



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 14 OF 2017

JOSEPH MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of Hon Sitati, Ag SRM, delivered on 19/2/2013 in the Senior Resident Magistrate's Court at Narok in Criminal Case No. 993 of 2013, R v Joseph Mwangi)

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 (3) of the Sexual Offences Act No 3 of 2006.
2. The state has supported both the conviction and sentence.
3. In this court, the appellant has raised four grounds in his petition of appeal.
4. In ground 1 the appellant has faulted the trial court for convicting him when his identification was not from error or mistake. The victim IA (Pw 2) was allowed to give sworn evidence after successfully undergoing a *voir dire* examination. Pw 2 testified that a man called her and gave her a sweet. That man then took her to Mukuru. There he removed her underwear and then had sex with her. Thereafter the man threw her into a ditch full of water. She felt pain and was injured in her private parts. A pass by woman (who was not called as a witness) came and removed her from the ditch and took her to the hospital. She further testified that the man who did the bad things to her was the appellant. She had not known the appellant very well. The offence was committed during lunch time. Before he gave the sweet, the victim was with F and M (both were not called as witnesses).
5. While under cross examination by the appellant, Pw 2 testified that: *"Father told me to say who did it. Father said it is you."*
6. There is evidence of RO (Pw 3), who was a Jua kali operator. She testified that she was called by mama Kelvin, who gave her certain information. As result she proceeded to Narok district hospital. There she found her 4-year-old daughter, who was born 3/01/2008, according to the birth certificate; which was put in evidence as exhibit 2. She found the clothes of her daughter were muddied. She was wet all over. She was bleeding from her private parts. The daughter told the mother that she was raped and dumped in a ditch full of water. The mother asked her if she could recognize the person who raped her, if she saw him again. She answered in the positive.
7. The victim was taken to Narok Referral Hospital for medical examination. She was examined by Kiptoo, the Clinical Officer. He found as follows. Generalized severe tenderness to the abdomen. The genitalia was torn. The labia was torn and bruised. She was taken to hospital three days after being defiled. She was treated for HIV. Pain killers and other drugs were administered. She was admitted to hospital for corrective surgery on the perineal tears. Her injuries were classified as grievous harm. The clinical officer noted that the major, minor labia lacerated, 3rd degree perineal tear – anus ruptured, hymen torn, bleeding from vaginal walls and anus.
8. On 5th August 2013, they were alerted by an eye witness (Kelvin) that he had seen the rapist. The eye witness led them to the rapist, whom they arrested. The daughter pointed out the rapist before they arrested him.
9. The prosecution then called Kelvin Muigai (Pw 4), who testified after undergoing a *voire dire* examination. He was affirmed. On the material date, Pw 4 testified that at 2.00 pm he saw a man calling the victim at Mukuru. The man gave the victim a sweet. The man held her hand walked away with her to Mukuru forest.
10. When Pw 4 went to collect water, the second time, he met the victim with a woman. This woman was helping the victim. The victim was crying and was bleeding from her private parts. Her clothes were muddied. This woman took the victim to hospital using a boda boda. On a later date, Pw 4 saw the man, who had taken the victim. He alerted the victim's parents. Pw 4 used to see the man in the local area as a

person, who used to collect waste bottles. He knew where the man lived. He then identified that man as the appellant.

11. While under cross examination, Pw 4 testified that when he saw the appellant taking the victim, he thought that the victim knew the appellant.

12. The victim knew the appellant before this offence was committed. The offence was committed during day time. The victim told her mother that if she saw the person, who raped her, she could be able to recognize her. Pw 4 was the second witness, who saw the appellant take the victim to Mukuru forest. Pw 4 knew the appellant before the offence was committed. Pw 4 knew the appellant as a person, who used to collect waste bottles in the area. It is Pw 4 who saw the appellant in the area collecting the waste bottles and that is when he alerted the parents of the victim. Even the appellant in his unsworn statement testified that he collects waste bottles. As result, the appellant was arrested. The appellant was known to both Pw 2 and Pw 4 before this incident and therefore he was positively identified. His identification was positive. The cases cited by the appellant are in respect of the evidence of a single identifying witness. They are therefore distinguishable. It was free from error. Furthermore, I find that the victim was not coached by the father as submitted by the appellant. I therefore find that ground 1 lacks merit and is hereby dismissed.

13. In ground 2 the appellant has faulted the trial court for convicting him in the absence of corroborating evidence. The sworn evidence of the victim does not need corroboration. **See *Kibangeny arap Kolil v Regina (1959) EA 92***. Additionally, the trial court found her to be truthful in terms of section 124 of the Evidence Act (Cap. 80) Laws of Kenya.

14. In ground 3 the appellant has faulted the trial court for convicting him, when the dates of the incident are at variance. In his submissions, the appellant has submitted that the P3 form (exhibit 1b) prepared by Hillary Kiptoo, but which was put in evidence by his colleague Edwin Kiprotich (Pw 1), indicates that the victim was sent to hospital on 3rd August 2013. In his evidence Pw 1 testified that the victim was sent to hospital on 5th August 2013. This is clearly wrong as the P3 clearly indicates that the date was 3rd August 2013. The evidence of the investigating officer, PC (W) Faith Naimodu was that the appellant was arrested on 5th August 2013. Based on this evidence I find this to be a curable error in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. I therefore find no merit in this ground 3, which I hereby dismiss.

15. In ground 4, the appellant has faulted the trial court for convicting him on the evidence of Kelvin Muigai (Pw 4), who gave evidence after being affirmed and not sworn. Pw 4 was subjected to a *voire dire* examination and the trial magistrate ordered that: “*Witness intelligent enough. Shall be affirmed owing to lack of specific religious belief though he appreciates duty of telling the truth.*” Section 15 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya, authorizes the usage of affirmations instead of oaths before a witness testifies; although it is used where a person objects to taking an oath on religious belief and once an affirmation has been administered, it has the same effect as if the person has taken the oath. In the circumstances, I find that this ground lacks merit and is hereby dismissed.

16. The appellant has not challenged his sentence of life imprisonment. I therefore confirm his sentence.

17. In the premises, the appellant’s appeal is hereby dismissed its entirety.

Judgement signed, dated and delivered in open court at Narok this 11th day of December, 2019 in the presence of the appellant and Ms. Nyaroita for the respondent.

J. M. Bwonwong’a

Judge

11/12/2019