REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 308 OF 2004

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 70 of 2003 – S. MUKETI [P.M.])

JOHN MUIGAI NGÁNGÁ …….....……APPELLANT

VERSUS

REPUBLIC…….....……..……RESPONDENT

JUDGMENT

The appellant John Muigai Nganga was charged with attempted rape contrary to **Section 141 of the Penal Code**. The particulars of the offence were that on 7th of December 2002 at Kabazi, Nakuru, the appellant attempted to have carnal knowledge of T W K without her consent. The appellant was alternatively charged with indecent assault of a female contrary to **Section 144(1) of the Penal Code**. The particulars of the offence were that on the same day and the same place the appellant unlawfully and indecently assaulted T W K, a girl aged fourteen years by touching her private parts. The appellant pleaded not guilty to both charges and after a full trial was convicted of the alternative charge of indecent assault and sentenced to serve five years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based inconsistent and contradictory evidence of prosecution witnesses. He faulted the trial magistrate for not considering the fact that there existed a grudge between the complainant's family and himself and therefore ruled out the fact that the said grudge could have motivated the complainant to lay the said charge against him. He was aggrieved that the trial magistrate had failed to consider the fact that no exhibits were produced or evidence adduced by the prosecution to establish that he had indeed attempted to rape the complainant. He finally faulted the trial magistrate for failing to consider the fact that it took over a month for the complainant to make the complaint to the police therefore raising doubt that the said incident actually took place.

At the hearing of the appeal, I heard the submission which were made by Mr. Nyagaka learned counsel for the appellant and by Mr. Koech, learned State Counsel. Whereas Mr. Nyagaka made vigorous submission urging this court to allow the appeal on the grounds that the evidence adduced by the prosecution was insufficient to sustain a conviction on the charge of indecent assault, Mr. Koech countered the appellant's argument by submitting that the prosecution had proved its case against the appellant to the required standard of proof beyond reasonable doubt. He submitted that there was overwhelming evidence which was adduced by the prosecution to prove the charge of indecent assault. Before addressing the points raised by the parties to this appeal, it is imperative that the facts of this case be set out, albeit briefly.

On the 7th of December 2002 at about 3.00 p.m. PW1 T W K (*hereinafter referred to as the complainant*) testified that she had been instructed by her grandparents to take coffee beans to a coffee factory at Kabazi. She delivered the coffee and while on her way back was requested by a woman, whose coffee bags had dropped off from the back of her donkey, to assist her load back the coffee onto the donkey. The complainant attempted to assist the woman but was unable. The woman called some men who were passing by to assist her. She was assisted. Among the men who assisted the woman was the appellant. After assisting the woman, the complainant started walking back home.

The appellant who was her neighbour offered to give her a lift on his bicycle. The complainant accepted the offer. She testified that while on the way, the appellant touched her breasts. She stated that she was shocked and jumped down from the bicycle. It was her testimony that the appellant then parked the bicycle, held her and carried her to a nearby bush whereby he removed her pants half way (*presumably she meant upto her knees*), removed his trouser and then removed his penis and inserted it on her vagina and spermed. The complainant testified that she wanted to scream but the appellant restrained her by putting his hand on her mouth. The complainant testified that she felt pain after the incident. It was her evidence that the appellant then abandoned her at the scene.

She walked home and immediately told her grandfather, PW2 K M what had happened. PW2 testified that he took the complainant to a neighbour PW3 V M with a view of having her ascertain if the complainant had indeed been sexually assaulted. PW3 testified that the complainant told her that the appellant had "*done bad manners to her*". She did not however check the complainant's private parts. During the cross-examination of PW2 by the appellant, it emerged that the appellant's younger brother had stolen PW2's sheep but PW2 had chosen not to file any criminal charges against him. PW4 Police Constable David Mbugua attached to Kirengero Police Station testified that he arrested the appellant on the 9th of January 2003 at his home. All the witnesses who testified did not tell the court when the report of the incident was made to the police. No medical evidence was adduced by the prosecution to establish whether or not the complainant was indeed sexually assaulted by the appellant.

When the appellant was put on his defence, he denied that he had sexually assaulted the complainant. He admitted that on the 7th of December 2002 he had given the complainant a lift on his bicycle and dropped her near her home. He testified that the complainant was the age of his son and therefore he could not possibly have harmed her as was claimed by the complainant. He testified that there existed a grudge with PW2, who was his neighbour over a mattress. He denied that he had attempted to rape the complainant.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate so as to reach its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comments as to the demeanour of the witnesses (*See* **Njoroge –vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charge of indecent assault as against the appellant to the required standard of proof beyond reasonable doubt. I have considered the submissions which were made before me by the appellant and by the State. I have also re-evaluated the evidence adduced by the prosecution witnesses before the trial magistrate.

The issue raised by the appellant on this appeal is whether or not corroboration is required in sexual offences. The law as regard the corroboration or lack thereof in sexual offences is now settled. In **Margaret –vs- Republic [1976] KLR 267**, Trevelyan J. held at page 268, para F that;

"***It is not a rule of law that a person charged with a sexual offence cannot be convicted on uncorroborated evidence of a complainant, but it has long been the custom to look for and require corroboration before a conviction for such an offence is recorded. There are many cases in the report saying so, such as Njuguna s/o Wangurimu –vs- Republic (1953) 20 EACA 196. Nonetheless, there are certain cases where conviction may yet be entered even though there is no corroboration of the complainant's evidence. As Law J. A. put it at page 723 in Chila's case (Chila –vs- Republic [1967] E.A. 722), to which reference has already been made:***

"The law of East Africa of corroboration in sexual cases is as follows: The judge should warn the assessors and himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."

The court of appeal in the case of **Bernard Kebiba –vs- Republic C.A. Criminal Appeal No. 104 of 2000 (Kisumu) (***unreported)* held at page 6 that:

"***The law on corroboration in sexual offences is not in dispute anymore in our courts. There is requirement for corroboration in all sexual offences. It is however, a rule of practice only. Though a strong rule of practice it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such situation however the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant".***

In the instant appeal, it is the complainant's evidence that is crucial in determining whether or not the appellant indecently assault her. Her evidence was not corroborated. Although she testified that she informed PW2 and PW3 of the indecent assault soon thereafter, the two witnesses did not give any testimony that would have corroborated the complainant's story that she was raped by the appellant. PW2 testified that the complainant was crying when she arrived home. PW2 did not tell the court about the appearance of the complainant's clothing. PW2 sent the complainant to be examined by PW3 to confirm if she had been indeed sexually assaulted. PW3 testified that she did not examine the private parts of the complainant to confirm whether or not she had been sexually assaulted as she claimed.

Further the evidence adduced by the prosecution does not reveal when the complainant made the report to the police. The only evidence we have on record is the evidence of PW4 who testified that he arrested the appellant on the 9th of January 2003. This was more than a month after the incident. No medical evidence was adduced by the prosecution to establish that indeed the complainant had been either sexually or indecently assaulted by the appellant.

Having carefully re-evaluated the evidence on record, it is clear that the only evidence that the prosecution relied on is that of the complainant. This evidence has of necessity to be compared with that which was adduced by the appellant in his defence. As stated above, this court can convict the appellant on the uncorroborated evidence of the complainant if it is satisfied that the complainant was telling the truth. In this case it is evident that there are gaps in the prosecution's case which raises doubt as to the evidence adduced by the complainant. No evidence was adduced as to the state of the clothing of the complainant when she made the report to PW2 and PW3. The complainant testified that the appellant had spermed on her. Apart from her testimony, no other witness corroborated her story. There is no evidence on record as to when the complainant reported the incident to the police. If the complainant made the report to the police one month after the incident, the submission by the appellant that she could have been motivated by the grudge existed between her family and that of the appellant could well be true.

In the circumstances of this case, I do hold that reasonable doubt has been raised by the appellant as to the evidence which was adduced by the prosecution to support its case of indecent assault. These doubts will of necessity be resolved in favour of the appellant. The appeal filed by the appellant must therefore succeed. The conviction of the appellant by the trial magistrate is hereby quashed. The sentence of five years imprisonment is hereby set aside, the appellant is ordered set at liberty and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 12th day of May 2006.

L. KIMARU

JUDGE