



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mlandi v Republic (Criminal Appeal E004 of 2021)  
[2023] KEHC 679 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E004 OF 2021  
SM GITHINJI, J  
FEBRUARY 13, 2023**

**BETWEEN**

**GAILOD YAMBWESA MLANDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in Sexual Offences  
Case No. 168 of 2016 of the Senior Principal Magistrate's Court at  
Lamu before Hon. T.A. Sitati - PM, dated 4th day of February, 2021)*

**JUDGMENT**

1. Gailod Yambwesa Mlandi, the appellant herein, was charged in the lower court with the offence of defilement contrary to section 8 (1) and (2) of the *Sexual Offences Act, 2006*.
2. The particulars of the offence being that on March 28, 2016 at [Particulars Withheld] area, Lamu County within Coast Region, he intentionally caused his penis to penetrate the vagina of the complainant, DK, a child aged 8 years.
3. The appellant also faced an alternative count of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act*, in that on diverse dates he intentionally and unlawfully touched the complainant's vagina using his penis.
4. Before I consider the evidence adduced, I wish state that this case has taken a cycle as the appellant underwent the first trial on the very same offences at the lower court and was convicted on the main count and sentenced to serve life imprisonment. He appealed to the high court and the conviction as well as the sentence were upheld. He never gave up and proceeded to the Court of Appeal where on November 28, 2019 a retrial was ordered mainly on the ground that the appellant was not accorded an opportunity to cross-examine the complainant at the initial trial.



5. The current appeal is against the retrial court's finding, made by Hon TA Sitati. The Appellant as before was found guilty on the main count and sentenced to serve life imprisonment.
6. The evidence adduced by the prosecution in the retrial is that the complainant, who gave evidence as PW-1, was by the alleged date of the offence which is March 25, 2016 aged 8 years. A copy of her birth certificate produced by the investigating officer shows she was born on July 31, 2007. On the material day the complainant had been left at home at 5.00Pm by her mother (PW -2) who had gone to sell samosas. The Appellant who was their neighbour at Manda, Maweni, went to the house where the complainant was. He took her and carried her into a nearby bush. While there he inserted his penis into her vagina. She was injured, felt pain and cried. After he was through he set her free. She went home but the mother had not returned. A neighbour called Musimi went and alerted the mother about the incident. She rushed home where she found neighbours and the police already present. The police briefed her about the incident. She got into the house and examined the complainant. She was in shock, crying and bleeding from her genitalia. Her father was also present. When she calmed down she narrated what "Wa Ingo" had done to her.
7. PW-2 led the police to the house of the appellant. On arrival they found the door to the house locked. He was however inside. The police pushed the door open. The Appellant was on his bed half naked. There was presence of what resembled male semen on him. The public arrested him and was taken to the police station where he was booked in.
8. The complainant was taken to King Fahd Hospital for examination and treatment. She was examined and a PRC form as well as a P-3 form were filled. According to Pw-3, a clinical officer, the records show her vagina had semen and hymen was perforated. There was however no blood in vaginal canal and lab tests revealed no infection. The clinical officer concluded that there was rough penetration due to forcefulness. The appellant was also examined but nothing abnormal was observed on him. The charges were then preferred after conclusion of investigations.
9. The Appellant gave sworn evidence and called no witness. In his defence he denied the charges. He alleged that on March 26, 2016 he was at Manda Maweni Village. That day he went to Lamu Island to buy bags for packing ballast. He returned home at 5Pm and prepared supper. He ate and went to bed. At 1.0Pm he was woken up by police from the local administration camp. He was arrested and handed to Corporal Julius Kinja. He was falsely accused with defilement. The following day he was taken to Lamu Police Station. He had 49,000/= with him. The investigating officer demand 20,000/= bribe to release him. He declined and was then charged. Cpl Kinja had previously accused him falsely with defilement but the OCS rejected the report. He had a strained relationship with PW-2 over Kshs 300/= of which he owed her, having sold him a bucket on credit. She once boasted that she will use 50,000/- to cause him trouble. He alleged that he is a family man and did not commit the offence.
10. Dissatisfied with the conviction and the sentence meted, he appealed to this Court on the grounds that; -
  1. That he was not accorded a fair trial.
  2. The relied on evidence is contradictory, inconsistent and uncorroborated.
  3. The evidence does not reveal him as the culprit.
  4. He was arrested on a mere allegation.
  5. The offence was not proved beyond reasonable doubt.



6. His defence was wrongly dismissed.
11. The appeal was canvassed by way of written submissions and both sides filed their submissions.
12. I have considered the preferred charges, evidence adduced in the lower court, the judgment made and the sentence. I have as well weighed the grounds of the appeal against the entire evidence, judgement and sentence.
13. I wish to restate the now well established ingredients for the offence of defilement of which are; -
  1. The age of the victim which must be under 18 years.
  2. Penetration of a genital organ by a genital organ.
  3. Prove that the accused is the culprit.
14. I will therefore proceed to consider whether each of the above ingredients was established by the prosecution beyond reasonable doubt.
15. During the trial on August 25, 2020 the complainant stated she was 12 years old. However, that day the mother who offered evidence as PW-2 stated she was 13 years old. The investigating officer produced a copy of her birth certificate which indicates she was born on July 31, 2007. The offence allegedly took place on March 25, 2016. This then shows beyond reasonable doubt that she was aged 8 years by the time of the offence, and at the time of giving evidence in the retrial, she was 13 years old as indicated by her mother. Her calculation was wrong when she said then that she was 12 years old, but her actual and correct age is not in dispute. I therefore find that the prosecution established beyond reasonable doubt that the victim was aged 8 years at the time of the alleged defilement.
16. I now move to consider the issue of penetration. Under section 2 of the *Sexual Offences Act 2006*, “penetration” is defined to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. The evidence of the complainant in regard to this is that;-

“He carried me up to the bush. In the bush he did bad manners to me. He used his private male organ into me. This was in the bush. I started to cry. He inserted his male organ into me here (points to the genital area – she points her right hand against her pubic region). I started to cry because he injured and hurt me.”
17. The foregoing words considered together leads to clear conclusion that what the victim expressed is that the appellant inserted his penis into her vagina, of which amounts to penetration as envisaged in the Act. The evidence is buttressed by that of her mother who said when she observed her immediately after the incident, she was bleeding from the genitalia. Further, the clinical officer’s evidence corroborated the evidence of the two when he said upon examination of the victim it was noted that she had semen in her vagina and the hymen was perforated. Given the evidence, I find that the prosecution established beyond reasonable doubt that the complainant was penetrated.
18. On the last issue, it is not contested that the appellant was a neighbour to the victim at Manda, Maweni. The evidence of PW-2 shows she knew the appellant as a neighbour. The appellant in his defence acknowledged the fact as he alleged he had a strained relationship with PW-2 over 300Kshs which he owed her. PW-1, the complainant stated it is Wa-Ingo their neighbour who defiled her. PW-2 when she was told of him, referred to as Wa-Ingo, knew of him and went for him. It is clear the victim was defiled and the evidence reveals no possibility where someone else, other than the appellant could have done it. The evidence reveals he is the one who did it. There are no basis giving rise to a reasonable doubt on this.



19. The appellant defence is a sham. It was availed during cross-examination of PW-2 and must have been an afterthought. The trial court rightly dismissed it.
20. On sentence, the victim was aged 8 years. The prescribed sentence in the Act is Life Imprisonment. The sentence meted by the trial court is lawful and I do not find a reasonable ground to vary the same.
21. The bottom line is that the appeal lacks merit and is dismissed.

**JUDGEMENT FOR GARSEN DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2023**

**S.M.GITHINJI**

**JUDGE**

**In the presence of; -**

The Prosecutor and the Appellant

**Coram: Hon. S.M Githinji**

**Appellant in person**

**Ms Mkongo for the state**

