



**Nzikali v Republic (Criminal Appeal E052 of 2022)  
[2023] KEHC 17571 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E052 OF 2022  
GMA DULU, J  
MAY 18, 2023**

**BETWEEN**

**LUCAS MUTHOKA NZIKALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Criminal Case No. 107 of 2018 at Makindu Law Court delivered on 14th February, 2020 by Hon. J. D. Karani (RM))*

**JUDGMENT**

1. The appellant was charged in the Magistrate’s Court at Makindu with defilement Contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) Number 3 of 2006.
2. The particulars of offence were that on 13<sup>th</sup> December, 2018 at [Particulars withheld] village in Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of N.N.K a girl aged 14 years.
3. In the alternative, he was charged with committing an indecent act with a child Contrary to Section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same date and at the same place intentionally and unlawfully caused his male organ namely penis to touch the vagina of N.N.K a child aged 14 years.
4. He denied both charges. After a full trial, he was convicted on the alternative charge of committing an indecent act and sentenced to serve ten (10) years imprisonment.
5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. The sentence was pronounced when there was no plea of guilty.



2. The offence was framed on him.
3. The prosecution evidence was not enough to establish a case for him to answer.
4. That he prays for an independent consideration for the decision made by the court.
5. That if found guilty, the sentence be reduced to the time served.
6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
7. This being a first appeal, I am duty bound to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. See *Okeno v Republic* (1972) EA 32.
8. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered unsworn defence testimony and did not call any additional witness.
9. The appellant was convicted of committing indecent act with a child. The elements of the offence are the age of the victim who should be below 18 years. Secondly, the act of indecent touch. Thirdly the identity of the culprit. Each of these elements had to be proved by the prosecution beyond any reasonable doubt – see *Sawe v Republic* (2003) eKLR.
10. With regard to the age of the victim PW1, she stated in evidence that she was 14 years old on 9<sup>th</sup> May, 2019 and in Standard 8. She said that she was born in 2005. She did not refer to any document. The investigating officer PW6 PC Michael Kithome produced a notification of birth form dated 21.3.2019 in the names Naomi Nzisu Kasimu born on 26<sup>th</sup> June, 2004.
11. I note that the mother of the victim, named in the birth notification document as LNM was not called by the prosecution to testify in court to confirm the date of birth of PW1 the victim. The notification of birth was also not referred to or identified by PW1. More importantly, it was issued on 21<sup>st</sup> March, 2019 while the offence was said to have been committed earlier in 2018, and no evidence was tendered by the prosecution on how the entries therein were determined.
12. In my view, the prosecution did not prove beyond reasonable doubt that the complainant PW1 was a minor or child as alleged. She could as well have been an adult.
13. I now go to the second element of the indecent act. Was an act amounting to an indecent act proved? An indecent act is defined under Section 2 of the *Sexual Offences Act* as follows:-
  - ‘2. ....
    - ‘indecent act’ means an unlawful intentional act which causes-
      - a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.
      - b. Exposure or display of any photographic material to any person against his or her will.’
14. In my view, based on the uncontroverted evidence of PW1 the victim and PW2 MK, that a person grabbed PW1 in broad daylight, fell her down, pulled her dress and panty, exposed his penis, and lay on her, that amounted to committing an indecent act with PW1, as the perpetrator must have touched the breasts of the victim in the process in addition to exposure of his own and PW1’s body.
15. I thus find that the prosecution proved beyond any reasonable doubt that an indecent act was committed against PW1 as alleged.



16. I now turn to the third element of the culprit. Was the appellant the culprit? Though PW1 the victim said that the appellant was the culprit, she also said that she did not see his face clearly and only saw the clothes he wore, which she described together with rasta hair.
17. PW2 MK, the sister of PW1, said in evidence that she saw the culprit before she ran away and screamed which screams attracted a person who was in a nearby household PW3 BMK, to intervene. PW3 intervened and rescued PW1 from the forest, but did not see the perpetrator. PW4 Mwangangi Peter was also attracted by the screams. Though initially they did not see the perpetrator, they later that same day searched deep into the forest and saw the appellant lying on the ground in the forest wearing clothes, matching the description earlier given by PW1.
18. I note that the appellant was not arrested at the scene. I also observe that neither PW1 nor PW2 gave a clear description of the culprit before the appellant was arrested. No identification parade was conducted.
19. However, the marvin hat of the culprit described by PW1 and PW2 was found at the scene. Both PW1 and PW2 said that the culprit had rasta hair and the appellant had rasta hair, and was found in the bush the same day alone crawling. This not being a common place for people to reside and crawl, the appellant should have explained what he was doing in the forest that day at that time. Instead of explaining what he was doing in the bush that day that time, he attempted in his defence to suggest an alibi, which is not believable.
20. From the totality of the above evidence, the clothes described by PW1 and PW2 as having been worn by the culprit having fitted the clothes that the appellant wore and the rasta hair, and the fact of being found crawling in the bush, in my view, the prosecution proved beyond any reasonable doubt that the appellant was the culprit.
21. I thus find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit and committed an indecent act on PW1, but that PW1 was not proved to be a child I thus find the appellant guilty of committing an indecent act with an adult Contrary to Section 11A of the [Sexual Offences Act](#), and will enter a conviction accordingly.
22. With regard to sentence, the statutory sentence under Section 11A is imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or both.
23. I will set aside the sentence of 10 years imprisonment, and sentence him for indecent act on an adult. As he was sentenced in February 2020 and was in custody during trial, from December 2018, I will reduce the sentence to the prison sentence served.
24. Consequently and for the above reasons, I quash the conviction of the trial court, and in its place I convict the appellant for committing an indecent act with an adult Contrary to Section 11 A of the [Sexual Offences Act](#). I also set aside the sentence of 10 years imprisonment imposed by the trial court and order that instead the appellant will serve the prison sentence he has already served to date, as he was sentenced on 14<sup>th</sup> February, 2020 and was in custody from December 2018. The appellant will thus be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF MAY, 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-



Appellant

Mr. Sirima holding brief Mr. Kazungu

Mr. Otolu court assistant

