IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, KOOME & KIAGE, JJA)

CRIMINAL APPEAL NO. 13 OF 2014

BETWEEN

PAUL KANJA GITARI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya ***(Githua, J.)*** *dated 13th November, 2013* **in**

H. C. Cr. A. No. 175 OF 2013)

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JUDGMENT OF THE COURT

By this appeal the appellant challenges the decision of the High Court at Kerugoya **(C. Githua J)** by which his first appeal against the conviction and sentence of 20 years imprisonment imposed by the Senior Resident Magistrate's court at Baricho on 3rd May 2011 was dismissed.

That conviction and sentence was on a charge of defilement contrary to **Section 8 (1)** of the **Sexual Offences Act No. 3, of 2006,** which the learned Judge substituted with Incest contrary to **Section 20** of the same Act**.** The particulars were that on 16th October, 2010 at *[particulars withheld]* in Kerugoya West District of the (then) Central Province he "penetrated with his penis the virgin" (sic) of **J.M.K**, a girl aged 12 years. He did also face an alternative count of indecent act contrary to **Section 11 (1)** of the same Act in that he was alleged to have rubbed his penis against the same girl's thighs. Following conviction on the principal charge, no finding was made on the alternative.

The prosecution case, which the trial Magistrate found proved, was that on the material day at about 5.00 pm, **J.M.K** went to the appellant's house to get her brother's child who was there with other children. When she got there, the appellant asked her to mix some juice he fished out of his pocket with water and serve the children who were there. She did so and after those children drank the juice, the appellant then pushed **J.M.K** into his bedroom while armed with a knife and undressed "and did bad things" to her there.

The bad things involved his "inserting his private parts into hers"after removing her pants. She put them back on after he was through with her, and left. As she emerged from the appellant's house, **J.M.K** was seen by her aunt (PW2) who beat her and demanded that she remove her pants for inspection. They had sticky white stains. As PW1 beat **J.M.K,** the latter screamed and people came including an elder called Njoro and Wachira. **J.M.K** was taken to Baricho Health Centre. An examination by Joshua Kibet Bundet (PW3) a Clinical Officer, revealed that she had a torn hymen and had a discharge from her vaginal canal which contained spermatozoa. She concluded that she had had penetrative sex. He produced a treatment chit and P3 form duly filled.

Put on his defence, the appellant gave sworn testimony in which he denied the charge. He stated that he only heard **J.M.K** being beaten by his daughter in law (PW2) and he was ordered by some youths to sit and was interrogated. The prosecution elected not to cross-examine the appellant.

The appellant called two witnesses. The first was his brother D.G.G whose testimony was simply that he knew nothing about the incident as he was not present. DW3 was his daughter T W. She stated that both **J.M.K** and the appellant were beaten on the material day and that **J.M.K**, who had been a frequent visitor to the appellant's home, was beaten and coerced by one M W to implicate the appellant. DW4 was another daughter of the appellant who testified that after the incident she discussed the matter with the appellant and it was agreed that he

leaves that home.

The appellant's complaints before us are contained in a self-authored document titled "Grounds of Appeal" as follows;

"1. That I'm the first offender and a law abiding citizen with a very clean record for I had been acting within the law before I was charged with the offence mentioned above.

2. That I'm a frail old man hard to withstand the harsh conditions of prison.

3. That my health is deteriorating due to my old age.

4. That I pray if possible I can be released to go and spend my sunset time with my family.

5. That I pray for a lesser sentence.

6. That I pray to be accorded a non-custodial sentence."

Doubtless those grounds that the appellant raised, without more, would not have triggered our jurisdiction because they were all in the nature of challenging severity of the sentence and mitigation. By dint of **Section 361** of the **Criminal Procedure Code** we have no jurisdiction over matters of fact and severity of sentence, which he raised, is by express statutory pronouncement a matter of fact.

At the hearing of the appeal, however, the appellant relied on a document he filed on 25th March 2015 titled "The Supplementary Grounds of Appeal" in which he raised some four grounds by which he asserts that the said judge erred by:

- **relying on the doubtful testimony by PW1 and PW2**
- **upholding a conviction unsupported by evidence of those who arrested the appellant**
- **upholding a conviction based on a defective charge revolving around incrimination by PW2**
- **failing to evaluate and analyze the entire record and improperly rejecting his unchallenged defence thereby shifting the burden of proof.**

The same document contained submissions expanding and expounding on those grounds and it is those submissions the appellant requests us to consider.

On his part, **Mr. Kaigai,** the learned Assistant Director of Public Prosecution was of the view that the appellant was properly convicted as the evidence of the complainant **J.M.K** was clear and consistent that the appellant defiled her, which PW3 confirmed. He also submitted that the appellant's defence was considered and properly rejected.

In his reply, the appellant, who looked his age, informed us that he was 84 years old and protested his innocence asserting that **J.M.K** was told what to say against him and prayed that the Court look kindly on his appeal.

This being a second appeal, we consider only matters of law and the approach of this Court has been pronounced upon in many cases. In **DAVID NJOROGE VS. REPUBLIC [2011] eKLR**, it was stated;

> ***"Only matters of law fall for consideration as the Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principals in making the findings."***

See also **CHEMAGONG VS. REPUBLIC [1984] KLR 213.**

In principle then, we are slow to interfere with concurrent findings of fact but, in appropriate cases, where there is demonstrable error leading to findings that are unsupportable, we would interfere. In the case before us it is the appellant's contention that the evidence relied upon by the trial court to find, and the first appellant court to affirm the appellant's conviction was that of PW1 and PW2, impugned as doubtful and unsubstantiated.

What we find troubling about this case is that **J.M.K** did not on her own volition make a complaint that the appellant had defiled her. Her testimony was that after the "bad things", she went home whereat she met her aunt (PW2) who beat her up to reveal what had transpired. It was the appellant's contention that **J.M.Ks'** testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an idle or insubstantial contention.

We also find it strange that PW2, who testified that she had had heard romours that the appellant "was in the habit of having sexual intercourse with the complainant" after luring her with sweets and juice, nevertheless left **J.M.K** at the complainant's home with other children on the material day as she went to fetch water. She proceeded;

"I saw some children leave accused's home. I went to accused's home. I asked him where complainant was. He told me complainant had left his home. I doubted accused. I left and hid nearby. After about 30 minutes, I saw complainant leave accused's house. I asked her to stop and reprimanded accused for lying to me."

This evidence appears to us not to have been properly interrogated by the two courts below. Of immediate concern to us is the fact that the learned judge, even after advising herself on her duty as a first appellate court to subject the entire evidence to a fresh and exhaustive examination before arriving at its own independent conclusions per **KIILU & ANOTHER VS. REPUBLIC [2005] 1KLR 174,** which she cited, does not seem not have discharged that duty as the appellant was entitled to expect. Had she done so, she would have questioned the veracity of PW2's testimony on the point for it seems to us quite incredible that the said witness, with all of her suspicions, would not only have left **J.M.K** at the appellant's home in the first place but also accepted his word for she says, that **J.M.K** emerged from the appellant's house. We do not see that the learned judge questioned why the PW2 did not satisfy her obscurity or confirm her suspicions by simply entering the appellant's house to see if **J.M.K** was indeed there. She might then have caught him in the act, if there was.

It seems that the High Court was content to accept that if there was evidence of sexual intercourse involving **J.M.K,** then the perpetrator must have been the appellant hence the learned Judge's dealing with identification or recognition yet that is not what was in issue.

We also note the contradiction between PW2's claim that the appellant habitually had sex with **J.M.K** and **J.M.K's** own evidence on oath that it was the first incident and that the appellant "had never joked with her before". There is also the contradiction that contrary to what PW2 herself said, the investigating officer **PC Nixon Tallam** (PW4) provided a different picture that the report he received was that PW2 went to the appellant's home during the incident and "found the complainant on accused's bed without pants." That variance is not a minor one.

The first appellate court seems not to have dealt with those contradiction and inconsistencies in the prosecution evidence with the effect that we find merit with the appellant's complaint that his appeal did not benefit from the thorough, exhaustive and independent re-evaluation that he was entitled to. They should have been interrogated and resolved in the appellant's favour.

The state of the evidence tendered with all of its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof of a fact. See **Section 143** of the **Evidence Act.** However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See **BUKENYA & OTHERS VS. UGANDA [1972] EA 549.**

Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.

The appeal is allowed, the conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Nyeri this 2nd day of March, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR