



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 52 OF 2019[SO]

[CORAM HON. R.E.ABURILI J]

CALEB ONYANGO OTAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment, conviction and sentence by Hon C.I. Agutu, SRM in Ukwala SRM'S Court Sexual Offence Case No.8 of 2019 delivered on 15th July 2019]

JUDGMENT

Introduction

1. The appellant herein **CALEB ONYANGO OTAKO** was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that on the 24th day of February, 2019 at Segga sub-location in Ugenya sub-county within Siaya County he intentionally caused his penis to penetrate the vagina of RA [full name withheld for legal reasons], a child aged 17 years. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.
2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.
3. The trial magistrate, Hon. C.I. Agutu after hearing four prosecution witnesses and testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to serve a 15 years' imprisonment.
4. Aggrieved by the said conviction and sentence, the appellant filed his Petition of appeal challenging both conviction and sentence but in his amended Petition, he challenged only sentence and based it on the following ground:

That, the trial court failed to observe that the sentence imposed was unconstitutional due to its mandatory nature.

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The appellant submitted attacking both the conviction and sentence imposed on him by the trial Magistrate. He submitted that the evidence tendered by the prosecution against him was hardly enough to prove any case against him as it was fabricated by the complainant. It was the appellant's submission that the complainant was 19 years old and that she had reasonably made him to believe that she was an adult.
6. The appellant submitted that his Identification by the complainant failed to meet the required standard since the minor (PW1) did not know the appellant's full name but only identified him in the dock, a fact that should not have warranted a conviction against the appellant and that conversely, an identification parade should have been undertaken to verify his identity. Reliance on this proposition was placed on the case of **Ajode v Republic, Court of Appeal at Kisumu, Criminal Appeal Number 87 of 2004**, which the appellant quoted as follows:

“It is a trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a property conducted identification parade, second it is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and police should then conduct a fair identification parade.”

7. The appellant further submitted that the prosecution was entitled and under an obligation to avail as many witnesses as possible for the interest of proving its case beyond the required standards. He further submitted that though section 143 of the Evidence Act did not prescribe the required number of the witnesses that the prosecution should call to prove its case, the trial court was empowered to exercise its powers under Section 150 of the Criminal Procedure Code to summon any material person.

8. The appellant submitted that the prosecution violated his right to a fair trial by not serving him with the medical examination report (P3 form) which is a vital and relevant document that the prosecution relied upon in this case, contrary to the provisions of Article 50(2)(b)(c)(g) and (j) of the Constitution of Kenya. He relied on the case of **D.O.O v Republic (2015) eKLR** where it was held:

“Accordingly, the trial court is under constitutional duty to ensure an accused person has a fair trial. A fair trial is a constitutional right for any accused person which is guaranteed by the constitution. The Court is also supposed to be impartial in determining dispute and ensure level playing ground is laid down before commencement of the trial for both the prosecution and the accused. The fair trial includes the right to be informed of the charge with sufficient details to answer it, to have adequate time and facilities to prepare a defence, to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. To avoid such lapses by the trial court it is important and desirable for the trial court to inform the accused person of such rights and ensure the prosecution complies with the provisions of Article 50 before trial commences... It is in my view nevertheless, even where the mandatory sentence is prescribed by law that justice is not only supposed to be done but to be seen to have been done.”

9. He further submitted that there was no medical evidence connecting him to the alleged offence; that he was convicted on contradictory statements and inconsistencies from the prosecution witnesses that amounted to a total infringement and contravention of his constitutional rights and fundamental freedom to a fair trial and amounted to a slap on the face of natural justice.

10. The respondent never filed any submissions.

Analysis & Determination

11. This is a first appellate court. As expected, I have to analyse and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions bearing in mind that I neither saw nor heard any of the witnesses as they testified. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

12. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

13. The prosecution evidence as laid out in the trial Court was as follows: PW1 The complainant testified that the accused was a stranger to him and she first saw him in a disco matanga during a funeral. She testified that she was with one Nancy when the appellant offered to give them a ride home at the end of the ceremony. That she naively got onto a motorbike that had four people on board, the rider whom she did not know, Nancy, herself and lastly the appellant.

14. She further testified that while on the ride home her diversion was passed and the bike stopped at an unknown area to her. That the appellant then got off and grabbed her off the bike and before she knew what was happening, the rider had taken off with Nancy. It was her testimony that the appellant threatened to harm her if she resisted his directives.

15. The complainant testified that the appellant led her to a house and ordered her to undress which she did and then the appellant undressed and forcefully assaulted her sexually. She testified that she put up a fight and tried to scream but the appellant scratched her neck. The trial court noted that the complainant’s neck bore a nail scratch.

16. The complainant further testified that the appellant had a difficult time penetrating her vagina and resorted to lubricating it after which he took her mobile phone which had an illumination application and used it to view her vagina. She further testified that the appellant continued defiling her threatening to kill her if she did not keep still. She further testified that when dawn came, the appellant ordered her to dress up and leave but the appellant held on to her Kshs.30/= and her phone.

17. In cross-examination, the complainant reiterated that on the material night the appellant had offered to take them home at no monetary costs. She stated that her home was not far from the dance arena. She further stated that she reported her misfortune to a lady in a shop who identified the appellant as Onyango. It was her testimony in cross-examination that the lady called out to the appellant as a common thief and further threatened to lynch her. The complainant further stated that the lady showed her a path that would lead her to the local administrator where she would then lodge her complaint which she did.

18. PW2, Corporal Jackson acknowledged that the complainant in the company of the area chief reported a sexual assault. He further testified that he then accompanied the complainant to the appellant's house where they found him sleeping. Corporal Jackson further testified that the complainant informed him that the appellant had remained with her phone however he did not locate it although the appellant's mother surrendered the said phone.

19. In cross-examination, Corporal Jackson stated that he arrested the appellant over defilement accusation as well as the alleged theft of the complainant's phone but that he did not see the phone.

20. PW3 George Otieno Ombwak the Clinical Officer based at Ukwala sub-county Hospital testified that he examined the complainant and found here with a bloody discharge from her vagina. Further, that her labia minora was bruised, which was an indication of forceful vagina penetration.

21. Upon examining the appellant, the medic testified that there was no leading laboratory evidence implicating the appellant despite the fact that the appellant was arrested within 72hrs and presented for exam. He further testified that it appeared that the accused did not sheath his penis and yet no spermatozoa was seen in the urine although this could be explained if the perpetrator was infertile, but that he did not pursue and analyze the fertility of the appellant.

22. In cross-examination, the Clinical Officer stated that the blood found on the complainant was not menstrual blood and that it was on the opening of vagina not in the cervix. He further reiterated that there was sign of trauma.

23. PW4 No.107257 PC Lydia Adhiambo testified that on the 26th February, 2019 the appellant and the accused had been taken to Kogere Administration Police Post on allegation of defilement. PW4 testified that the appellant was arrested and a phone belonging to the complainant was retrieved.

24. In cross-examination PW4 reiterated that the complainant had blood stains on her pant which was not her menses. She denied the suggestion that she told the complainant to scratch her vagina.

25. At the close of the prosecution's case, the appellant gave a sworn statement of defence. He denied the allegations levelled against him. He explained that he was a disc jockey at Chungulia club in Mumias. The appellant explained that he was in possession of the complainant's mobile phone by virtue of being a disc jockey and that he had been requested to feed it with music from his other appliances. The appellant further stated that he directed the complainant to his home to come and pick up her phone however the complainant arrived with police who accused him of raping the complainant.

Determination

26. Having carefully considered the appellant's grounds of appeal, the evidence adduced against him and his defence together with submissions for and against the appeal herein, the main question for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. There are various ancillary questions that arise from the main issue above.

27. As a preliminary point, I will consider the point raised by the appellant in his written submissions.

28. The appellant claimed that his right to a fair trial was violated as he was not served with the medical examination report (P3 form) that was relied on by the prosecution in their case.

29. This court has due regard to the provisions of Article 50(2)(c) and (j) of the Constitution of Kenya, 2010 which provides:

“Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

30. Addressing this right of an accused person being furnished with the relevant evidence, in **Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR**, the Court of Appeal rendered itself as follows:

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”

31. I have perused the trial court record and it is notable that at no time did the appellant raise the issue of failure to be provided with a P3 form. It is worth noting that if a trial court grants an order that an accused person should be furnished with the evidence or witness statements that the prosecution intends to rely on and the accused fails to follow up on the same from the prosecution, the blame would lie squarely on him. The accused person would be expected and/or required to inform such trial court that he has not been supplied with the same before he proceeds with the trial. Indeed, such accused person has the right to refuse to participate in the proceedings until such time that he is furnished with the said evidence.

32. However, where an accused person is a layman on issues pertaining to law and procedures of the court, the trial court is charged with a higher responsibility of satisfying itself that such a person has been supplied with witness statements.

33. In the instant case, the appellant who from the trial court records is a previous offender and convict would have been expected to know that he was entitled to the P3 form to enable him prepare for trial. Further to this, the appellant had the opportunity, which he took to cross-examine the Clinical Officer examined the complainant, filled her P3 form and produced it in court as an exhibit.

34. At no point during the trial did the appellant seek an adjournment or raise a query alleging failure by the prosecution to supply him with the P3 form of the complainant.

35. Accordingly, it is my considered view that this ground of appeal as raised by the appellant is an afterthought. The same is hereby dismissed.

36. **Back to the main question of whether the prosecution proved its case against the appellant beyond reasonable doubt**, section 8 of the *Sexual Offences Act* provides as follows:

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children’s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.”

37. For an accused person to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013**, where it was stated:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

38. In the **Court of Appeal at Malindi in Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo v Republic** the court stated as follows:

“Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

39. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello v Republic (2010) eKLR** where the Court stated:

“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) ...proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”

40. In **Dominic Kibet v Republic Criminal Appeal No. 155 of 2011** it was held that:

“...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

41. In this case the complainant’s age was not disputed. The complainant testified that she was 17 years old. The P3 form produced as an exhibit also shows that the complainant was 17 years.

42. The appellant in his submissions claims that the complainant was 19 years but he never raised this in his defence or in cross examination. Submissions or grounds of appeal cannot be substitutes for evidence.

43. I am satisfied on the evidence tendered by the prosecution that the complainant’s age was proved to be 17 years.

44. On whether the prosecution proved that there was penetration of the complainant’s genitalia, the complainant testified and the trial court believed her testimony that the appellant accompanied her and Nancy on a motorcycle from a ***disco Matanga*** –funeral vigil dance and enroute he alighted and pulled her from the motorcycle and the rider sped off then he led her into a house and ordered her to undress and proceeded to repeatedly have sex with her. She stated that he lubricated her vagina and even used a phone light to view her vagina before inserting his penis into her vagina and that she fought him off and the trial court observed that the appellant had nail scratches on his neck but he overpowered her and threatened to harm her and succeeded in defiling her severally.

45. PW3 the Clinical Officer based at Ukwala sub-county Hospital who examined the complainant and filled her P3 form testified that there was a bloody discharge from the vagina of the complainant and further that her labia minora was bruised, which was an indication of vaginal penetration.

46. In his submission, the appellant claims that there was no medical evidence linking him to the alleged offence. What he is basically complaining about is that there was no DNA evidence linking him to the offence of defilement.

47. Section 124 of the Evidence Act Cap 80 Laws of Kenya provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

48. The above section is clear that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. In her judgment in the lower court, the trial magistrate stated as follows:

“The complainant struck the court as a truthful witness. She did not prevaricate in her evidence.”

49. (See **George Kioyi v R Cr. App. No. 270/2012 (Nyeri)** and **Jacob Odhiambo Omumbo v R. Cr. App No. 80 of 200 (Kisumu)**.)

50. Accordingly, the appellant’s claim that the complainant’s evidence was not corroborated also fails. The trial court carried out a *voire dire* examination on the complainant who was not a child of tender years and was satisfied itself that the complainant was telling the truth. I have no reason to differ with that finding of fact as I did not have the opportunity to examine the complainant and appellant as they testified in court.

51. The appellant also submitted that he was convicted based on prosecution evidence that contained inconsistencies and contradictions however he failed to cite any such contradictions/inconsistencies. The Court of Appeal addressed itself on the issues of contradictions in **Richard Munene v Republic [2018] eKLR** stated as follows:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

52. Accordingly, I find no contradiction during the trial that would prejudice the appellant. I am satisfied that on the evidence adduced by the prosecution witnesses, penetration of the complainant’s genitalia by a penis was achieved and this left bruises on the complainant’s labia minora. Consequently, this ground of appeal fails. The same is hereby dismissed.

53. On whether the act of penetration was done by the appellant herein, the complainant testified that though she did not know the appellant's name, she came to know his name when she reported the incident to a shopkeeper who identified the appellant as Onyango. The complainant also identified the appellant at the disco matanga and at his house when he defiled her severally and after he was done he send her away and took her phone. In addition, she returned to his house with the police and they found him asleep and he was arrested therein.

54. On his part the appellant submitted that he ought to have been subjected to an identification parade as the complainant only identified him in court whilst he was in the dock.

55. It is a well settled principle of criminal law that recognition is better than identification. The evidence available against the accused person on the issue of identity was the evidence of PW1 only, the complainant.

56. I remind myself of the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, inter alia, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.”

57. Further in the Court of Appeal in Anjononi and Others v Republic, (1976-1980) KLR 1566 stated that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

58. Taking all this into consideration together with the provisions of section 124 of the Evidence Act on the weight to be given on the evidence adduced by a victim in sexual offences cases, I am of the considered view that the appellant was rightfully identified by the complainant as the perpetrator of the offence. I find no mistaken identity of the appellant by the complainant as she had ample time to view the appellant at the disco matanga and as he pulled her from the motorcycle and led her into his house where he spent time defiling her. The complainant had ample time to view her assailant.

59. The appellant also submitted that the prosecution failed to call crucial witnesses to prove their case and as such the trial court ought to have exercised its discretion under section 150 of the Criminal Procedure Code and called the said witnesses so as to avoid the miscarriage of justice.

60. Section 150 of the CPC provides that:

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

61. Section 150 of the Criminal Procedure Code empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

62. In Kulukana Otim v R [1963] EA 257, cited by J. Ngugi, J in Stephen Mburu Kinyua v Republic [2016] eKLR, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the Criminal Procedure Code stated that:

“It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself....”

63. The learned Judge further stated, and I concur with him, that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. This is what the learned judge stated:

“This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC.”

64. In my humble view, whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much greater

caution is called for when the court decides to act suo moto. It is always better to let the parties present their cases in the manner they think best. The prosecution should be left to identify the witnesses it wants to call. Likewise, the defence should be left to decide on the witnesses to call. This was stated by the court in the case of **Clement Maskati Mvuko v Republic [2018] eKLR**.

65. Further, this court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

66. In **Bukenya v R (UGC 1952)**, the court addressed itself thus:

(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.”

67. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”

68. In **Keter v Republic [2007] 1 EA 135** the court held inter alia:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

69. In the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case. Furthermore, the trial court observed in her judgment that it appeared the appellant acted in concert with Nancy and the motor cycle rider and stated:

“Neither the rider of the motorbike that ferried the parties nor Nancy, the girl accompanying PW1 gave evidence.

What can be deduced is that PW1 was naïve and depended on her influential relation. Nancy’s judgments and decisions. This could have been a very well laid out plan between the rider, Nancy and the accused.

70. Accordingly, I find that this ground of appeal fails. It is hereby dismissed.

71. On the lawfulness of sentence imposed, the appellant citing the **Francis Karioko Muruatetu & Another v R (2017) eKLR** case submitted that the sentence meted out against him was unconstitutional as it was a mandatory sentence. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act of 2006 which carries a sentence of life imprisonment. The appellant was sentenced to 15 years imprisonment upon his conviction. The penalty is provided at section 8(4) of the Sexual Offences Act as the complainant was found to be aged 17 years and not 11 years or less.

72. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70** that:

“This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice.”

73. Similarly, the Court of Appeal of East Africa stated in **Wanjema v Republic [1971] EA 494** that:

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

74. Upon conviction, the appellant was sentenced to the mandatory minimum sentence of fifteen years imprisonment. The appellant was

found to be a second offender for masquerading as an officer and he was jailed for 1 year. In mitigation he pleaded for leniency stating that he was a young person who had not fulfilled his dreams. In this appeal he claims to have been 20 years old and there is no contrary view. Nonetheless, being a young person is no excuse for committing such a heinous crime that traumatizes the victim. The appellant has been in prison for now one year as this appeal was fast tracked. He is a young man. The complainant was a young girl but under the age of consent. Considering all the above, I am of the view that the trial Magistrate should have considered a less severe sentence although the appellant was a previous offender but the offence was unrelated to the defilement charge.

75. Exercising discretion and bearing in mind the decision in Francis Muruatetu and Jared Injiri Koita Cases, I hereby set aside the mandatory minimum sentence imposed on the appellant and resentence him to serve Five years imprisonment.

76. On the whole, the appeal against conviction fails. The appeal against sentence succeeds to the extent stated above. The ten years imprisonment is hereby set aside and substituted with a prison term of five (5) years to be calculated from 24/2/2019.

77. Orders accordingly. File closed.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020 via Microsoft Teams

R.E.ABURILI

JUDGE