IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 194 OF 2016

BETWEEN

MICHAEL ANG'ARA PAUL .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu (E.N. Maina, J.) dated 6th October, 2016

in

HC. CR.A. No. 151 of 2015)

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JUDGMENT OF THE COURT

This is a second appeal from the Judgment of the High Court of Kenya at Kisumu (**E.N. Maina, J.**). The appellant, **Michael Angara Paul**, was charged before the Senior Resident Magistrate at Tamu with the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006** particulars being that on diverse dates between 1st September, 2014 and 13th September, 2014 at a place named in the charge sheet he intentionally caused his penis to penetrate the vagina of **"CC",** a child aged 12 years. He was charged in the alternative with the offence of Indecent Act with a child contrary to **Section 11(1)** of the said **Act** particulars being that on the said dates at the said place he intentionally touched the vagina of the said girl aged 12 years with his penis. He was tried before the said magistrate where four prosecution witnesses testified; was placed on his defence where he gave sworn testimony and called three witnesses and, upon evaluation of the case, the magistrate convicted him and sentenced him to serve 20 years imprisonment in the main charge. His first appeal failed and the appellant has filed this appeal.

Being a second appeal our jurisdiction is limited by **Section 361(1) (a) Criminal Procedure Code** where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – **Chemagong v Republic [1984] KLR 611.**

We shall briefly visit the facts of the case purely to see whether there are any issues of law falling for our consideration.

On 13th September, 2014 (EJ) (PW3), an older sister to the complainant, was enjoying a drink at a social place when she overheard a strange conversation. Revellers who were known to her were saying that there were stupid women who were presenting their younger sisters to old men for sex. This conversation disturbed her and the following day she confronted one of the men who told her to go to her younger sister, the complainant, to find out the source of the story. When she confronted her sister "CC" (PW1) the complainant freely related to her how the appellant who she called Janema, was **"… a bad man …."** who had repeatedly defiled her, offered her cash, and demanded that she should not reveal the happenings to anyone. PW3, accompanied by the complainant reported those events at Muhoroni Police Post and the appellant was arrested and charged, as we have already stated.

The complainant, who stammered heavily and appeared to the Clinical Officer (PW2) to suffer growth retardation, testified how the appellant had visited her home, sent her to his shop, followed her there and defiled her. Although he instructed her not to report the incident to anyone she told a salonist, Mama Janet, about it. The next day the appellant came to the complainant's home, picked her and took her to his shop and again defiled her, giving her money as an inducement not to report the act.

The Clinical Officer, on examination, found a whitish discharge, the hymen was perforated and he assessed her age at 11 years although he thought that due to her fully developed breasts she appeared to be 13-15 years old.

The last prosecution witness was **Corporal Muli Ngumbao of Muhoroni Police Post.** He was the Investigations Officer who produced the complainant's birth certificate which showed that she was 12 years old.

Upon evaluation of the case the trial magistrate found that there was a case to answer and in a sworn statement the appellant, a businessman in Muhoroni, testified that he had a number of shops, one managed by his wife **Jane Aoko Angara (DW3)**. He denied defiling the complainant stating that from April to October, 2014 he was operating his shop at Awasi and was not in Muhoroni, returning to his home in Muhoroni at night. According to him the shop managed by his wife was very busy and there could not be any opportunity for him to commit defilement there.

The appellant also called **David Otieno Otieno**, a turn boy at the shop, as his witness. He testified that in September, 2014 he and his boss (the appellant) operated from Awasi where they would close shop at 7 p.m. Jane Aoko Angara testified that she ran the shop at Muhoroni and that she had never seen the complainant in her shop.

Meshack Okoth Ohanya, a shop assistant in the shop at Muhoroni, denied ever seeing the complainant at the shop.

That was the whole case made by both sides upon which the appellant was convicted and his first appeal dismissed.

There are six grounds raised in the Memorandum of Appeal drawn for the appellant by his lawyer, **Richard B.O. Onsongo**. It is stated that both courts below erred in finding that there was sufficient evidence in support of the case of defilement; that there was erroneous admission of hearsay evidence; that the High Court should have found that some witnesses were not called; that alibi defence was ignored; in the penultimate ground, that the High Court failed in its duty to re-evaluate the evidence and, finally, that the sentence imposed was manifestly harsh and excessive.

When the appeal came up for hearing before us on 8th December, 2020 through the "Go-to-Meeting" platform due to the COVID-19 pandemic the appellant, appearing on screen from Kibos prison, was represented by learned counsel Mr. Richard Onsongo while learned counsel **Mr. Edward Kakoi** appeared for the Director of Public Prosecutions. Both counsel had filed written submissions which they entirely relied on, Mr. Onsongo highlighting only one issue relating to sentence which he submitted that we should review, sentencing being a judicial function. Mr. Kakoi, on that issue, disagreed, submitting that the Supreme Court of Kenya decision in **Francis Karioko Muruatetu & Anor v Republic [2017] eKLR** did not apply to sexual offences.

We have carefully considered the record of appeal, the submissions made by both sides and the law and having done so, and reminding ourselves of our mandate in a second appeal like this one, we consider as issues of law raised whether there was sufficient evidence in support of the case of defilement; whether material witnesses were not called in support of the prosecution case; whether the High Court carried out its duty on first appeal of re-evaluating the case and the issue of sentence that was imposed on the appellant for the offence he was charged with.

The complainant, a young girl, testified how she was lured by the appellant to his shop, not once, but twice where he defiled her offering her money not to reveal those events to anyone. She however revealed this to a lady called Mama Janet, and later, to her elder sister who testified as PW3. It was PW3's evidence that while socializing with friends she overheard a conversation where it was being alleged that a woman who (it later turned out that it was her own sister) was offering her younger sister to an old man for sex. On the complainant evidence the trial court found:

> ***"In my opinion having spent time listening to her in court on two different days, I must say that ti (sic) found her honest. Her story never changed despite coming to court on two different occasions and being asked the same questions. Despite her mental challenge she stuck to her story and was never shaking even after lengthy cross examination ……"***

The High Court, on re-evaluation of that evidence found it to be strong and rendered the defence offered unconvincing.

The complainant identified the appellant as the person who had defiled her. She described the location of the shop where defilement took place even describing what she saw at the shop. She gave details of money given to her by the appellant to conceal the acts that took place but she did inform the lady Mama Janet and her older sister, PW3, that the appellant had defiled her. On the evidence presented we find that both courts below reached the correct decision that the appellant defiled the complainant.

On the issue of the number of witnesses called it is true that the prosecution is duty bound to call all witnesses in support of its case as was held in the Ugandan case of **Bukenya v Republic [1972] EA 549** where it was held:

> ***"It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

But it is also true that it is not necessary to call a multitude of witnesses; the prosecution need only call those witnesses that it considers will prove its case. The proviso to **Section 143** of the **Evidence Act** provides that no particular number of witnesses is required to prove a fact.

The prosecution is at liberty to call the number of witnesses it considers necessary to prove the case it presents against an accused person.

We have looked at the Judgment of the High Court on first appeal and find that the Judge analysed the whole case and came to the conclusion that the appeal before her had no merit. She considered the case for the prosecution and the defence as she was required to do.

Counsel for the appellant submitted that we should reconsider the sentence imposed and review it.

The trial magistrate considered the mitigation offered on behalf of the appellant –that he was of advanced age with a family; had responsibilities and was a first offender and sentenced him to serve twenty years imprisonment, a sentence confirmed on first appeal. Looking at all the circumstances including the fact that the defiled child was 12 years old we think that the sentence awarded was well deserved. The appeal has no merit and we dismiss it.

Dated and delivered at Nairobi this 5th day of February, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

I certify that this is a true

copy of original.

Signed

DEPUTY REGISTRAR