



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Appeal 34 of 2006

OLIVER OUMA MAYOBE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein was arraigned before the Resident Magistrate's Court in Mumias for the offence of attempted rape C/S 141 of the Penal Code. He was also charged with an alternative charge of indecent assault of a female C/S 144 (1) of the Penal Code. He pleaded not guilty to both counts and the matter went to full trial with the prosecution calling 5 witnesses. Incidentally, the appellant was placed onto his defence twice on 12.10.2005 when he actually testified and once again on 16.2.2006 when he testified again. Indeed on that date, the learned trial magistrate reserved the case for judgment on 8/3/2006. On 8.3.2006, she said that the judgment was not ready and deferred the same to 24.3.2006. The appellant however informed the learned trial magistrate that the matter was for defence witnesses and without setting aside her earlier orders proceeded to take the evidence of the defence witnesses before she again adjourned the matter for judgment.

With respect to the learned trial magistrate, she defied all known rules of Criminal Procedure and on that ground only, the proceedings before her ought to have been declared a mistrial. I note however that the appellant's counsel did not raise those issues and the inference or presumption is that no prejudice was occasioned to the appellant by those irregularities.

Following the trial, the appellant was convicted and sentenced to serve 24 months imprisonment on the main count of attempted rape.

Being dissatisfied with the said conviction and sentence, he filed this appeal through Namatsi & Co. Advocates. He relies on 5 grounds of appeal but in my considered view, only grounds 1 and 5 have substance. These grounds are:

1) The learned magistrate erred in law in convicting the accused person, the appellant herein when the facts of the case stated did not constitute the offence charged.

The learned magistrate erred in law in convicting the appellant against the weight of evidence.

In his reply to appellant's counsel's address to court, learned counsel for the state conceded the appeal on ground 1 saying that the offence that was proved was that of indecent assault. He asked the court to allow the appeal but substitute the conviction with that of indecent assault. I have considered the 2 grounds of appeal along with the submission by both counsel herein. This being a first appeal however, it is my duty to reconsider the evidence which was before the trial court, evaluate the same and draw my

own conclusions while bearing in mind that I have neither seen nor heard the witnesses testify and giving due allowance for this (*see Okeno VS Republic 91972) E. A. 32, Ngui V Republic (1984) KLR 729 and Njoroge V Republic (1987) KLR 19.*

The appellant's conviction was solely based on the evidence of PW2 and PW4. These were the 2 minors who were sleeping on the same bed on the night in question when the said offence was allegedly committed. In her evidence in Chief, PW1, the complainant said:

"I was sleeping with L while the accused was on bed. After a short while he started pulling the blanket. I then asked what he was doing. He never did anything. He never touched me anywhere."

On cross-examination, the closest she came to imputing bad conduct on the appellant was when she stated:-

"You touched me as you were taking the blanket."

She did not even say where she was touched. From the evidence of the complainant therefore, no offence of whatever nature can be disclosed – not attempted rape or even indecent assault on a female. PW1V who was sleeping on the same bed with the complainant said in her evidence in chief that she only heard the complainant 'screaming'. She did not say she saw the appellant touch the complainant and if so where. The learned counsel for the state submitted that since appellant had the opportunity to commit the offence, that should amount to corroboration of the complainant's evidence.

As stated in *STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES* 6th Ed. At page 551:

"The word "corroboration", in the context of charges of indecent assault has no special technical meaning and by itself means no more than evidence tending to confirm other evidence."

In this case therefore, before we can use the issue of opportunity to offer corroboration, there must be evidence first and foremost that there was the offence of indecent assault which had been committed. Corroboration cannot exist in a vacuum. In the Court of Appeal case of *MUTONYI V REPUBLIC (1952) KLR 203*, the definition of the term "corroboration" was reiterated as follows:

"An important element in the definition of corroboration ... is that it affects the accused by connecting him or tending to connect him with the material particular not only the evidence that crime has been committed but also that the accused committed it."

The crime has to be proved first and there has to be a claim that it was the accused who committed the crime. Then and only then can corroboration be sought.

As stated earlier, there was no crime disclosed by the evidence of PW1 and PW5 in this case. The issue of corroboration does not therefore even arise. This in my considered view is a case where the appellant should not have been placed on to his defence in the first place. In spite of the poor and lackadaisical manner in which this appeal was prosecuted, the same must succeed.

Accordingly, I allow this appeal, quash the conviction and set aside the sentence of the trial court. The appellant is hereby set at liberty unless he is otherwise lawfully held.

W. KARANJA

JUDGE

Delivered, signed and dated at Bungoma this 16th day of May, 2007 in the presence of appellant and Mr. Ndege for state.