Case Number:	Criminal Appeal 136 of 2017
Date Delivered:	01 Aug 2018
Case Class:	Criminal
Court:	High Court at Narok
Case Action:	Judgment
Judge:	Justus Momanyi Bwonwong'a
Citation:	John Maina Karanja v Republic [2018] eKLR
Advocates:	Mr. Onduso for the appellant, Ms. Nyaroita for the state.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Narok
Docket Number:	-
History Docket Number:	Criminal Case No.42 of 2016
Case Outcome:	-
History County:	Narok
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 136 OF 2017

JOHN MAINA KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence dated 3rd November, 2017 in the Chief Magistrate's Court at Narok in Criminal Case No.42 of 2016, R. v. John Maina Karanja]

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of two offences of defilement contrary to 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 A N (PW1), who is the complainant in count two. He was also convicted on the direct evidence of N W (PW2), who is the complainant in count one. Both complainants gave unsworn testimony after undergoing a *voire dire* examination in which the court found that they were unable to appreciate the nature of the oath.

4. In this court the appellant has raised seven grounds of appeal. In ground one, the appellant has stated the unchallengeable fact that he did not plead guilty.

5. In ground two, the appellant has faulted the trial court both in law and fact by convicting him on the evidence of identification which was not proved. In this regard the evidence of both PW1 and PW2 is that they lived in the same plot with the appellant. They both testified that the appellant used to give them sweets and that he was very friendly to them.

6. The evidence of both PW1 and PW2 was that the offences were committed during broad daylight, when the wife of the appellant had gone to the market. In the circumstances, I find that the recognition of the appellant was positive. PW1 and PW2 would not have been mistaken on the identity of the appellant. I therefore find no merit in ground two and is hereby dismissed.

7. In ground three, the appellant has faulted the trial court both in law and fact for convicting him in the absence of proof of penetration. The evidence of PW1 in this regard is that the appellant used to repair machines and that he used to greet her before the commission of this offence. She further testified that the appellant used to go to their house to repair their hoofer machine. It was her further evidence that when she was going to the toilet, the appellant called her and directed her to go and see his shoes in the house. She complied.

8. After entering the house, she found the shoes were under the bed. The appellant then held the complainant, blindfolded her and gagged her mouth using a white piece of cloth. Thereafter, he removed her dress and underpants. He then entered her private parts using the thing he uses for urinating. As a result she felt a lot of pain. Thereafter, he then wiped her private parts and then released her. The appellant then bought chips for her worth ten shillings, telling her that if she ate she would stop feeling the pain. After eating the chips, the appellant wanted again to have sexual intercourse with her. She managed to escape.

9. Before escaping, the appellant told her she should not tell anybody concerning this incident and if she did, he would kill her. Later the complainant shared her story with PW2.

10. The evidence of PW2 in this regard was that she was aged nine years old. The appellant called her to his house. He then proceeded to cover her mouth and put her on his bed. He then removed her clothes and covered her mouth with a *lesso*. The complainant cried and bled from her private parts. The appellant told her to remove her pants, which he then burnt using kerosene.

11. The appellant gave PW2 five shillings to go and buy Mr. Berry (chewing gum). It is also her evidence that the appellant held a knife and a cooking stick and instructed her not to say anything concerning this incident and if she did he would kill her. She also testified that the appellant used his “thing” for urinating in her private parts as a result of which she bled. The appellant gave her tissue to wipe the blood. It was her evidence that the offence was committed during daytime.

12. The two complainants, PW1 and PW2 were taken for medical examination at Narok County Referral Hospital on 27th May, 2016. The complainant (N W) was found to be 9 years old and the examining clinical officer, Isaac Kenyanya (PW5), found that her hymen was broken and found faecal matter in her private parts and there were no lacerations. He found no spermatozoa in her private parts. Thereafter, he put in evidence the medical report of N W as Exhibit Ex1A. He also produced the treatment sheet of N W as exhibit 1B.

13. Furthermore, PW5 examined the complainant A.N. He found her to be 11 years old. He found that her hymen was broken. He also found no spermatozoa in her private parts. He then put in evidence her medical report as exhibit 4A.

14. Furthermore the prosecution called C K (PW6), who was a teacher at [Particulars withheld] Primary School. It was her testimony that she called the two complainants. They told her how the appellant had slept with them. As a result the matter was reported to the police.

15. No. 77299 CPL. Joyce Ruto (PW7), investigated the case of the two complainants. According to her the complainants told her they were defiled on 2nd May, 2016. As a result she arrested the appellant and she also visited the scene of crime and found that they were staying in the same plot.

16. In the light of the foregoing evidence, I find that the two complainants were truthful witnesses as contemplated by section 124 of the Evidence Act [Cap 80] Laws of Kenya. They gave cogent and credible evidence, detailing on how they were defiled by the appellant. I find from the medical evidence that penetration was proved in respect of the two complainants and for that reason I find no merit in this ground of appeal, which I hereby dismiss.

17. In grounds four and five, the appellant has faulted the trial court that the medical evidence was not conclusive proof of defilement and that his defence was not rebutted. The unsworn evidence of the appellant was that he was very friendly to the two complainants and that he liked them. He also stated that PW1 and PW2 used to assist him with his work in his house. After doing so, he could buy them some sweets but he never gave them money. He denied engaging in any sexual activity with the complainants. He concluded his evidence that he was never involved in any quarrel with them. After considering the evidence of the two complainants and that of the appellant, I find that the appellant was on good terms with the two complainants. I find no reason as to why the two complainants would tell lies against the appellant. In the circumstances, I find that the defence of the appellant was considered and rightly rejected by the trial court. I therefore find that grounds four and five are lacking in merit and are hereby dismissed.

18. In grounds six and seven, the appellant merely expressed his wish to attend the hearing of his appeal which he has done and he also prayed to be supplied with a record of court proceedings and the judgement to enable him argue his appeal, which request was complied with. I therefore find that these two grounds are spent.

19. As regards sentence the appellant has submitted that the sentence of life imprisonment is unconstitutional. He relied on a number of authorities both local and those of the European Court of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) in support of his argument. I find that the sentence imposed upon the appellant is permitted by both the constitution and the Sexual Offences Act. I further find that the sentence was merited. In the circumstances I find that his submissions are lacking in merit and are hereby dismissed.

20. This is a first appeal. As a first appeal court, I am required to assess the entire evidence and make my own independent findings. I have done so. As a result, I find the appellant was convicted and sentenced on ample evidence.

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

Judgement Delivered in open court at **Narok** this **1st** day of **August, 2018** in the presence of Mr. Kambo holding brief for Mr. Onduso for the appellant and Ms. Nyaroita for the state.

J. M. BWONWONGA

JUDGE

1/8/2018