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Landi v Republic (Criminal Appeal E041 of 2023) [2025] KECA 1339 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1339 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E041 OF 2023

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

JULY 18, 2025

BETWEEN

GAILORD YAMBWESA LANDI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (S. M. Githinji, J.) delivered on 13th February 2023 in HCCRA No. E004 of 2021)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Garsen (S. M. Githinji, J.) dated 13th February 2023 in Criminal Appeal No. E004 of 2021 in which the learned Judge upheld the judgment of the Principal Magistrate's Court at Lamu (T. A. Sitati, PM) dated 4th February 2021 in Criminal Case No. 168 of 2016.

2. The brief background of the instant appeal is that the appellant was charged and convicted of the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* and sentenced to life imprisonment. The particulars of the offence were that, on 25th March 2016 at [Particulars Withheld], Lamu West Sub-County within Lamu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DK, a child aged 8 years.

3. In addition, the appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that, on the date and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of DK, a child aged 8 years contrary to section 11(1) of the Act.

4. The appellant denied the charges whereupon the trial proceeded with the prosecution calling five (5) witnesses, including the complainant. It is noteworthy that the trial proceeded to conclusion,

conviction and sentence, whereupon the appellant moved to the High Court and, subsequently, to this Court on 2nd appeal on the ground that he was not given the opportunity to cross-examine the complainant. Consequently, this Court set aside the conviction and sentence and ordered a retrial, which proceeded, leading up to the instant appeal.

5. At the retrial, the complainant (PW1) gave an unsworn statement after a voire dire examination and testified that, on the material day, she had been left at home on her own after her mother, LGK (PW2), left for the market to sell eggs; that the appellant, whom she knew well as the one who made and sold Mandazi near her home, came into their home and carried her into a nearby bush; that the appellant inserted his penis into her vagina; that she felt pain and cried; that, after the appellant was done, he set her free; that she went back home and informed one Musimi what had happened; that Musimi called on PW2 who examined her and discovered that she was bleeding from her vaginal region; and that she was thereafter taken to Hospital for treatment after the appellant was arrested.

6. The complainant's mother, (PW2), testified that she knew the appellant who was their neighbour and a fellow trader; that, on the material day, she left home at 5pm to sell samosa's close to her home; that, a little while later, one Musimi came and requested her to urgently accompany him to her house; that, upon arrival, she found PW1 in the company of her father crying uncontrollably; that PW1 had blood oozing from her genitalia; that PW1 disclosed that the appellant had "done bad manners to her private parts"; that she later accompanied the police to the appellant's house to make an arrest; that the appellant was found in bed half naked with his penis exposed, and with what appeared to be a semen stain on his trousers; and that, thereafter, PW1 was escorted to the Police Station and to the hospital the next day for medical examination.

7. PW2 further testified that the appellant gave PW1's sibling, one Badi, Kshs. 10 to go and buy juice before he disappeared with PW1 in tow.

8. Elvis Mwadzuya (PW3), a Court Administrator at Lamu Law Courts, appeared in court to testify and produce the previous court proceedings in Lamu Criminal Case No 168 of 2016 – Republic vs Gaylord Nyabwesa Landi – detailing the testimonies of David Mutembei, Joseph Nderitu, PC Margaret Bitok and Cpl Julius KInja in compliance with section 34 of the *Evidence Act*, which permits the Court to rely on previously recorded evidence where a witness or witnesses were either dead or could not be found to attend court. However, PW3 was stood down before producing the proceedings as intended.

9. PW4, Made Sheyumbe, a Clinical Officer at King Fahd Hospital in Lamu, appeared in court to present the findings of his colleague, one Clinical Officer named Nderitu. PW4 testified that PW1 was presented at the said hospital on 26th March 2016 for medical examination with a history of alleged defilement; that, upon physical examination, she was found to have semen in her vagina, a freshly perforated hymen, and bleeding in her vaginal canal; that a high vaginal swab showed no fungal or bacterial infection; that both HIV and Syphilis tests came back negative; that his colleague concluded that PW1 had experienced "rough penetration due to forcefulness"; and that the appellant was also examined and found to be normal. PW4 concluded his testimony on production in evidence of PW1's Treatment Notes and a Post Rape Care Form dated 26th March 2016, and a P3 Form dated 31st March 2016.

10. PW5, Isaq Jarso Argelle, the Acting Court Administrator at Lamu Law Courts, appeared in court on 20th January 2021 and produced the certified copies of the proceedings in Criminal Case No 168 of 2016 – Republic v Gaylord Nyabwesa Landi – after PW3 was stood down on 25th September 2020 before producing them in evidence.

11. The investigation officer, PC Peter Lesalle (PW6) attached to Lamu Police Station, testified that the initial investigating officer was PC Margaret Bitok, who had since been transferred; that when a retrial was ordered, he re-interviewed PW1 and PW2, both of whom maintained the same account of the events as previously testified; that, in the first trial, the first investigating officer relied on PW1's Age Assessment Report; but that PW1 had since obtained a Certificate of Birth indicating her date of birth as 31st July 2007; that this meant that, as at the date of the alleged defilement, PW1 was 8 years and 9 months old; that the Certificate of Birth matched the findings of the Age Assessment Report; and that he wished to produce both the original and a certified copy of PW1's Certificate of Birth as evidence of her age.

12. At the close of the prosecution's case, the learned magistrate found that the appellant had a case to answer and put him on his defence, whereupon he gave a sworn statement and stated that, on the material day, he went to Lamu Island to buy bags for packing ballast; that he returned home at 5:00pm and prepared supper; that, at 11:00pm, he was woken up by the police from the local administration camp; that he was arrested and accused of defilement, which he denied; that the investigating officer demanded a bribe to release him; that he had a strained relationship with PW2 over a debt of Kshs. 300 after PW2 sold her a bucket on credit; and that PW2 once boasted that she would use Kshs. 50,000 to cause him trouble.

13. In its judgment delivered on 4th February 2021, the trial court (T. A. Sitati, PM) noted that there was direct and overwhelming evidence that the complainant saw and interacted with the appellant that evening as he took her away into the bush; that the complainant knew him well as their neighbour; that the oral and medical evidence proved that the offence was committed by the appellant; and that his defence created no reasonable doubt against the prosecution case. Accordingly, the trial Magistrate convicted the appellant and sentenced him to life imprisonment.

14. Aggrieved by the trial Magistrate's decision, the appellant moved to the High Court on appeal challenging his conviction and sentence. In his undated "Amended Grounds of Appeal", the appellant faulted the trial magistrate for: not according him a fair trial; relying on contradictory, uncorroborated and inconsistent evidence; relying on the prosecution evidence without any substantial proof; not considering that the prosecution did not prove its case beyond reasonable doubt; and for dismissing his sworn defence.

15. In its judgment dated 13th February 2023, the High Court (S. M. Githinji, J.) found and held: that the prosecution established beyond reasonable doubt that the victim was aged 8 years at the time of the alleged defilement; that the complainant clearly expressed that the appellant inserted his penis into her vagina, which amounted to penetration; that the complainant's evidence was corroborated by the evidence of her mother and the clinical officer who examined her; and that the appellant's defence was a sham and an afterthought. Accordingly, the High Court upheld his conviction and sentence.

16. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on a second appeal challenging the learned Judge's decision to uphold his conviction and sentence. In his undated "Grounds of Appeal", the appellant faulted the learned Judge for: convicting him in the absence of any cogent and tangible evidence; relying on the evidence of a single witness; relying on contradictive, inconsistent and unsubstantiated witness accounts; failing to consider time spent in remand while on trial; and failing to consider his "unshaken" defence.

17. In addition to the grounds aforesaid, the appellant filed undated "Supplementary Grounds of Appeal" containing 7 grounds, namely that the 1st appellate court erred in law and fact for not considering: that his constitutional rights were not protected due to his long stay in custody contrary to the order of this Court; that the charge sheet was fatally defective; that his identification was not proven; that

penetration was not established; that the prosecution did not prove its case beyond reasonable doubt; and that his defence was not considered.

18. In support of his 2nd appeal, the appellant filed undated written submissions citing 4 judicial authorities, namely: John Njeru v Republic [1980] KECA 18 (KLR) where this court held that a retrial should be ordered only when the original trial was illegal or defective; David Odhiambo & Another v Republic [2005] KECA 315 (KLR), submitting that the charge sheet in the initial trial was defective for omitting the word "unlawfully" and for not indicating his alias name "Waingo"; Republic v Turnbull (1976) 3 ALL 549, submitting that since the alleged defilement happened at night and in the bushes, the chances of his positive identification were minimal; and David Muturi Kamau v Republic [2015] eKLR, arguing that the prosecution must prove a criminal charge beyond reasonable doubt.

19. Opposing the appeal, the Prosecution Counsel, Mr. Martin Kariuki Nguthuko, filed written submissions and a List of Authorities dated 24th January 2025 citing 2 judicial authorities, namely: Moses Nato Raphael v Republic [2015] eKLR, submitting that this Court should consider matters of law only, unless it be shown that the two courts below considered matters of fact that should not have been considered, or that they failed to consider matters that they should have considered, or that they were plainly wrong in considering the evidence; and Sammy Charo Kirao v Republic [2020] eKLR, submitting that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence.

20. Our mandate on a second appeal, as is the one before us, is confined to matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

21. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on three intertwined points of law, namely: whether the appellant's constitutional rights were not protected due to his long stay in custody contrary to the order of this Court; whether the prosecution proved its case beyond reasonable doubt; and whether his defence was considered.

22. The remaining grounds of appeal are founded purely on matters of factual evidence and new points of law raised on second appeal, which fall outside the mandate of this Court on second appeal. Consequently, we decline to re-open or re-examine them as they do not raise any points of law worthy of our pronouncement.

23. Our preceding observations are made on the authority of the case of Adan Muraguri Mungara v Republic [2010] eKLR where this Court set out the only circumstances under which it would disturb concurrent findings of fact by the two courts below in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

24. With regard to the 1st issue, the appellant submits that, in its Judgment and Order given on 28th November 2019, this Court directed that his retrial be conducted within 14 days from the date of that Order; that he was arraigned in court for re-trial on 21st February 2020 which, according to him, was

prejudicial and a violation of Article 49(f) of *the Constitution*. It is noteworthy that the record as put to us does not contain a copy of the said Judgment or Order. Neither did the Respondent submit on this issue, which the 1st appellate court did not address even though raised as a ground of appeal before it.

25. It is indisputable that there was a delay in arraigning the appellant afresh for retrial contrary to this Court's order. The consequence of such violation was pronounced by this Court in Julius Kamau Mbugua vs Republic (2010) eKLR thus:

> " In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.[sic] However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72(6) expressly compensable by damages."

26. This civil right for which an accused is entitled to seek compensation in civil proceedings is now guaranteed under Article 23(3) (e) of *the Constitution* of Kenya, 2010 which confers authority on courts to uphold and enforce the Bill of Rights. In particular, Article 23(3) (e) empowers a court, in proceedings brought under Article 22 (enforcement of the Bill of Rights), to grant an "order for compensation" as appropriate relief. Accordingly, the instant appeal is not the appropriate forum for such relief. In conclusion, this ground fails and is hereby dismissed.

27. We reach this conclusion on the authority of this Court's decision in Musa Shaban Kabughu v Republic [2020] eKLR where the Court had this to say:

> " In other words, the violation of the appellant's right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appellant was at liberty to claim for the violation of his Constitutional rights. On this basis, we do not consider the delay in his arraignment in court to have been unreasonable or fatal to the prosecution's case. This ground is dismissed"

28. Turning to the second issue as to whether the prosecution proved its case against the appellant beyond reasonable doubt, we hasten to point out right at the outset that the factual evidence led by the prosecution proved the charge of defilement beyond reasonable doubt. The three (3) ingredients of the offence of defilement, namely: the age of the victim; penetration; and the recognition/identification of the accused were proved in accordance with section 8(1) and (2) of the Act.

29. The offence of defilement is rooted on three main ingredients, namely the age of the victim (who must be a minor), penetration and the proper identification of the perpetrator (see George Opondo Olunga v Republic [2016] eKLR.).

30. On the 1st ingredient of age, this Court in Edwin Nyambogo Onsongo v Republic (2016) eKLR stated as follows with regard to proof of the victim's age in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." [Emphasis added].

31. The fact that the complainant's age was eight years and nine months at the time of the incident remains unchallenged. Her age was confirmed by the age assessment report and certificate of birth produced in evidence by PW6 in proof of the 1st ingredient of defilement.

32. With regard to the 2nd ingredient of penetration, Section 2 of the *Sexual Offences Act* defines 'penetration' as:

> The partial or complete insertion of the genital organ of a person into the genital organs of another person

33. The decision of the High Court of Kenya at Bomet in Sigei v Republic [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in Bassita vs. Uganda S.C. Cr*iminal Appeal No. 35 of 1995*, cannot escape our attention. As the High Court correctly observed:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence."

34. In the complainant's case, PW1 narrated how the appellant inserted his penis into her vagina, resulting in pain and bleeding in her vaginal area, which PW2 observed before taking her to hospital for treatment. On physical examination, the complainant was found to have semen in her vagina, a freshly perforated hymen, and bleeding in her vaginal canal. PW4 produced in evidence PW1's Treatment Notes and a Post Rape Care Form dated 26th March 2016, and a P3 Form dated 31st March 2016, all of which proved penetration. Concluding his testimony, PW4 stated that his colleague who had examined her concluded that PW1 had experienced "rough penetration due to forcefulness".

35. On the 3rd and last ingredient of identification, Madan J.A in Anjononi and Others v The Republic [1980] KLR 59 had this to say:

> "... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

36. In the same vein, this Court in Peter Musau Mwanza v Republic [2008] eKLR pronounced itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time,

is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

37. It is indisputable that the appellant, who was a well-known neighbour to PW1 and PW2, as well as to Musyimi who assisted in his arrest, was easily recognized and properly identified by the complainant. According to PW1, the appellant gave PW1's sibling, one Badi, Kshs. 10 to go and buy juice before he disappeared with PW1 into the bush. In PW2's testimony, the incident occurred soon after 5:00 pm when she left the complainant and her sibling at home and headed to the market. Accordingly, the appellant's submission that "... since the alleged defilement happened at night and in the nearby bushes, the chances of his positive identification were minimal" does not hold. Having considered the evidence on record, we find nothing to fault the finding by the two courts below that the appellant was positively identified as the perpetrator of the offence with which he was charged and convicted. Accordingly, the grounds of appeal relating to the 2nd issue before us fail.

38. Turning to the 3rd Issue, we hasten to observe that we only have the odd number pages of the trial court's Judgment, which compels us to concentrate on the 1st appellate court's decision. In the impugned judgment, the learned Judge re-examined and analysed the defence evidence at pages 4 to 5 and, more specifically, on the second last paragraph at page 8, which reads:

> " 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."

39. Our examination of the record as presented to us discloses no reason to suggest that the learned Judge was at fault in dismissing the appellant's contention that his defence was not considered. Likewise, this ground of appeal fails.

40. Having carefully examined the record of appeal, the grounds on which it is anchored, the appellant's submissions and those of the Principal Prosecution Counsel, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. Consequently, Judgment of the High Court of Kenya at Garsen (S. M. Githinji, J.) delivered on 13th February 2023 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR