



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzioki v Republic (Criminal Appeal E001 of 2022)  
[2023] KEHC 3988 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3988 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E001 OF 2022**

**GMA DULU, J**

**MAY 4, 2023**

**BETWEEN**

**BENSON KYALO NZIOKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Makindu SPM  
Criminal Case No. 1862 of 2014 by A. Ndungu – RM)*

**JUDGMENT**

1. The appellant was charged in the Magistrate's court at Makindu with two counts of sexual assault contrary to Section 5(1)(a)(1)(2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of Count I were that on diverse dates between the month of May 2014 and November 8, 2014 at Kiboko Location within Makueni County intentionally and unlawfully used his fingers to penetrate the vagina of FNM (name withheld) a child aged 10 years.
3. The particulars of Count II on the other hand, were that between the same dates and at the same place intentionally and unlawfully used his fingers to penetrate the vagina of AMM (name withheld) a child aged 8 years.
4. He denied both charges. After a full trial, he was convicted on both charges and sentenced to ten (10) years imprisonment on each of the two counts. It was not specifically indicated by the trial court whether or not sentences were consecutive or concurrent.
5. The appellant has now come to this court on appeal against both conviction and sentence and relied on the following grounds:-
  1. The learned trial Magistrate erred both in law and facts by convicting him on defective charge sheet contrary to Section 134 and 214 of the *Criminal Procedure Code*.



2. The learned trial Magistrate erred both in law and fact by failing to do proper *voire-dire* examination pursuant to Section 19 of Cap 15 in respect of PW1 and PW2 for Count I and II both being children of 10 and 8 years in compliance with the principles in the celebrated case of *Francisco Matove =Versus= Republic* (1961) EA.
  3. The learned trial Magistrate erred both in law and facts in accepting uncorroborated evidence of PW1 in both counts which required corroboration under Section 31(10) of the Sexual Offences Act.
  4. The learned trial Magistrate erred in law and in fact in that in accepting uncorroborated evidence of PW1 failed to comply with the provisions of Section 124 of the Sexual Offences Act.
  5. The learned trial Magistrate erred in law and facts by shifting the burden of proof to the appellant and in demonstrating clear bias against the appellant.
  6. The learned Magistrate erred in law and fact by convicting the appellant with contradictions and inconsistencies in the evidence of witnesses.
  7. The learned trial Magistrate erred both in law and facts in finding the appellant guilty against the weight of the evidence tendered.
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 have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent inferences and conclusions – see *Okeno =Versus=Republic* (1972) EA 32.
  8. I have evaluated the evidence on record. In proving their case, the prosecution called five (5) witnesses. On his part, the appellant tendered unsworn defence testimony and did not call any additional witness.
  9. The appellant has raised technical as well as substantive grounds of appeal. I will deal with the technical grounds first.
  10. He has first of all complained that the two complainants PW1 and PW2 being minors, the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15) were not complied with, in regard to conducting *voire-dire* examination to test their intelligence, and their appreciation of the importance of an oath.
  11. Having perused the trial court record, I find that the trial court took both PW1 and PW2 through *voire-dire* examination. That ground of appeal thus has no basis and I dismiss the same.
  12. The other technical ground is that the two charges were defective by talking generally about diverse dates, and also not specifically stating the specific location of the incident, to enable the appellant defend himself as required under Article 50(2) of the Constitution. He relied on the case of *Sigilan =Versus= Republic* (2004) eKLR 480. I note that the Prosecution Counsel has not responded to this complaint in the submissions.
  13. Indeed, the charges talk of diverse dates between May and November 8, 2014. In my view, though those two months are wide between them, it is clear that the specific dates of offence were not known. Secondly, the said period of a few months did not cause any confusion to the appellant, as he understood the period and could deny or accept the allegations.



14. In addition, I note that the place of alleged offence was specifically stated to be '[Particulars withheld] village' contrary to the allegation of the appellant. It cannot be said therefore that the charge was defective or that the appellant was not able to defend himself in terms of Article 50(2) of the Constitution. I dismiss that ground of appeal.
15. The other grounds are on the reliability of the evidence of the prosecution witnesses, and the adequacy of the evidence to prove the case against the appellant beyond any reasonable doubt.
16. Having considered the evidence of the two complainants PW1 and PW2 as well as the medical evidence of PW5 Doctor Kavuli Dorcas on record, I find that the two girls were sexually assaulted as alleged. Thus penetration or touching of their sexual organs was proved.
17. With regard to their alleged age of the victims, again I find that there was no dispute on this. The Magistrate saw the two girls (victims) and was convinced that they were young girls. PW1 said that she was 10 years old. PW2 said that her sister PW1 knew her age. She was in nursery school.
18. I note that nobody testified in court to the age of PW1 and PW2. No evidence on age assessment was produced in court. No birth certificate or notification of birth was tendered in evidence. The two school teachers, PW3 and PW4 did not indicate the age of the two girls according to school documents. The investigating officer also did not testify in court.
19. With the uncontroverted evidence on record however, I find that the prosecution proved the age of PW1 and PW2 beyond any reasonable doubt, since the Magistrate saw them in court and the appellant being an Uncle – a close relative did not raise an issue. I thus find that the prosecution proved the age of PW1 and PW2 beyond any reasonable doubt.
20. I now turn to the identity of the culprit. The incidences are said to have occurred at night. The complainants (victims) PW1 and PW2 knew the appellant well as the person who lived with them. The evidence on record is that he talked to them each time he sexually assaulted them. The two girls had nothing to gain by implicating him.
21. In his defence, the appellant put blame on the school teacher for implicating him. The evidence on record however is that the information on the allegations against him was from the complainants PW1 and PW2, and thus his defence cannot be believed. I find like the Magistrate that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus dismiss the appeal against conviction on both counts.
22. With regard to sentence, this is a serious offence committed against young children. The children were also orphans under the appellant's care. The statutory sentence is also a minimum of ten (10) years imprisonment. Considering the age of the appellant, however I will make the sentences run concurrently.
23. I thus dismiss the appeal against conviction. I uphold the conviction on each of the two (2) counts.
24. As for sentence, I order that the two sentences of ten (10) years imprisonment will run concurrently. The appellant will thus serve a total of ten (10) years imprisonment from the date he was imprisoned by the trial court.

Right of appeal explained.

**DATED, SIGNED AND DELIVERED THIS 4<sup>TH</sup> DAY OF MAY, 2023 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**



**In the virtual presence of: -**

Appellant

Mr. Kazungu for state

Mr. Mwendwa court assistant

