



**ENM v Republic (Criminal Appeal E118 of 2023)  
[2024] KEHC 12572 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12572 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E118 OF 2023  
SM GITHINJI, J  
OCTOBER 17, 2024**

**BETWEEN**

**ENM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from the Judgment of the trial court magistrate Original case file No.SO E094 of 2022 delivered by Hon Nancy Makau on 26th October, 2023)*

**JUDGMENT**

1. Edward Ngweni Maitha was charged in the lower court with a main count of defilement, contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of this offence are that on the 8<sup>th</sup> day of December, 2022 at [in Malindi Sub-County within Kilifi County, the appellant unlawfully caused his penis to penetrate into the vagina of T.N.B a girl aged 12 years.
3. In the alternative, the appellant faced a charge of committing an Indecent act contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006.
4. The particulars of this offence are that on the 8<sup>th</sup> day of December, 2020 at Malindi Sub-County within Kilifi County, the appellant unlawfully committed an indecent act by touching the vagina of T.N.B, a girl aged 12 years, using his penis.
5. The prosecution case is that the complainant in this case who gave evidence as Pw-1 was at the time of the offence aged 12 years. Though in her evidence she said she was not aware of her birthday date, and stated she was 13 years old, the mother stated she was 12 years old, an age that was confirmed by an age assessment done on 13/12/2022 at Malindi Sub-County Hospital. She was a pupil at [particulars withheld] Primary School in class/Grade 3. The appellant is her cousin and were living within the same



- compound/homestead at [particulars withheld], in Malindi. On 8<sup>th</sup> December, 2020 the complainant's mother was away in Mombasa. The complainant was with her uncle namely Elbert. They had dinner and went to sleep at around 10.00Pm. She was to sleep in the same room with a girl called Salma. The appellant who is her cousin was called by his mother. He went into the said house. After he had left the house and the children had gone to sleep, he returned and urged the complainant to open the door. He said he had left his phone charging and wanted to collect it. The complainant knew his voice and opened for him. After he entered he expressed intention to sleep in the room with the two girls. The complainant protested asking him why he wanted to do so and he never slept in the room.
6. The appellant entered the room by force and urged the complainant not to disturb him. There were two mattresses in the room. The complainant and Salma shared one mattress while the appellant slept on the other. After the girls had slept the appellant went to where they were. He removed the complainant's panty. He then drew out his penis. Salma was asleep then. As he defiled the victim, she tried to shout but he shut her mouth.
  7. In the morning the complainant reported the incident to her aunt(mum), who chased her away saying she did not want nonsense. She then reported to her grandfather who equally chased her away. She went to Mama Joseph and reported to her. Mama Joseph told Mama Sandra about it. On 10/12/2022 Mama Sandra called Pw-3 who is the mother to the victim and told her about the incident. On 13/12/2022 Pw-3 returned home and took the complainant to Malindi Police Station where they made a report. Pw-2 recorded their statement and issued a P-3 form. They were referred to Malindi Sub-County Hospital for examination and treatment.
  8. There could however be a mix up on dates as the complainant was seen at Malindi Sub-County Hospital on 11/12/2022. Her treatment notes and the filled P-3 form shows she had broken hymen, redness and bruised labia minora which was tender or painful on touch. Pw-4, the clinical officer who filled the P-3 form was of the opinion that she suffered vaginal penetration.
  9. The appellant was arrested and charged with the offences carried in the charge sheet.
  10. The appellant in his defence stated that he lives at Msongoleni and was a fisherman. On 20/12/2022 he woke up early and went fishing. When he got back home he found an old man talking to his father. He greeted them and went to shower. The father then went and said there were issues they needed discuss about his maternal mother. He was told the chief had summoned him. He went to the Chief's place and found the mother. The chief was not there. As they waited for the chief he was arrested. He was taken to the police station where he was beaten and forced to sign a paper. He denied the charges.
  11. The trial court evaluated the evidence and found that the main count was proved by the prosecution beyond reasonable doubt. The appellant was convicted of the offence and sentenced to serve 30 years' imprisonment.
  12. Dissatisfied with the said conviction and sentence, the appellant appealed to this Court on the grounds that; -
    1. There were massive invariances and inconsistencies in the prosecution case and was not safe to convict on it.
    2. Medical evidence was not sufficient to sustain a conviction.
    3. Age of the victim was not proved to the required standard in Law.
  13. The appeal was canvassed by way of written submissions. Respondent filed their submissions but the appellant did not.



14. I have as the first appellate court re-evaluated the charges, evidence adduced, judgment entered and sentence meted; grounds of the appeal and the submissions by the respondent.
15. The conviction being on the main count of defilement, under section 8 (1) of the [Sexual Offences Act](#), the ingredients the prosecution needed establish beyond reasonable doubt are: -
  - i. Proof of the victim's age. Here the victim must be a minor or child below 18 years of age.
  - ii. Proof of penetration which is partial or complete insertion of the genital organs of a person into the genital organs of another person.
  - iii. Identity or recognition of the accused as the perpetrator.
16. On age of the victim, the court relies on the evidence of witnesses who knows when the victim was born. These could be the victim herself, her guardian, parent or relative. It can also be proved through authentic documents such as Birth Notification, Birth Certificate, age assessment report, baptism card and even school records. The court can also establish the age through observation of the victim's apparent age in court and recording about it in the proceedings. In my view the evidence necessary in relation to the age of the victim cannot be limited; what counts is whether the available evidence is admissible in law, and whether it establishes the age beyond reasonable doubt.
17. In this case, though the victim was not aware of the date she was born, she said she was 13 years old. However, the mother who would know her age better stated she was 12 years old. The age assessment report placed her age at 12 years as well as the age indication in the P-3 form. The evidence when weighed together shows she was 12 years old. There is no evidence to the contrary and therefore no ground on which to hold otherwise. I am therefore convinced by the evidence adduced that the victim was 12 years in age.
18. I now turn to penetration. The law is that even the slightest penetration would suffice for the offence. The complainant stated what was done to her. Her panty was removed. The appellant drew out his penis and penetrated her. The medical report corroborates her evidence to the effect that she was penetrated. Her hymen was absent, she had redness and bruises on labia minora, which was tender. The clinical officer, who is an expert formed the opinion that she had vaginal penetration. I find the evidence sufficient to the effect that the complainant's genital organ was penetrated by the appellant's genital organ.
19. The last ingredient is of proper identification or recognition of the perpetrator. The appellant and the victim are relatives who live within the same homestead. They are cousins. The appellant was therefore well known to the victim. The complainant narrated in her evidence how the appellant went to the room where she was sleeping with another girl called Salma and insisted on sleeping in the said room though that is not where he used to sleep. She had opened the door for him on allegation that he needed pick his phone which was charging therein. While asleep he turned to the mattress in which the girls were sleeping and defiled the victim. There was no other male person in the room. The evidence is convincing that it's the appellant who committed the offence. There was no opportunity for anyone else to commit it. The appellant was well recognized by the victim and she was consistent thereafter in revealing the person who committed the offence. The appellant's defence is evasive of the material day when the offence was committed. He only covered the day of arrest. The prosecution evidence is reliable that it is the appellant who committed the offence. Defence was rightly dismissed.
20. This court is therefore satisfied as the lower court was, that the main count is proved against the appellant beyond reasonable doubt.



- 21. The victim was aged 12 years. The offence under section 8 (3) carries a sentence of not less than 20 years' imprisonment.
- 22. Having considered the circumstances under which the offence was committed, the Victim Impact Assessment Report where it's indicated she has fully recovered and is expected to lead a normal life in future, and the appellant's mitigation where he prayed for forgiveness, I do reduce the imposed sentence of 30 years to the minimum allowed which is 20 years' imprisonment.
- 23. Sentence to run from the date of his arrest, December 20, 2022.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF OCTOBER, 2024.**

.....  
**S.M. GITHINJI**

**JUDGE**

In the Presence of;

- 1. Ms Ochola for the State
- 2. Appellant in Person (in prison)

