REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
CR. APPEAL. NO. 60 OF 2003

GEOFFREY ODHIAMBO OTWOMA ……. APPELLANT

VS

REPUBLIC ……..... RESPONDENT

J U D G M E N T

The appellant was tried on a charge containing 2 counts. The first count relate to a charge of rape contrary to Section 140 of the penal code.

The particulars of the charge are that on the 9th day of April 2002 at Airstrip Estate township location in Busia district within western province, had carnal knowledge of Phylis Nabwire without her consent. The second count relate to resisting arrest contrary to section 253 (a) of the Penal Code. The particulars are that on the 20th day of April 2002 at Air strip estate township location in Busia District within Western province, resisted lawful arrest from No. 53430 P.C. Benson Muchemi and No. 78814 P.C. Benard Juma Police officers who at the time of the said lawful arrest were acting in due execution of their duty of arresting the said Geoffrey Odhiambo Otuoma for offence of rape.

The prosecution's case was supported by the evidence of 4 witnesses. The appellant gave unsworn statement when he was placed on his defence.

The trial magistrate at the end of the trial acquitted the appellant on count 2. She however convicted the appellant on count 1 and sentenced him to ten (10) years imprisonment with four strokes of the cane. The appellant now comes to this court to appeal. The appellant put forward 17 grounds of appeal which grounds may be summarized into two grounds:

First is that the appellant was wrongly convicted on uncorroborated evidence and secondly that the prosecution did not prove its case to the standard of beyond reasonable doubt. The senior state counsel conceded to this appeal on a technicality by stating that the charge was defective in that the word "unlawful" was not used when framing the charge.

The brief facts of this case is that on 9th April 2002 at about 8.00 p.m. the complainant Phylis Nabwire who is a student at Busia High School was walking back home from the shops when she was followed by somebody who caught up with her. The man grabbed her and a struggle ensued. She screamed. The man tripped her and she fall down and the man tore her pants and forced his legs apart, removed his trousers and underwear and inserted his penis into her vagina and had sex without her consent.

The complainant says that the appellant who is her neighbour is the culprit whom she recognised with the assistance of moonlight. She said that the appellant ran away when a man known as Gabriel passed by. The complainant reported the complainant to the police who issued her with a P3 form which was duly filled by P.W 4 Nathan Bwabi Kennedy. He formed the opinion that there was penetration though there was no trace of spermatozoa. He did not however examine the appellant.

The appellant now complains that he was convicted on the evidence of a single witness. It is trite law that corroboration is required in sexual offences to support the testimony of the complainant. Although there are instances where the courts can convict on such evidence after warning itself on the dangers of convicting on uncorroborated evidence of the truth of the complainant's evidence.

In the instant appeal the trial magistrate found out that the evidence of P.W 4 corroborated the evidence

of P.W. 1. Hence there was no need for her to warn herself.

With due respect to the learned trial senior resident magistrate the evidence of P.W. 4 only confirms that there was penetration and that sexual intercourse took place. The P 3 form which was produced in evidence shows that the complainant was sexually assaulted. However there is no nexus between the offence and the appellant. No evidence save for that of the complainant connects the appellant with the offence he was charged with. I have evaluated the evidence and I have come to the conclusion that there was no corroboration. The trial Senior Resident Magistrate therefore misapprehended the point by holding that there was corroboration whereas there was none.

The other matter which was raised by the learned Senior state counsel relate to the fact that the charge was not properly framed. He conceded the appeal on that ground. With due respect to the learned Senior counsel, I do not think the matter he has raised renders the case before the trial court fatally defective. What is important is that the appellant was informed of the nature of offence facing him.

I have come to the conclusion that the prosecution did not prove its case to the standard of beyond reasonable doubt. Without corroboration there can never be a safe conviction.

In the final analysis I will allow this appeal. The conviction is quashed and the sentence set aside. The appellant is hereby set free unless lawfully held for other reasons.

DATED AND DELIVERED THIS 4th DAY OF June 2004.

J.K. SERGON

JUDGE