



REPUBLIC OF KENYA



KENYA LAW
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**Nzomo v Republic (Criminal Appeal 31 of 2022)
[2023] KEHC 17370 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL 31 OF 2022**

**GMA DULU, J
MAY 11, 2023**

BETWEEN

ARTHUR M. NZOMO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case No. 48 of 2019 at
Kilungu Law Court delivered by Hon. E. Muiru (PM) on 22nd February, 2022)*

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Kilungu with defilement contrary to section 8(1)(3) of the *Sexual Offences Act* Number 3 of 2006. The particulars of offence were that on October 24, 2018 at 4p.m at Kiongwani Sub-Location Mukaa Sub-County in Makueni County intentionally caused his penis to penetrate the vagina of EMK (name withheld) a child aged 15 years thereby causing her to be pregnant. 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 day and place intentionally touched the vagina of EMK with his penis against her will, a child aged 15 years.
2. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 20 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on grounds that:-
 1. There were contradictions in the prosecution evidence.
 2. The main prosecution witnesses made false testimonies.
 3. That the medical evidence was inconsistent.



4. That his defence was unchallenged.
5. That the matter was not properly investigated.
4. 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.
5. I have to start by reminding myself that as a first appellate court, I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
6. In proving their case, the prosecution called four (4) witnesses. The Appellant on his part tendered sworn defence testimony and called one other witness.
7. The elements of the offence of defilement are the age of the complainant or victim, penetration of a sexual nature and the identity of the culprit.
8. With regard to the age of the complainant (victim) PW1 and her mother PW2 FN testified in evidence in court that PW1 was born on August 3, 2003. PW1 EMK also said she was in Form One at [Particulars Withheld] Secondary School when the incident occurred. PW1 did not however rely on any document on her age. PW2 the mother on her part, produced a birth certificate issued on January 25, 2018 showing that EM was born on August 3, 2003. In my view, the prosecution proved the age of the complainant PW1 beyond any reasonable doubt, as the birth certificate must have been issued when she joined Secondary School in Form One in early 2018.
9. Did penetration of a sexual nature occur? The complainant PW1 said so. PW3 Eric Kasiamani the Clinical Officer at Kilungu hospital produced medical examination and treatment reports on the complainant. He testified that the hymen was missing and that PW1 was 31 weeks pregnant. In my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature did occur on the complainant PW1.
10. Was the Appellant the culprit? With regard to this element of the offence, PW4 Henry Loiptoo Sang a Government Analyst testified in court and produced a DNA report confirming that the Appellant was the biological father of the child of PW1 with 99.91% probabilities. In my view therefore, the prosecution proved beyond any reasonable doubt that the Appellant was the culprit.
11. Though the appellant has complained on appeal about contradictions in the prosecution witnesses evidence, I find no such contradictions. The only weakness in the prosecution evidence was the failure of the investigating officer to testify in court. However, in my view that fact did not affect the probative value and strength of the other prosecution evidence on record which links the appellant sufficiently to the offence. The appellant's defence story that the allegation against him was a fabrication, was also displaced by the convincing prosecution evidence on record, especially the finding in the DNA test report which established that the appellant was indeed the biological father of the child of PW1. I will thus uphold the conviction.
12. With regard to sentence, in view of recent jurisprudence on minimum sentences, I would have considered reducing the sentence of 20 years imprisonment imposed as the appellant was remorseful, with a young family to provide for and a first offender. However, he has given this young girl a life burden of a child. I will thus uphold the sentence.
13. Consequently and for the above reasons, I dismiss the appeal and uphold both the conviction and the sentence of the trial court. Right of appeal explained.



DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY 2023, VIRTUALLY FROM VOI.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima holding brief Mr. Kazungu for state

Mr. Otolu court assistant

