



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 54 OF 2017

]Being an appeal from the original Criminal Case No. 141 of 2013 in Narok Senior Resident Magistrate court, R. v. Lotiken Barigoi]

LOTIKEN BARIGOIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. The appellant was convicted on the direct evidence of the complainant (PW1) who was a minor. She gave sworn evidence after being subjected to a *voire dire* examination. The defence of the appellant was that he was framed by Marik Njapit (PW3).
4. The appellant has raised 7 grounds of appeal in his amended petition of appeal. In grounds 1 and 2, the appellant has faulted the trial court for failing to find that the age of the complainant was not proved. In this regard, I find from the evidence of Daniel Cherop (PW8) that the age of the complainant was 5 years. This is clear from the P3 form (report) that was put in evidence as exhibit 1. PW 8 produced the P3 form on behalf of his colleague Jesse Kimojino who had gone for further studies in Nakuru. According to that report, the complainant had inflammation in her private parts and her hymen was broken. Finally, there were pus cells in her urine. Furthermore, there is the evidence of Agnes Njapit (PW 6) who testified that the complainant was aged 5 years. Furthermore, I find that the P3 form was put in evidence pursuant to the provisions of section 33 (b) of the Evidence Act (Cap 80) Laws of Kenya. The reason being that the clinical officer who prepared the P3 was not easily available to give evidence, hence the resort to PW 8 giving evidence on his behalf. In the circumstances, I find that the age of the complainant was 5 years. It therefore follows that this ground of appeal is without merit and is hereby dismissed.
5. In grounds 3 and 4, the appellant has faulted the trial court for convicting him in the face of contradictions and inconsistencies in the evidence of the prosecution witnesses. In this regard, I refer to the evidence of the complainant (Pw1) who testified that the appellant forcefully had sexual intercourse with her. The evidence of the complainant is corroborated by that of Merik Njapit (PW3). PW3 was given a currency note of Sh. 500/-by a boy who had been sent by the appellant to buy for him some food called “*kangumu*.” Subsequently, PW3 arrested the appellant. There is further corroboration in the evidence of Lenah Njapit (PW4), who saw a person sipping his trousers after raping the complainant. I

find that the evidence of these witnesses to be cogent and consistent. In the circumstances, this ground of appeal is lacking in merit and I hereby dismiss it.

6. In ground 5, the appellant has faulted the trial court for failing to find that essential witnesses were not called to testify. In this regard, I find that certain witnesses in particular the boy whom the complainant referred to as Daddy and the owner of the kiosk who was given a currency note of Sh.500/= were not called as witnesses. Counsel for the appellant cited the case of *Bukenya and Others v. Uganda (1972) EA 549* in which the Court of Appeal held that it is the duty of the prosecution to make available all witnesses who are necessary to establish the truth, even if their evidence is be inconsistent. It was further held in that case that it is the duty of the court to call witnesses whose evidence appears essential to the just decision of the case. Finally, that court also held that an adverse inference may be drawn for failing to call such witnesses. The evidence tendered at trial proved beyond reasonable doubt that the appellant committed the offence notwithstanding the non-calling of those witnesses to testify. In the circumstances, I find that this ground of appeal lacks merit and is hereby dismissed.

7. In ground 6, the appellant has faulted the trial court for not ensuring that he was supplied with witness statements which is a violation of article 50(2)(j) of the 2010 Constitution of Kenya. In this regard, I find that the appellant applied to be given witness statements. The court made an order on 15/8/2013 that he be supplied with those witness statements at his cost. There were 5 mentions before the trial resumed on 15/10/2013. On that date, the appellant is recorded to have stated that he was ready to proceed with his case. This was in response to the statement of the prosecutor that he was ready to proceed with 3 witnesses. From what transpired on that date until the close of the defence hearing on 10/12/2013, the appellant never complained of not having been supplied with witness statements. It should be noted that the supply of witness statements to an accused person is a continuous process. However, the disclosure must be made with adequate notice to enable the defence to prepare for its case. In the circumstances, I find the notice was adequate. I must state here categorically that the supply of statements to an accused person should be at state expense. This was the procedure before the adoption of the 2010 Constitution of Kenya. Before the adoption of the 2010 Constitution, the state used to supply an accused person with the depositions of witnesses during the period when preliminary inquiries were held by the magistrate courts. Thereafter, the same procedure was followed during the period when committal bundles were introduced following the abolition of the preliminary inquiries. In the circumstances, I find that this ground of appeal lacks merit and is hereby dismissed.

8. In ground 7, the appellant has faulted the trial court for failing to find that the complainant was coached. In this regard, I refer to the evidence of the complainant in which she testified that:

“I was told to say that you did bad things to me by my teacher Supen. But Baragoi did tabia mbaya to me.”

I find from this evidence of the complainant that she was reminded to say what the appellant did to her. This does not amount to coaching. In the circumstances, I find no merit in this ground of appeal and I therefore dismiss it.

9. This is a first appeal. As a first appeal court, according to *Okeno v. R. (1972) EA 32*, I am required to scrutinize the evidence upon which the convictions were based. I have done so and I find that the appellant was convicted on sound evidence. I therefore confirm both the conviction and the sentence.

10. The upshot of the foregoing is that the appellant’s appeal is hereby dismissed in its entirety.

Judgement delivered in open court this 27th day of July 2017 in the presence of Mr. Kamwaro for Appellant and Ms Nyaroita for Respondent.

J. M. Bwonwonga

Judge

27/7/2017