



**Simiyu v Republic (Criminal Appeal E005 of 2021)
[2025] KECA 153 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 153 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E005 OF 2021
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 7, 2025**

BETWEEN

BENJAMIN WANJALA SIMIYU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at
Bungoma (Cherere, J.) dated 9th November, 2018 in HCCRA No. 79 of 2017)*

JUDGMENT

1. The appellant, Benjamin Wanjala Simiyu, was charged before the Chief Magistrate's Court at Bungoma, for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was alleged to have defiled JNL (name withheld), a girl aged fourteen years.
2. Upon hearing the evidence of six witnesses and the appellant's defence, the trial magistrate found the appellant guilty, convicted him and sentenced him to serve twenty years imprisonment. Being aggrieved, the appellant appealed to the High Court against his conviction and sentence. Upon hearing the appeal, the High Court (Cherere, J.), dismissed the appeal against both conviction and sentence.
3. The appellant is now before us in a second appeal in which he is appealing against sentence only. In his memorandum of appeal, he has listed four grounds, which can be compressed into two. That is, that the mandatory sentence in defilement cases is unconstitutional; and that his mitigating circumstances were not taken into consideration in imposing the sentence against him.
4. The appellant reiterates that he is reformed and rehabilitated having acquired a certificate and a diploma in theology; he is also a first offender and is very remorseful and repentant. He, therefore, urges the Court to reduce his sentence. He has also filed written submissions in which he urges that each case should be determined based on its own circumstances. He cites Francis Karioko Muruatetu & another -vs- Republic, for the proposition that mandatory minimum sentences in defilement cases



are unconstitutional; and *Dismus Wafula Kilwake -vs- Republic*, for the argument that Section 8 of the *Sexual Offences Act* should be interpreted so as not to take away the discretion of the Court in sentencing. The appellant also argues that *Maingi & 5 others -vs- Director of Public Prosecutions & another* [2022] KEHC 13/18, held that the minimum mandatory sentence in the *Sexual Offences Act*, contravenes Article 28 of *the Constitution* of Kenya. The appellant adds that the principle of sentencing is fairness, justice, proportionality and commitment to public safety, with the objective of retribution, deterrents, rehabilitation and reparation. He therefore urged the Court to exercise its discretion in reducing the sentence.

5. The appeal was opposed through written submissions that were duly prepared by Ms. P.J. Kibet, a prosecution counsel in the Office of the Director of Public Prosecutions (ODPP). Ms. Kibet submitted that the prosecution case was proved beyond reasonable doubt and that the victim suffered injuries which may have long term emotional effects on her. Relying on *Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* [2024] (amicus curiae) KESC 34 KLR, she urged that the sentence imposed by the trial court was lawful and commensurate with the circumstances in which the offence was committed. The Court was, therefore, urged to dismiss the appeal.

6. We have considered the record of appeal, the written and oral submissions and the authorities cited. Our jurisdiction in a second appeal is circumscribed by Section 361(1)(a) of the Criminal Procedure Code which limits our jurisdiction to matters of law only.

Severity of sentence is excluded from our jurisdiction as it is described in that section, as a matter of fact. The Supreme Court also reiterated this in *Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (supra). Therefore, the Court can only entertain an appeal against sentence if it goes beyond severity and raises an issue of law.

7. In this appeal, though the appellant's main complaint is severity of sentence, he has raised the issue of constitutionality of the sentence that was imposed against him. Although this is an issue of law, it is not a novel issue as the matter has been put to rest by the Supreme Court in *Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (supra), where the Supreme Court asserted as follows:

“(56) “Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law. Minimum sentence however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the court to impose a harsher sentence....

.....

(68) ... in any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.”

8. Thus, the appellant's contention that the sentence imposed upon him was unconstitutional or illegal, has no leg to stand on and must, therefore, be rejected. Moreover, the Court has no jurisdiction to intervene in reducing the sentence of twenty years imprisonment as the sentence is the statutory minimum provided under Section 8(3) of the *Sexual Offences Act* and the trial court was obligated to impose it.

9. The upshot of the above is that this appeal has no merit. It is accordingly dismissed.



DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

