



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 400 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at

Narok in Criminal Case No. 273 of 2003 – S. M. Githinji [SRM]

JULIUS LANGAT KIPROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Julius Langat Kiprotich was charged with rape contrary to **Section 140 of the Penal code**. The particulars of the offence were that on the 8th of April 2003 at Narok District, the appellant unlawfully had carnal knowledge of J S 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 in the same place, the appellant unlawfully and indecently assaulted J S by touching her private parts. The appellant pleaded not guilty to the offence and after a full trial was found guilty as charged on the main charge and sentenced to serve ten years imprisonment with hard labour. He was also sentenced to receive six strokes of the cane. The appellant was aggrieved by his conviction and sentence and filed an appeal to this court.

In this petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had considered the evidence of the complainant as having established the offence of rape whereas there was no evidence that the complainant had been injured during the alleged rape. The appellant faulted the trial magistrate for relying on the evidence of the medical report which was prepared eight days after the alleged rape incident and which did not establish that indeed the complainant had been raped. The appellant was aggrieved that the trial magistrate had relied on insufficient and uncorroborated evidence of the complainant to convict him on the charge of rape. He was further aggrieved that the trial magistrate had failed to consider the fact that he was not medically examined to prove that the sperms which were found on the dress of the complainant belonged to him. He was further aggrieved that the trial magistrate prevented him from presenting his defence adequately by calling witnesses to testify in his defence. He faulted the trial magistrate for failing to consider his alibi defence.

At the hearing of the appeal, Mr. Rono learned counsel for the appellant made submission urging this court to allow the appeal. He submitted that the evidence of the complainant was not sufficiently corroborated by the medical evidence which was adduced in evidence by the prosecution. He submitted that the P3 form was filled eight days after the alleged rape incident and, in any event, the said P3 form

did not establish that the complainant had indeed been raped. He further submitted that the fact that a discharge was observed from the complainant's private parts was no proof that the complainant had been raped because women usually had vaginal discharges. He further submitted that the evidence of the complainant had not established that she had been raped. He submitted that the complainant had not screamed for help when she was allegedly raped.

He further submitted that the village elder who the complainant allegedly reported to after the rape incident was not called to testify. In his view, the said witness was a critical witness who ought to have been called by the prosecution. He further submitted that the conviction of the appellant was based on speculative and not concrete evidence. He argued that the appellant had established that there existed a grudge between the complainant and the appellant over a land dispute. He complained that the sentence which was meted out was harsh and excessive in the circumstances and was based on extraneous and whimsical premises. The appellant relied on the decision of **Bernard Kebiba –vs- Republic C.A. No. 104 of 2000 (Kisumu) (Unreported)** in support of his appeal. Learned Counsel urged this court to allow the appeal.

Mr Gumo for the State supported the conviction and the sentence imposed upon the appellant. He submitted that the complainant was known to the appellant and were indeed related. He stated that the complainant and the appellant had been seen by PW2 leaving together on the material evening. He submitted that the complainant was lured by the appellant with the sole intention of sexually assaulting her. He argued that the trial magistrate believed the complainant's story to be true. He submitted that the evidence of the complainant was corroborated by the evidence of the medical officer who examined the complainant and established that there was a swelling on the complainant's private parts. The complainant's dress had been torn and had whitish stains which were visible and which appeared to be semen. He submitted that the prosecution adduced sufficient evidence to enable the trial magistrate convict the appellant for the charge of rape. He concluded his submissions by stating that the sentence that was imposed upon the appellant was lawful.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses during the trial so as to arrive at 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 (*See Njoroge –vs- Republic [1987] KLR 19*). The issue for determination by this court is whether the prosecution adduced sufficient evidence to enable this court convict the appellant on the charge of rape. I have carefully re-evaluated the evidence adduced before the trial magistrate and also considered the submissions made before me by the learned counsel for the appellant and by the State.

In rape cases, in most instances the evidence that is relied on by a court to reach a decision whether or not the complainant was raped is that of the complainant as compared with the evidence adduced by the accused. In the instant appeal, the complainant and the appellant are relatives. The appellant is related to the complainant by marriage. The appellant is related to the husband of the complainant. According to the evidence of the complainant, the appellant went to her house on the material evening and told her that she was required to attend to a meeting which had been called to resolve a land dispute. The complainant agreed to accompany the appellant to the venue of the meeting. It did not cross the complainant's mind that it was unusual that such a meeting convened to resolve a land dispute was being held at night. This was because the appellant asked the complainant to accompany him to the meeting at 7.00 p.m.

PW2 E C, the daughter of the complainant heard the conversation between the complainant and the appellant. She saw the two of them walk together towards the direction of the house where the meeting was allegedly to be held. The path to the particular house passed through a bush. While on the way, and some distance from the nearby homesteads, the complainant testified that the appellant tore her skirt and forcefully had sexual intercourse with her after pushing her baggy pants aside. Although she protested and pleaded with the appellant not to have sex with her because she was the appellant's mother's age, the appellant did not heed the complainant's plea and went ahead and had sexual intercourse with her. In the course of raping her, the appellant slapped and strangled the complainant. The dress which the complainant wore on the material night and which she alleged was torn during the rape incident was

produced as an exhibit during the trial.

On the following day the complainant made a report to a village elder who took her to the Chief's office at Olemekenyo. PW3 APC Julius Kamwaro arrested the appellant and took him to Olemekenyo police post. PW5 PC Philip Ndambuki re-arrested the appellant, investigated the case, and later charged the appellant with the offence of rape. He also issued a P3 form to the complainant which was filled by PW4 Jackline Chepleting, a Clinical Officer based at Narok District Hospital. In her report, she observed that the labia majora and labia minora of the complainant were swollen. She was of the opinion that the complainant had had sexual intercourse. She examined the complainant eight days after the alleged rape incident. PW6 Benjamin Kipkemoi, a nurse based at Sogoo Health Centre examined the complainant on the 15th of April 2003 and saw that the complainant had bruises on her neck which was consistent with the testimony of the complainant that she had been strangled.

When the appellant was put on his defence, he denied that he had raped the complainant. He gave an alibi defence. He testified that he was elsewhere at the time when the complainant allege that he had raped her. He testified that he had quarreled with the complainant over a complaint that the complainant had made to the effect that the appellant's cattle had eaten the complainant's maize plantation.

From the above evidence adduced before the trial magistrate, it is clear that it is basically the evidence of the complainant that was relied on by the trial magistrate to convict the appellant. The appellant takes issue with this evidence. He submits that the said evidence was not sufficient to sustain a conviction on rape because it was uncorroborated. The appellant dismisses the medical evidence which was adduced as not sufficient to corroborate the evidence of the complainant. 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 reports 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 this case, I agree with the counsel for the appellant that the evidence of the complainant was not corroborated by the medical evidence which was adduced by PW4. That evidence only proved that there was sexual intercourse. However the complainant produced as an exhibit the torn skirt which had dried semen on it and which she testified was the appellant's semen. Although the said semen was not analysed, I have no doubt in my mind that the complainant was saying the truth when she gave a testimony before the trial magistrate. Her evidence as to the circumstances leading to the rape was

corroborated by the evidence of PW2 who testified that she saw the appellant and the complainant walking towards the direction of the house where the appellant had claimed the land dispute was being discussed. Further as the trial magistrate observed at page 3 of his judgment:

“The complainant and PW2 could not have therefore made a mistake of him what happened thereafter (sic), which constitutes the offence against the accused, is narrated in details by the complainant. I find her evidence highly compelling as true. The case sounds natural and logical which withdraws any chance of it being a self made story. The torn dress, the swollen vagina with discharge therein, which was noted by independent witnesses, strengthens the complainant’s claim. She took action against the accused almost immediately, which portrays her urge to redress the wrong, which is quite natural. I have no doubt that she was forcefully penetrated by the accused as claimed. She was raped by him.”

The trial magistrate was impressed by the evidence of the complainant to be the truth. In this case therefore, although there was no sufficient corroboration, it would have been unnecessary for any corroboration as the trial magistrate was convinced that the complainant was telling the truth.

Although the trial magistrate did not warn himself of the danger of relying on the uncorroborated evidence of the complainant, on re-evaluation of the evidence I do warn myself of such danger, and proceed to find that the prosecution proved its case on the charge of rape against the appellant to the required standard of proof beyond reasonable doubt. I therefore find no merit whatsoever against conviction.

I similarly dismiss his appeal against sentence. The appellant attacked and sexually assaulted the complainant, a woman who is his mother’s age, without due regard to her modesty, her position as a respectable elder of the society and further in her capacity as a human being who has a right to enjoy her life without being molested by anyone. The appellant’s complaint that the sentence of ten years imprisonment was oppressive taken in the context of the above facts, is therefore unfounded. I will however set aside the corporal punishment ordered because the same was outlawed by the **Criminal Law (Amendment) Act, 2003**.

The upshot of the above is that the appeal filed by the appellant is hereby dismissed. The conviction and sentence of the trial magistrate is hereby confirmed.

DATED at NAKURU this 12th day of May 2006.

L. KIMARU

JUDGE