IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 19 OF 2015

BETWEEN

JAMES OUMA ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu

(Lenaola, J.) dated 15th April, 2016

in

HCCRA No. 1 of 2013)

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JUDGMENT OF THE COURT

James Auma Onyango, the appellant herein was charged, tried, convicted and sentenced to serve 20 years imprisonment for the offence of defilement contrary to **section 8(1)(3)** of the **Sexual Offences Act** by the Senior Resident Magistrate at Bondo. The particulars of the offence were that on 29th May, 2012 at Nyawiti Sub-location, in [particulars withheld] within Siaya County, he intentionally caused his penis to penetrate the vagina of "PJA", a child aged 13 years.

Aggrieved by the conviction and sentence, the appellant preferred an appeal against both to the High Court. That appeal was heard by Chemitei, J. who, by a judgment delivered on 25th November, 2013, found it unmeritorious and dismissed it, affirming both conviction and sentence.

The appellant is now before us on a second appeal in his self-crafted memorandum of appeal complaining that the learned Judge and the trial court erred in failing to consider that the investigation of the case was shoddy, flimsy and misguided; failing to note that essential witnesses were not called; failing to interrogate the medical evidence, and in belittling his defense which had aspects of believability and cogency.

At the hearing of the appeal the appellant, who was unrepresented, relied on his written submissions in which he colourfully castigated the investigations for being *"half-baked, porous, perforated and even minute"* for failing to interrogate two boys who were in the house when the offence was allegedly committed, yet they were essential witnesses having associated and stayed with the complainant for five days. He also submitted that his sworn defence, according to him, in the nature of *an alibi* because *"he could only remember the day he was apprehended but he could not encounter the alleged ordeal."* He challenged the medical evidence which was arrived at after a fortnight and therefore unreliable. In his address to us he said the belated medical examination turned up nothing. He faulted the prosecution's failure to call the two boys who were in the house at the time the offence was allegedly committed.

Opposing the appeal, **Mr. Kakoi**, the learned Principal Prosecution Counsel conceded that the two boys who were in the house should have been called but suggested that it is the appellant who should have called them as defence witnesses. The prosecutor was under no obligation to call any number of witnesses to prove its case, counsel contended.

This being a second appeal, our jurisdiction is limited to a consideration of matters of law only. See **section 361** of the **Criminal Procedure Code**.

We think that the three points of law that emerge for our consideration are whether the court's below properly analyzed the evidence; whether the offence was proved to the standard required; and whether the prosecution failed to call essential witnesses and; if so the consequences of such failure. The first two points can be addressed together.

The uncontested evidence from the record is that on Sunday 27th May, 2017 PJA faced imminent punishment from her mother **EOR** (PW2) who was upset that PJA had sold some charcoal to someone who however refused to pay for it. Fearing a caning, PJA ran from the house and on to the road. The time was 7.30 pm and it is there that the appellant found her. He was known to her as a motor cycle "boda boda" operator who plied his trade in the neighbourhood. He offered to hide her in his house to escape her mother's wrath, and she agreed. At his house they found two boys one of whom was older than PJA. They made tea which they all took. A certain person, a "boda boda" operator as well, came into the house and spoke to PJA inquiring of her why she was there. That other "boda boda" operator is unnamed and was not called as a witness, although it would seem it is he that reported PJA's whereabouts.

Back to the appellant's house PJA testified as to what transpired as follows:

> ***"I slept on the bed, the rest including the accused slept on the floor. Accused is a bodaboda operator. In the morning another bodaboda came asking where I was coming from. He left. His name is Ouma. The accused left. The boys went to plough; I was left in the house alone. The accused came back and told me that he had learnt that my mother wants to arrest him."***

At that point, and PJA having essentially absolved the appellant during her examination-in-chief, the prosecutor addressed the court as follows;

> ***"Prosecutor – I did not have a pre-trial with the witness, the file was brought late. I pray that the witness be stood down and (sic) another date."***

With that, and the appellant, who was unrepresented, not objecting, the trial magistrate stood PJA down and adjourned the case to 23rd August, 2012 when it was further adjourned to 5th September, 2012. At that resumed hearing PJA testified that the following evening the boys and the appellant came back to their one roomed house and after supper she slept on the single bed while the rest slept on the floor.

At around 9pm, however, the appellant went to the bed, called her, removed her skirt and pant, lifted her legs and inserted his penis into her vagina. She felt pain but did not scream as he threatened to take her to her mother if she screamed, and, she, in turn, would cane her. He also penetrated her on the evening and night of the following day, a Tuesday. She said the appellant was unknown to her. The two boys were older than her 13 years and they used to serve her porridge for lunch and *ugali* with *sukuma wiki* for dinner. She stated in cross-examination that the two boys were in the house on the occasions when the appellant defiled her.

PW2 testified that she did ask PJA how she could give charcoal to a stranger who did not pay and that thereafter PJA just disappeared from home. Days later a bodaboda operator came to her place to report having seen a girl who resembled PJA at a home in Nyawita belonging to one Alego. She asked the man to report to the police and a few days later she was called by the investigating officer. PJA refused to tell her what transpired at the appellant's house and when she was examined her she did not see anything. Later, PJA complained of itchiness in the vagina and when asked if it was due to being defiled, she was silent.

Edwin Omae (PW3) a clinical officer examined PJA on 3rd June, 2012. He testified that;

> ***"She was brought by her mother and police officer with history of defilement less than 3 months. Had complaints (sic) of lower abdominal pains. Had been earlier been held (sic) at police cells. Diagnosed with pelvic inflammatory disease and treated."***

He estimated her age at 13 years. Her genitals were normal, her hymen was torn and she had a foul-smelling discharge from her vagina. She was treated and discharged. Even though he did not say so in evidence, the P3 Form he completed recorded the general medical history as follows;

> ***"Brought by mother and police officer with a history of defilement; young girl also has previous history of defilement less than 3 months ago."***

We have perused the judgment of the High Court. It is noteworthy for its brevity and that it essentially disposed of the appellant's appeal rather peremptorily in a few paragraphs as follows;

> ***"I also do not doubt that the complainant stayed in the appellant's house for a number of days. But was she defiled and if so by who? It is evident that there were two young boys who stayed together with the appellant. There is no indication that they defiled the complainant. They were allegedly 6 and 12 years respectfully.***
>
> ***Apparently there is no evidence to show that the complainant went elsewhere after she was rescued from the appellant's house. She was taken to the police and later to the hospital. My finding therefore is that the appellant was all along with the complainant until she was rescued from his house.***
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> ***The other intrigue is why detain her for five days? Even if she feared being disciplined by her mother why as an adult not take her home the following day and perhaps plead her case? I think the appellant by all means had an ulterior motive namely to sexually defile the complainant which he did. He used fear, threats and intimidation namely that should she go home her mother was likely to punish her. In effect he acted as her "saviour."***

In the premises I do find this appeal unmeritorious. The appellant took advantage of the minor. He did not offer any plausible reason why he detained her for that long period.

There is sufficient evidence of sexual assault. The trial court justifiably convicted and sentence the appellant. I do dismiss the appeal."

With the greatest respect, and while we are cognizant that there is no given formula or template for the conduct of a first appeal, we must reiterate that such an appeal proceeds by way of a re-hearing. The first appellate court is duty bound, and an appellant at that forum is entitled to expect, demand even, that the court conducts a thorough, fresh and exhaustive re-evaluation of the entire evidence and arrive at its own independent conclusions of fact, cautious only to bear in mind that it did not have the advantage of hearing and observing the witnesses as they testified, and make due allowance for it. This has been restated in numerous cases including the more notorious ones of ***PANDYA vs. REPUBLIC [1957] EA 336; SHANTILAL M. RUWALA vs. REPUBLIC [1957] EA 570; PETERS vs. SUNDAYS POST [1958] EA 424 and OKENO vs. REPUBLIC [1971] EA 32.***

We are not satisfied that the learned Judge discharged that duty by law imposed on him. Had he done so, he would have been placed on notice by the adjournment sought by the prosecutor when the complainant had essentially completed her testimony in chief without implicating the appellant. He sought the adjournment on the rather ingenuous reason that he had not done a pre-trial with the witness in the box. When the trial resumed the complainant now stated that the appellant had defiled her. The conduct of the prosecutor leaves a bad taste in the mouth. The adjournment has the thought and word of *'witness coaching'* written all over, in the circumstances of this case.

Moreover, it was quite puzzling for the learned Judge to have stated his finding was that the appellant "was all along with [PJA] until she was rescued" when the evidence was that he would leave the house in the morning and return in the evening. PJA was left with the two boys who fed her with *uji* for lunch and *ugali* with *sukuma wiki* for dinner. She was otherwise entirely free. The finding was without basis and, if it was the ground for a finding of guilt based, perhaps, on circumstantial evidence, it was weak and unsustainable.

Equally weak was the conclusion that the infection that PJA had pointed to sexual intercourse with the appellant. Had the learned Judge been keener on the record before him, he would have noted that the P3 Form indicated that she had been defiled less than 3 months before the alleged incident before court. Could the infection have been from that prior incident? It is quite obvious that the culprit in the prior defilement was someone other than the appellant and had in fact been prosecuted. This is why on 27th September, 2012 the prosecutor is recorded as stating as follows;

"***Prosecutor- I pray for an adjournment, the original birth certificate was produced in a matter before court and that's now concluded, I need time to pull out the same."***

So, even if the medical evidence, which related to a time more than a fortnight after the alleged offence, indicated that the complainant's hymen was torn due to defilement, the co- existing fact of a recent prior act of defilement meant that the medical evidence did not advance the prosecution case one bit. It did not prove penetration by the appellant.

That means that the testimony of PJA would be pivotal to any finding of guilt against the appellant. Indeed, without her testimony, there would be nothing to tie the appellant to the alleged offence. By the amendment to **section 124** of the **Evidence Act** introduced in contemplation of the **Sexual Offences Act**, No. 3 of 2006, a court would be entitled to convict on the sole testimony of a complainant in a sexual offence without the need to seek corroboration. The wisdom of that provision may be debated but suffice to say that in order to convict the court must be satisfied that the complainant is telling the truth. Wisdom dictates that a court would address itself deliberately to the question of the credibility of the complainant and the reasons for the court's satisfaction as to truthfulness, must be clear on the record. The proviso to **section 124** requires it;

"Provided that where in a criminal case involving a sexual offence 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

(our emphasis)

The record before us does not reveal such. In fact, on a perusal of the record one cannot but note the essentially exculpatory first testimony of PJA before she was stood down only to return and implicate the appellant, as we have already stated. It is also telling that while the appellant was known to her, which is why she went to his house to escape her mother's apprehended wrath, she stated in her second examination in chief that "the accused was unknown to [her]," notwithstanding that she referred to him by his first name, James, throughout her testimony.

Moreover, it is worth noting that according to PW2, when PJA was questioned she did not mention ever being defiled by the appellant. This, added to her initial exculpatory testimony, goes to cast doubt on whether the return testimony in which she implicated the appellant was truthful. There is also the curious fact recorded in the initial treatment notes made on 3rd June, 2012 that PJA *"sleeps on floor (sic) of police cells,"* which the clinical officer **PW3,** referred to when he testified that *"she had earlier been held at police cells*". The question that begs is why a child of 13 years, who had doubtless been previously defiled and who was being treated as a victim of defilement by the appellant, was detained in a police station and made to sleep on the floor of a police cell. This is a disturbing aspect of this case which the courts below did not address themselves to at all. Did her changed testimony have anything to do with the treatment that she had been subjected to?

The final aspect of this appeal that we address is the failure to call essential witnesses. It is trite that the prosecution need not call any particular number of witnesses in order to prove a fact. Where, however, the evidence adduced by the prosecution is barely adequate, then a court would be entitled to draw an inference that any essential witness that the prosecution ought to have called but did not call would have given evidence adverse to the prosecution case. See ***BUKENYA & OTHERS vs. UGANDA [*1972] EA 549.**

On the central question of whether or not the appellant defiled PJA, in the face of her questioned assertion that she did and his firm insistence that he did not, the evidence of the two boys who were in the house when the acts are supposed to have occurred would have been illuminating. The investigating officer **PC James Ledame** (PW4) spoke to the boys. He stated that they were both called O and that they were aged 6 years and 12 years, which is quite different from the testimony of PJA who stated that the two were older than she. PW4 testified that the boys told him the appellant used to sleep on the floor while they slept on the bed. Significantly, he conceded in cross examination that they told him that they did not see the appellant defiling PJA.

We think, from a consideration of this evidence that the prosecution deliberately chose not to call the two boys because their evidence was at variance with the prosecution case. What they said to PW4, and would presumably have told the court, would have created serious doubts in the prosecution case and tendered to the innocence of the appellant. We think, with respect, that the prosecution service bears a first duty to the doing of justice. It is not the duty of the prosecutor to seek a conviction at any cost. Thus, there is a duty to turn over to the defense any evidence that may tend to the accused person's innocence.

They also have a duty to call all material witnesses to an event even if their evidence may be inconsistent. That is why a court should draw negative inferences from a failure to call material witnesses. The two boys were very material witnesses.

The totality of our consideration of this appeal is that it is for allowing. The prosecution case was riddled with fatal weaknesses and the case against the appellant was not proved beyond reasonable doubt. The conviction was not safe and we quash it. We also set aside the sentence imposed on the appellant and order that he be set at liberty forthwith, unless otherwise lawfully held.

Dated and delivered at Kisumu this 3rd day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR