



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: GICHERU, TUNOI & O'KUBASU, J.J.A.
CRIMINAL APPEAL NO. 174 OF 2000
 BETWEEN

SALIM HAMED YAGA 1ST APPELLANT
 MOHAMED RAMA MWAFISI 2ND APPELLANT
 HASSAN JUMA MWASORO 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
 Mombasa (Waki, J. & Khaminwa, Comm of Assize) dated
 3rd April, 2000

in

H.C.CR.A. NOS. 327, 309 & 316 OF 1998)

JUDGMENT OF THE COURT:

According to the authority of **Kibangeny Arap Kolil V R [1959] E.A. 92 at page 94** letter G , in the absence of any definition in the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya of the expression "**child of tender years**" for the purpose of **Section 19** of the said Act, such expression, in the absence of any special circumstances, is taken to mean any child of any age, or apparent age, of under fourteen years.

In this second appeal, the star witness in the court of first instance was **M.A (P.W. 6)** , hereinafter referred to as **M** . In her testimony in the aforesaid court, she said that she was 14 years old. She was therefore outside the provisions of Section 19 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya , hereinafter called **the Act** . Accordingly, the provisions of Section 124 of the Evidence Act, **Chapter 80 of the Laws of Kenya** were not applicable to her testimony. Her evidence, if truthful, required no corroboration. According to the trial magistrate, there was no reason to doubt her evidence as she knew the appellants before and had enough time and light to recognize them as the persons who attacked, robbed and killed her mother, **J.A** , on the evening of 3rd October, 1997 at about 7.00 p.m. at [particulars withheld] in Kwale District of the Coast Province. After a careful analysis of the evidence before the trial court, the first appellate court concurred with the holding of the trial court and hastened to add that as the first appellate court, there was even less reasons to doubt the evidence of M.A since, unlike the trial magistrate, it had not heard nor seen this witness in the witness box.

The evidence of **M.A** was that on the material day, the appellants whom she knew before came to

their house at about 7.00 p.m. while she was cooking in the kitchen which was lit by a lantern. Her mother was in the main house where there was also a lantern. The appellants used to visit her mother everyday and she knew one of them by name - the 2nd appellant, Mohamed Rama Mwafisi - while she was familiar with the appearance of the 1st and 3rd appellants - Salim Hamed Yaga and Hassan Juma Mwasoro. These three young men sat with her mother on the verandah which was lit by a lantern. After the meal was ready, she served them and when they had eaten, she removed the plates while the lantern light was still on. Thereafter, the appellants called her mother to give them money to buy cigarettes and as the latter entered into her house with a view to getting money for them, they followed her into her bedroom, tied her with a rope and subsequently strangled her to death. They then took her small black radio, hand-bag which contained her documents, an iron box and a panga. Subsequent thereto, they raped M.A and severely cut her with a panga on both sides of her face and on her right thumb. She became unconscious and on regaining consciousness she on the following morning reported the incident to the village elder who took her to Diani Police Station who then took her to Msambweni Hospital from where she was transferred to Coast General Hospital.

Meanwhile, the appellants were arrested and in the course of the investigation, the 2nd appellant, Mohamed Rama Mwafisi, led the police to the place where some of the items stolen from the house of M.A's mother were recovered. These comprised of the black hand-bag in which were personal documents as are narrated above, an iron box besides the small black radio and a panga which had been left in the house of **MOHAMED OMARI MWAKUMUKI (P.W.5)** by the 2nd appellant. These items were identified in the trial court by M.A as belonging to her deceased mother.

Upon this evidence, the appellants had been convicted of the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** and the 1st appellant was sentenced to suffer death in the manner authorized by law while the 2nd and 3rd appellants being under the age of 18 years were ordered to be detained during the President's pleasure. The appellants' first appeal in the superior court was dismissed for the reasons that that court could not fault the judgment of the trial court. The appellants now appeal to this Court principally on the issues of their identification by M.A and corroboration of her evidence. According to counsel for the appellant, Mr. Byrant, in the absence of an identification parade, the identification evidence of M.A, was suspect and incapable of founding the appellants' conviction. Besides, M.A being a child of 14 years, her evidence required corroboration before it could be acted on. Such corroboration was lacking. According to counsel for the respondent, Mrs. Mwangi, however, the identification evidence of M.A was that of recognition as she knew the appellants before although she knew only the 2nd appellant by name. There was therefore no need for an identification parade. And as regards the need for corroboration of M.A's evidence, since she was outside the ambit of Section 19 of the Act, the provisions of **Section 124 of the Evidence Act, Chapter 80 of the Laws of Kenya** were inapplicable to her. Once therefore her evidence was truthful, it could safely be acted upon. In any event, the discovery of the stolen items from the house of M.A's deceased mother was corroboration of the robbery in respect of which the appellants were charged, convicted and sentenced as is set out in this judgment, particularly in regard to the second appellant who led the police towards the discovery of the said items.

The crucial issue in this appeal is the identification of the appellants by M.A as the persons who committed the robbery in respect of which they were convicted and sentenced. The brief resumé of the evidence set out in this judgment indicate a familiarity of M.A with the appellants for the period they visited her now deceased mother every day. The adequate lighting in her mother's house and her interaction with the appellants as she served them with the evening meal and collecting plates after they had eaten immediately before the robbery stabilizes her identification of the appellants by recognition. That aspect of her evidence was believed by the trial magistrate and upheld by the first appellate court. We can find no sound basis upon which to fault the two courts below in that regard. In the result, this appeal must fail and the same is dismissed.

Dated and delivered at Mombasa this 20th day of July, 2001.

J. E. GICHERU

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. O. O'KUBASU

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR