW2 used to be his girlfriend from 2018 and left the relationship when he got to know that she had a child, and PW2 was not happy seeing him with another girlfriend.

7. DW 2,Nelson Nalianya stated that the appellant was known to him from 2019, and trained with him in a football club. He had heard that the appellant had been arrested for defiling a girl on 20th August 2018; and that on that day he met the appellant at about 12.00 pm and accompanied him since they were going in the same direction. The appellant entered an Mpesa shop as DW2 entered the barbershop. He said he did not know how the alleged incident of defilement took place. Edgar Sikolia Muyundo testified as DW 3 and stated that the appellant was known to him from July 2018, and that at 12.30pm on 20th August 2018, he met the appellant at an Mpesa shop at Kibos Market sitting with a girl and young boy talking. DW3 talked to him for about 15 minutes and went to a nearby hotel and left at about 2.00pm.

8. It is on the basis of this evidence that both the trial Court and High Court found that the ingredients required to sustain a conviction for a charge of defilement were conclusively proved by the prosecution before the trial court and that the appellant's defence of alibi was not sufficient to outweigh the evidence tendered by prosecution. The appellant has now filed a second appeal to this Court, and challenges the High Court judgment for being at variance with the evidence, and for upholding a sentence which was excessive. We heard the Appeal on the Court's virtual platform on 7th May 2025 and the Appellant, Mr. Ken Sitati Simiyu was present virtually from Kibos Maximum prison, learned counsel Mr. Geoffrey Okoth appeared for the appellant and relied on written submissions dated 24th March 2025 and 2nd May 2025, while learned counsel Mr. Okang'o, appeared for the respondent and placed reliance on his submissions dated 30th April 2025.

9. Before we commence our determination of the appeal, we reiterate the role of this Court as a second appellate Court as set out in *Karani v R* (2010) 1 KLR 73:

> 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, in which case such omission or commission would be treated as a matter of law.

10. We note in this respect that the appellant raised two issues of law as regards the defective charge sheet and defective trial that were not in the memorandum of appeal he filed in this Court. We accordingly cannot make a decision on the issues as they were not pleaded. The issues of law properly raised in this appeal are firstly, whether the High Court's evaluation of the evidence adduced during the trial supported the conviction of the appellant for the offence of defilement, and secondly, whether the sentence meted on the appellant was unlawful.

11. Mr. Okoth submitted that the first appellate court did not subject the evidence to fresh scrutiny, analysis and re-evaluation as was expected; that the respondent failed to adduce sufficient evidence linking the appellant to the incident involving PMJ who was defiled; PMJ's evidence/ testimony was marred with contradictions as she gave two different versions of the defilement and as such her evidence could not be relied on unilaterally; none of the PMJ's friends who were playing with her on the material day were brought to court to confirm that PMJ indeed sent by the appellant's friend as alleged and/ or that she went to the appellant's house; the investigations were inconclusive; no DNA was ever conducted to connect the appellant to PMJ, and witnesses who confirmed to the trial Court that the appellant was not at the scene at the material time of the offence, which alibi was not rebutted by the

prosecution. According to counsel PMJ's account of the involvement of the appellant in the offence required corroboration under section 124 of the *Evidence Act* because the prosecution's case was based on circumstantial evidence from witnesses whose credibility was questionable.

12. On the legality of the sentence, counsel submitted that the sentence of life imprisonment was declared to be unconstitutional due to it's indeterminate nature by the Supreme Court in the case of *Muruatetu & Another v Republic* (2017) eKLR "Muruatetu 1", and as inhumane treatment which violates the rights to dignity under Article 28 of the *Constitution* of Kenya, 2010. Counsel also cited the decision by the European Court of Human Rights in *Vinter & Others v The United Kingdom* (Application No. 66069/09, 130110 And 3896/10 (2016) 11 ECHR.317 (91 July 2013) that an indeterminate life sentence without any prospect of release or possibility of review is degrading and in humane punishment , and that it is now a principle in international law that all prisoners, including those serving life sentence, be offered the possibility of rehabilitation and prospect of release if that rehabilitation is achieved. Lastly, that the appellant had therefore taken his incarceration seriously and positively by engaging himself in prison rehabilitation and reformation programmes such as spiritual courses and technical courses and the Court was referred to certificates issued to the appellant in this respect.

13. On his part, Mr. Okang'o submitted that the discrepancies and inconsistencies were not fatal to their case, and cited the decision of this Court in *Richard Munene v Republic* (2018) eKLR which held that to be fatal, discrepancies must be of such gravity that they materially prejudice the accused. Therefore, that reference as to the incident happening in the bathroom or at the house was too remote a contradiction, and did not negate the uncontested fact that PMJ was defiled and the perpetrator was recognised and identified by PMJ as the appellant.

14. Regarding the defence of alibi, it was submitted by counsel that the appellant raised the alibi during the defence hearing, and the trial Court rightly considered the same alongside the totality of the prosecution evidence on record. In this respect the prosecution had adduced unrebutted evidence placing the appellant at the scene, the victim identified the appellant through recognition as he was a neighbour and mentioned the appellant's name as "Ken", and the incident occurred during the day when the circumstances were conducive for a positive identification. Furthermore, the trial Court found that PMJ was a credible and trustworthy witness and could rely on her evidence under section 124 of the *Evidence Act*, and also noted that her evidence was corroborated by the medical evidence that was adduced by PW 4 and the evidence that PMJ was walking with her legs apart the following day after the incident . Accordingly, the case presented by the prosecution before the Trial Court was so cogent and sufficient as to lead to the conviction of the Appellant.

15. Lastly on the sentence, Mr. Okang'o submitted that the Supreme Court in its decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) affirmed the mandatory sentences in the Sexual Offence Act holding that for as long section 8 of the *Sexual Offences Act* remains in our statutes unattended, then the mandatory sentences therein are legal. Consequently, a person convicted of defilement under section 8 (2) of the Act, as the case herein, is to be sentenced to the mandatory life sentence.

16. We have considered the arguments by counsel for appellant and respondent. The essential elements that need to be proved to convict on a charge of defilement under the *Sexual Offences Act* as reiterated in *John Mutua Munyoki v Republic*, [2017] eKLR, are that the victim must be a minor, and there must be penetration by the perpetrator of the genital organ and such penetration need not be complete or absolute, and partial penetration will suffice. We need to state at the outset, that after perusing the record, we note that the judge of the High Court did set out and analyse the evidence adduced in the

trial Court, and the arguments that were raised by the appellant, including some of which he has raised in this appeal, and held as follows:

> " 44. The Appellant questioned how a child could play after being defiled. This was a reasonable observation. However, it was not entirely improbable behaviour as victims of sexual offenses can behave in the strangest of ways in what is referred to as trauma bonding. Notably, the complainant testified that she used to go to the appellant's house daily. He did not deny the same.
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> 45. Further, although the Appellant argued that when asked why she was working (sic) with her legs apart the Complainant first replied that she had been defiled at the bathroom and then later gave a different version that it was the one who defiled her, did not draw any contradictions (sic). She testified that the appellant had threatened her into silence. It was reasonable to expect that a child at that age would be afraid of disclosing to a third party what had actually transpired.
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> 46. Though young, the court found that the Complainant was intelligent enough and appreciated they (sic) need two speak the truth. She recognized the appellant as Ken and was emphatic that he was the one who defiled her. The court also noted that her evidence was corroborated by medical evidence that was adduced by PW4. Of critical importance was that the Complainant was walking with her legs apart the following day after the incident and medical examination showed that her genitalia had injuries".

17. The general rule as regards the credibility of evidence adduced by minors is that it requires corroboration, however, there is an exception in sexual offences, as noted by this Court in *Sahali Omar v Republic* [2017] eKLR where it was held as follows as regards section 124 of the *Evidence Act*:

> "...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. *Patrick Kathurima v R* (*supra*) and *Johnson Muiruri v Republic*, (1983) KLR 445 and also *John Otieno Oloo v Republic* [2009] eKLR)...In addition, the proviso to section 124 of the *Evidence Act* affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim."

18. The law therefore, is that where a minor is the victim of a sexual offence, the evidence of that minor if believed by the trial court, can be the basis of a conviction without corroboration. In the present appeal, the appellant has sought to impeach PMJ's evidence on the defilement as having been contradictory. It is notable that PMJ did own up to giving different accounts as regards the place where the penetration occurred, but was consistent that it was because the appellant had threatened her with strangulation,

and more importantly, that it was the appellant, who was known to her, who inserted his organ into her place for urinating. The trial Court found the evidence of PMJ to be truthful and this is a finding of fact we cannot interfere with. It was held as follows in *Joseph Kariuki Ndungu & Another v Republic* [2010] eKLR as regards the assessment of the attributes of credibility:

> "...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."

19. In addition, there was no evidence on record to impeach the credibility of PW2, whose concerted efforts to find out what had happened to PMJ, who was her niece, after she observed she had difficulty walking, were described by the appellant as being due to jealousy. Furthermore, the medical evidence by PW4 and PW6 was independent corroborative evidence, and together with that of PMJ was sufficient to prove penetration. In this regard, it is notable that unless the penetration is alleged to have taken place in an open public place, the evidence of PMJ who was the victim, and medical evidence is sufficient to prove penetration. We are in agreement in this regard with the threshold in determining whether any variances and contradictions in the evidence will affect its probative value, as set out by this Court in the case of *Josephat Manoti Omwancha v Republic* [2021] eKLR while citing the decision in *Stanley Mathenge Karani v Republic* [2015] eKLR, as follows:

> "The role of a court of law when confronted with allegations of contradictions, discrepancies in the prosecution case has now been crystallized. See *Joseph Maina Mwangi v Republic* CRA No.73 of 1993; *Njuki & 4 Others v Republic* [2002] 1KLR 771, *Vincent Kasyula Kingoo v Republic* Nairobi Criminal Appeal No.98 of 2014, all for the proposition that when confronted with such allegations an appellate Court should apply the guidelines set in Section 382 of the *Criminal Procedure Code* Cap 75 Laws of Kenya to determine whether such discrepancies, contradictions or inconsistencies are such as to cause prejudice to the appellant or that they are inconsequential to the conviction and sentence. Where these do not affect an otherwise proved case against an appellant, they should be ignored.."

20. We also need to point out that DNA evidence was not necessary to prove penetration, and we are in this regard persuaded by the decision of this Court in *Williamson Sowa Mbwanga v Republic* [2016] eKLR, that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, and allows the court to determine whether from the circumstances of a case, it is necessary for purposes of gathering evidence to order that samples be taken from an accused person for forensic, scientific, or DNA testing. We need to emphasize in this regard that the element that requires to be proved in defilement is penetration, and not paternity in the eventuality of a pregnancy. We therefore cannot find any basis to fault the following holding by the High Court Judge:

> "40. The record showed that the Complainant testified that the Appellant herein who was known to her removed her clothes and inserted his penis into her organ that she used to urinate. The medical evidence indeed showed that the labia majora was swollen and labia minora was bruised. High vaginal swab showed pus cells and red blood cells. This court was therefore satisfied that penetration was proved"

21. On the alibi defence, this Court has held in the cases of *Kiarie v Republic* [1984] KLR 739 and *Karanja v Republic* [1983] KLR 501 that an alibi raises a specific defence and an accused person who puts up an alibi in an answer to a charge does not in law thereby assume any burden of proving that answer and

that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, and that it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. In *Victor Mwendwa Mulinge v Republic* [2014] eKLR, this Court, while referring to the decision in *Karanja v Republic* [1983] KLR 501 held that:

> " in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."

22. A defence of alibi asserts that the accused was at a different location from the scene of crime when a crime was committed, and there is no obligation of the accused to prove the alibi, the objective is to raise reasonable doubt. The burden remains on the prosecution to prove guilt beyond a reasonable doubt, including disproving the alibi. While an alibi can be raised at any time, it should ideally be raised at the earliest opportunity during investigation, and a delayed alibi may be viewed as an afterthought, although it must still be considered by the court. In this respect evidence was adduced by PMJ that the defilement took place on 20th August 2018, at lunch time. DW2 and DW3 gave evidence that they met the appellant on his way to meet a friend, and at a friend' s mpesa shop respectively, when the offence was alleged to have been committed. This defence was raised by the appellant during the defence hearing, and after he had heard PMJ's version of events, In addition, it is material that the said friend who the appellant alleged he was with from 12 noon to 3 pm on the material day did not testify, and that the appellant does not deny being in his house on 20th August 2018. It is thus our conclusion that the alibi defence was an afterthought, and did not displace PMJ's evidence as regards the defilement having taken place on 20th August 2018, nor raise any sufficient doubt as regards the time the offence occurred.

23. The trial Court and first appellate Court therefore did not err in finding that the alibi defence had no basis and was not sufficient to outweigh the evidence tendered by the prosecution. We however feel obliged to correct the following erroneous finding by the Judge of the High Court, in light of the principles we have set out hereinabove as regards proof of an alibi defence:

> " It was his (the appellant's) responsibility to call his friend Michael, if he had such a friend or relative, to support his case and not for the Prosecution to have called him. The Prosecution was under no obligation to assist him is (sic) proving his case."

24. On the legality of the sentence, life imprisonment is provided for in section 8(2) of the *Sexual Offences Act* as the mandatory sentence for the offence of defilement of a child aged eleven years and less, and the appellant has not contested the evidence that proved that PMJ was nine years old at the time of the offence. The said sentence was therefore not illegal and the Supreme Court of Kenya clarified in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others Amicus Curiae)* [2021] eKLR and reiterated in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others* (*supra*) that it did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute, and they remain constitutional. The Supreme Court also held in *Republic v Manyeso* [2025] KESC 16 (KLR) the Supreme Court further affirmed the validity of life imprisonment as a lawful punishment, and held that setting the duration of a life sentence falls under legislative power, and courts cannot amend statutes to define it as a fixed term. We therefore have no basis to set aside or interfere with the sentence, and find that the High Court did not err in finding the sentence of life imprisonment to be lawful.

25. For these reasons, we uphold both the conviction of the appellant for the offence of defilement contrary to section 8 (1) and (2) of the *Sexual Offences Act*, and the sentence of life imprisonment. This appeal is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR