



-REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI
HC CR. APPEAL NO.37 OF 2003

(From original conviction and sentence in Criminal Case
No.349 of 2002 in the Senior Resident Magistrate' s Court
at Karatina by J. N. Nyagah – S. R. M.)

JOSIAH WACHIRA MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Josiah Wachira Mugo hereinafter referred to as the Appellant was tried and convicted by the Senior Resident Magistrate Karatina for the offence of attempted Rape Contrary to section 141 of the Penal Code.

The particulars of the offence against him alleged that on the 21st day of July 2002 at Gathaiti village in Nyeri District, He attempted to have carnal knowledge of Monicah Wangare Waweru without her consent.

Five witnesses testified for the prosecution. Briefly their evidence was as follows:-

On 21st July 2002, the Complainant was in their house when the Appellant called her to the gate and informed her that her boyfriend Munene Kimenyi was in the Appellants house waiting to see the Complainant. The Complainant was reluctant to go but when a brother of the Appellant passed by and the Appellant told him to go and tell the person waiting that they were coming, she became convinced and accompanied the Appellant to his house. The Complainant stood at the door and asked the Appellant to ask Munene to come out. The Appellant however forced the Complainant into the house. The Complainant screamed but the Appellant put his fingers in her mouth in an attempt to stop Complainant from screaming. The Complainant struggled with the Appellant who trapped her legs and Complainant fell down on her belly. The Appellant sat on her back and removed her pair of bickers. He tried to remove the Complainant's body suit but the Complainant screamed, the Appellant's sister called Peris came and forcefully pushed the door. The Appellant then got up and the Complainant grabbed her Bickers and ran away leaving her headscarf and pair of slippers in the Appellants house.

The Complainant reported the matter to her mother. The next day a meeting of elders which was attended by the Complainants mother Mary Nyawira (P. W. 2) Michael Wachira Kinyua (P. W. 3) the Appellants father, Complainant's father and two other elders was held. The Complainant explained how the Appellant had attempted to rape her and how she had left her headcover and pair of slippers in the Appellant's house. The Appellant was asked to produce the items and He went and brought them.

On 24th July 2002 P. W. 5 APC Edward Migwi of Ndiriti Administration Police Post having earlier received the report of attempted rape arrested the Appellant. The Appellant was later escorted to Karatina Police Station where He was charged with this offence.

In his defence the Appellant claimed that He had been having a long standing problem with the father of the Complainant. Between 22nd and 24th April the Complainant's father cut the Appellant's posts. The matter was reported at Kamunyaka Police Post and Complainant's father was ordered to pay. On 21st July, 2002 He went to the Complainant's house to follow up the issue of the posts. He found Complainant's mother making allegations about him.

The next morning He called elders and challenged the Complainant's mother to establish her allegations. It was then that the Complainant's mother alleged that he had attempted to rape her daughter. The trial Magistrate having heard the evidence rejected the defence and found that there was sufficient evidence that the Appellant did attempt to rape the Complainant. He accordingly convicted him of the offence and sentenced him to serve five years imprisonment thereby giving rise to this appeal.

For the Appellant it was argued that the trial Magistrate erred in convicting the Appellant on insufficient evidence, in that there was no corroboration of the Complainant's evidence as the presence of the slippers and Headscarf in the Appellant's house was not sufficient corroboration, and that the trial Magistrate erred in shifting the burden of proof to the defence by requiring the Appellant to prove his innocence.

Learned State Counsel Mr. Obuo has conceded the appeal on the grounds that the trial Magistrate did not warn himself about convicting on the uncorroborated evidence of the Complainant and that the slippers and headscarf did not provide the required corroboration nor was there any evidence of a covert act such as to lead to the conclusion that there was an attempted rape.

I have carefully re-considered and re-evaluated the evidence which was adduced before the trial Magistrate. The evidence of the Complainant was quite clear that the Appellant lured the Complainant to his house by falsely pretending that her boyfriend Munene was waiting for her there.

The Appellant's motives became apparent when He forced the Complainant into the house struggled with her tripped her into falling down, forcefully removed the Complainant's Bickers and tried to remove her body suit. Any doubts as to the Appellant's intention were obviously eliminated by his four letter word description of what He wanted to do.

It is quite evident that the Appellant's actions were all directed towards achieving the objective of raping the Complainant and that had the Appellant's sister Peris not intervened the Appellant would probably have achieved his objective. It is true that Peris was a material witness who ought to have been called to testify, however given her relationship with the Appellant her absence was understandable. The trial Magistrate found the evidence of the Complainant quite truthful and convincing. The trial Magistrate had the advantage of observing and assessing the demeanor of the witness and I have no reason to depart from his finding. In any case the evidence of the Complainant was consistent with the evidence of her mother P. W. 2 to whom she reported the incident immediately it happened as well as the evidence of P. W. 3 in whose presence Appellant produced the Headscarf and slippers.

The trial Magistrate found corroboration of the Complainant's evidence in the Complainant's head scarf and slippers recovered from the Appellant. It was submitted that the trial Magistrate erred in holding the recovery of the Headscarf and slippers to be corroboration of the Complainant's evidence.

The definition of the term "corroboration" was reiterated in *Mutonyi vs Republic* [1982] KLR 203 as :-

"affecting the Accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it."

In this case it was the Complainant's evidence that the Appellant forcefully tried to have sexually intercourse with her and that in the process of the struggle and escape she left her headscarf and slippers in the Appellant's house. The fact that the Appellant admitted the presence of the headscarf and slippers in his house and produced the same, lend credence to the Complainant's allegations. I find that the trial Magistrate was right in finding that the presence of the headscarf and slippers in the possession of the Appellant connected the Appellant with the commission of the offence, and constituted corroboration of the Complainant's evidence.

Moreover, the need for corroboration of the Complainant's evidence in sexual offences was recently considered by the court of appeal in Criminal Appeal Number 227 of 2002.

John Mwashigadi Mukungu vs Republic

Wherein the Honourable Judges of Appeal stated:-

".....we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls

.....we think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with Section 82 of the Constitution."

It follows that the trial court and this court having been satisfied that the Complainant was an honest and truthful witness, her evidence was sufficient to sustain a conviction even without corroboration or any warning.

I am satisfied therefore that the Appellant's conviction was well founded. I have further considered the sentence imposed on the Appellant but find that the same was not so manifestly excessive as to warrant the intervention of this court.

In the light of the above this appeal fails and is accordingly dismissed.

Dated, Signed and Delivered this 15 th day of

January 2004.

H. M. OKWENGU

JUDGE