Case Number:	Criminal Appeal 28 of 2013
Date Delivered:	27 May 2016
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	David Kenani Maraga, Festus Azangalala, Sankale ole Kantai
Citation:	Daniel Odero Oboyi v Republic [2014] eKLR
Advocates:	Mr. L. K. Sirtuy for the Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Senior Resident Magistrate (J. W. Onchuru)
County:	Kisumu
Docket Number:	-
History Docket Number:	HCCRA NO. 144 OF 2011
Case Outcome:	Appeal dismiss
History County:	Kisumu
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA. AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 28 OF 2013

BETWEEN

DANIEL ODERO OBOYI ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High of Kenya at Kisumu (H.K. Chemitei, J) dated 24th September, 2012)

in

HCCRA NO. 144 OF 2011)

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JUDGEMENT OF THE COURT

Section 361(1) (a) Criminal Procedure Code limits our jurisidiction in a second appeal. We are to consider only issues of law raised in the appeal and must avoid the temptation to deal with matters of fact which the trial court has dealt with and the first appellate court has re-evaluated. We can only interfere where it is shown that there has been a misdirection on the treatment of facts or the findings of fact are not based on the evidence- **Aggrey Ochieng Aguch & Anor' v Republic (Kisumu) Criminal Appeal No. 367 of 2008 (ur); M'Irungu v Republic (1982- 88) I KAR 360**. That statement of the law was also put succinctly by this Court in **Gachuru v Republic [2005] KLR 688** where it was held:

"**As a second appeal, only points of law may be raised since the Court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence"**

We shall lay out the facts of the case in this judgment purely for establishing what evidence, if any, was placed before the trial court; how that court dealt with that evidence and, on first appeal, how the High Court carried out its legal duty of re evaluation of the evidence to come to its own conclusion in the first appeal.

The appellant, **Daniel Odero Oboyi**, was charged before the Senior Resident Magistrates Court, Bondo, on two counts. Count 1related to kidnapping contrary to Section 257 of the Penal Code where it was alleged that on 17th day of March, 2011at [particulars withhed] in Bondo he kidnapped "LAW", a child aged sixteen years from lawful guardianship of her mother "JOW".

On count 2 the appellant was charged with being involved in the Prostitution of a Person with Mental

Disability contrary to Section 9 (1) of the Sexual Offences Act No.3 of 2006 particulars being that on the said date at [particulars withhed] in Bunyala for favour to "LAW" a child aged sixteen years with mental disability he intentionally detained her under deception for purposes of sexual intercourse.

There was an alternative charge of Indecent Act with a child contrary to Section 19 (1) (g) of the Sexual Offences Act No.3 of 2006 particulars being that on diverse dates between 17th March, 2011 and 24th May, 2011at the said [particulars withhed] he intentionally touched the vagina of "LAW" a child aged 16 years with his penis.

A trial took place before the learned Senior Resident Magistrate (J. W. Onchuru) who heard evidence of six prosecution witnesses and an unsworn statement of the appellant and in a judgement delivered on 20th September, 2011the appellant was convicted and sentenced to serve seven years imprisonment on the first count and twelve years imprisonment on the second count, and both sentences ordered were to run concurrently.

Those findings led to the appellant filing an appeal at the High Court of Kenya, Kisumu (H. K. Chemitei, J) which appeal was dismissed in the judgement delivered on 24th September, 2012. That provoked this appeal premised on a homemade Amended Memorandum of Appeal with eight grounds filed in this court on 3rd October, 2014. Those grounds can be summarized thus: that the charge of kidnap was not proved; that the courts erred by not ordering DNA; that the complainant was couched on the evidence to give; that failure to call some witnesses was prejudicial to the appellant and that the sentence awarded was harsh and excessive.

When the appeal came up for hearing before us the appellant relied on the said Memorandum of Appeal while Mr. L. K. Sirtuy, the learned Principal Prosecuting Counsel, opposed the appeal on the basis that no points of law were raised at all.

The case for the prosecution was that on 17th March, 2011 "LAW" (PW2), then a sixteen year old Form 3 student at [particulars withhed] Secondary School, went to Bondo District Hospital to collect drugs because she had a mental problem. Upon collecting drugs she saw the appellant, a man she knew before as he:

".... used to come to our home and hospital to offer prayers. The doctors knew him as he used to offer prayers to patients...."

The appellant took the drugs from her and offered her a sweet then led her to [particulars withhed] near Lake Victoria where he bought her food. They then boarded a boat to the appellants home in Osieko where, upon arrival, the appellant laid out a mattress where "LAW" slept still in her school uniform. When she awoke in the morning she found herself naked, her panty was missing and there was blood on the mattress. In her own words:

"....I realized he had defiled me. My v*** was painful...."**

She was then locked up in the house where the appellant would return in the evenings and repeatedly defile her until 25th May, 2011when she was rescued and he was arrested.

Meanwhile the child's mother "**JOW" (PWI),** on noticing disappearance of the child and after an unsuccessful search reported the disappearance to Bondo Police Station. She also sent word to the various churches in the region. She knew the appellant very well as a preacher who used to visit her home to offer prayers.

"MO" (PW3), a brother of the complainant received word on 23rd May, 2011 that his sister had been spotted in Bunyala. He hastened there and on 25th May, 2011 with assistance of local administration he was led to the appellants home where he found his sister. The appellant was arrested by local police and he was transferred to Bondo Police Station.

No. 97067336 Sgt, John Tengenya (PW4) arrested the appellant on 25th May, 2011and the appellant led police to his house where "LAW" was found.

No. 89362 P. CJohana Lengandu (PW5) of Bondo Police Station had received report of disappearance of "LAW". He formally arrested the appellant and arranged for "LAW" to undergo medical examination which was conducted by **Dr. Fredrick Mitema (PW6) (the Doctor)** who found that:

"....her v*** had lacerations at 2 o'clock position. It was healing. This suggested a recent sexual intercourse. We did a pregnancy test that turned positive 2 months old..... I concluded that she had been defiled as there was evidence of penetration...."**

That was the prosecution case which the appellant was called upon to answer. He did so through an unsworn statement where he related events that took place on 25th May, 2011 when he was arrested. He told the court that upon being stopped by a police officer and upon being shown the complainants photograph he led police to a place he had seen the complainant. He therefore denied all the charges.

The matters of law that appear to come for our consideration are whether the charges preferred against the appellant were proved to the required standard and whether failure to call some witnesses caused prejudice to the appellant.

The trial magistrate, after analysing the evidence and considering the appellants defence held that:

".... its clear from the evidence that accused led PW4 to [particulars withhed] **where he found PW2. PW2 maintained that its here where accused had been holding her defiling her every evening until the 25.5.2011 when she was rescued ....**

The medical evidence shows that she had been defiled. Evidence of PW2 shows that accused took her to Bunyala against her will after giving her a sweet. Its at [particulars withhed] **that he defiled her repeatedly by taking advantage of her illness…"**

The High Court, on first appeal, analyzed the evidence and found that the complainant had been taken away by the appellant and was finally traced to the home of the appellant who had illegally detained her there against her will. The High Court also found that the appellant had defiled her repeatedly at his said home and that:

"By his past association with her, he ought to have guarded her and not take advantage of her mental status. The appellant does not deserve any pity at all...."

The High Court carried out its duty of re-evaluating the evidence and found that the two main counts against the appellant had been proved beyond reasonable doubt.

We can see no merit in the appellants complaint as standard of proof to establish ignore the charges that he faced.

On the complaint that some witnesses were not called by the prosecution suffice to say that Section 143

of the Evidence Act declares:

"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"

As long ago as 1953 the predecessor of this court stated in **Abdalla Bin Wendo & Shah Bin Mwambere v R [1953] 20 EACA 166** that subject to certain exceptions a fact may be proved by the testimony of a single witness. In **Benard Mutua Matheka v Republic [2012] e KLR** where essential witnesses were not called to testify it was held that as a general rule the prosecution is supposed to call all witnesses whose evidence is material for the just determination of a case, whether or not it is favourable to their case. The prosecution is not obligated to call more witnesses than are necessary for the just determination of the case **(Bukenya & others v Uganda [1972] EA).** The court may however draw an adverse inference that an essential witness who is not called to testify would have testified adversely against the prosecution case unless reasonable cause is shown for not calling that witness. It was further held that there was an additional qualification - an adverse inference may only be drawn where the evidence in support of the prosecution case is barely sufficient to prove its case.

In the case before the trial magistrate as reviewed on first appeal the evidence of the complainant, her mother and brother, that of the Doctor coupled with the police evidence showing how the complainant was found detained by the appellant at his house was more than what the prosecution required to establish the charges beyond reasonable doubt. No essential witness was left out and it was not necessary to call any other witness.

There is no merit in this appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 30th day of October, 2014

D. K.MARAGA

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JUDGE OF APPEAL

F.AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR