



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO.386 OF 2002**

(From original conviction and sentence in Criminal Case No.1231 of 2002 of the

Senior Resident Magistrate's Court at MOLO – K. KIRUI (S.R.M.)

**JOHN KAROKI GITAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant JOHN KAROKI GITAU has filed this appeal through Mr. Konosi, Advocate. He has appealed against both the conviction and sentence. The Appellant had been charged with RAPE contrary to Section 140 of the Penal Code. That on 27th March, 2002 at Nyeki Farm, Molo, in Nakuru District of Rift Valley Province, unlawfully had carnal knowledge of GRACE NJOKI NGARE without her consent.

He was charged with an Alternative Charge of INDECENT ASSAULT contrary to Section 144(1) of the Penal Code. That on 27/3/2002 at NYEKI FARM, Molo, in Nakuru District, Rift Valley Province, indecently assaulted GRACE NJOKI NGARE by touching Her private parts. The appeal was opposed. The Appellant raised five grounds of appeal. The first one was that the Trial Magistrate erred in law and in fact by holding that the evidence of the Clinical Officer corroborated the evidence of the Complainant. The Learned Counsel for the State submitted that the corroboration offered in the evidence of both the Clinical Officer and the Complainant's husband was the torn pants which were Pexh.1.

The part of the Judgment criticised by the Appellant's advocate was:-

***“On the other hand the Complainant's evidence that she was raped by the Accused is corroborated by the findings of the Clinical Officer, PW5, who confirmed she was raped, injured and her under pants torn as she claimed, and supported by that of her husband PW2.”***

I will deal with this aspect of the appeal together with those others raised by the Appellant later.

The Appellant complained that the Complainant did not report the same day but waited until the next day. In answer to this, the Learned Counsel submitted that no doubt arises out of that omission.

That the Complainant PW2 explained that it was late. That indeed is confirmed from the record of the proceedings. The Complainant and PW2 considered it too late and unsafe to attempt to report the incident

same day as it was already dark. Given the fact that this inadvertence occurred in a rural area in Molo, like many rural areas of our country, many such areas have no means of transport at night and it would be unwise to make an attempt to travel. I would not find that the omission created doubt as to the sincerity of the Complainant's complaint against the Appellant.

The Appellant argued further that the Complainant's evidence was not corroborated. He highlighted this evidence as fact that she was infected by the Appellant with a venereal disease. He also highlighted evidence that the Appellant disappeared from the area for 11/2 months as being the Complainant's creation. That DW3's evidence was that a farm Chairman and not the Appellant sent him to the Complainant to settle the matter.

In response to these issues the Learned Counsel for the State submitted that the Complainant and her husband, PW2, both testified that they had no sexual intercourse that night for fear that the Appellant had infected the Complainant with a venereal disease.

That the Clinical Officer, PW5, confirmed that indeed the Complainant was infected. He also submitted that there was no delay in reporting the incident. That indeed any delay caused was by the Appellant who disappeared from the scene for 11/2 months after the act. The last issue raised by the Appellant was that his alibi defence was not considered by the Court. The Learned State Counsel submitted that the court did consider it and did find that it did not relate to the issue and did not tie up with the case. The State Counsel also submitted that the Complainant knew the Appellant before and that there was no grudge between them.

The key issue that arises out of this appeal is that of corroboration. Let me start by dealing with the issue of whether corroboration was required and what constitutes corroboration in sexual offences cases.

It is not disputed that the Appellant and the Complainant knew each other before. The issue of identification by the Complainant alone does not pose any legal issues since the Appellant does not deny that the Complainant knew him before.

The Complainant was examined and treated by PW5, a Clinical Officer who also filled a P3 form on the Complainant. In his evidence he said that after examining the Complainant he found that her inner wear was torn, Results from a Lab test he sent her for was positive for spermatozoa and infection of gonorrhoea. It was a vagina swab. He said he concluded that she had been raped.

In **MWANGI –V- REP 1984 KLR 595, 603, Kneller JA, Chesoni and Nyarangi Ag. JJA held:-**

***“The Doctor’s evidence did no more than support Consolata’s evidence that she had had sexual intercourse. His conclusion was based on the finding of spermatozoa on a specimen of Consolata’s vagina which was examined at a laboratory. The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she has had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact to the offence of rape, which the doctor’s evidence did not establish or corroborate.”***

Proof of sexual intercourse as far as a charge of rape is concerned is penetration and not the presence or absence of spermatozoa. PW5's evidence merely confirmed that the Complainant had had sexual intercourse and not that she had been raped. To that extent the trial Magistrate misdirected himself. Having said that I must state that there is an area that was not probed further in the evidence of PW5. PW5 seemed to say that he concluded that there was evidence of rape as three grounds. One the torn underpants or inner wear as he called it. Two presence of spermatozoa and three infection with a venereal disease. This last ground is of interest to the court and would have offered important evidence if PW5 had given the possible age of the infection to offer a link between it and the date of the incident. As stated, that was not probed further and as such it offers no assistance to the prosecution case. The nature of corroboration required in sexual offences is that which would connect the accused person with the offence.

The next issue is whether the court could still convict in absence of corroboration? This was a sexual offence and it was incumbent upon the trial Magistrate to warn himself that it was not safe to convict the Appellant on the uncorroborated evidence of the Complainant, but that having warned himself, he could convict in the absence of corroboration.

In ***Chila -v- Rep*** [1967] EA 722 at page 723 adopted in

Mwangi -v- Rep quoted earlier, it was held:-

***“The law of East Africa on corroboration in sexual cases is as follows: \_***

***The Judge should warn the Assessors and himself of the danger of acting on the 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 was given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.”***

As already stated elsewhere in this Judgment, the trial court found that the Complainant’s evidence was corroborated by that of her husband PW2 and Clinical Officer PW5 which finding was a mistake.

In the courts judgment the Magistrate observed:-

***“Further more she knew the accused very well as her neighbour before and had no reason to lie against him. Her evidence is further corroborated by the unchallenged evidence that the accused subsequently disappeared from his home until arrested over 9 months later...”***

It was not denied by the defence that indeed the Appellant disappeared from the area after this incident and remained gone for 11/2 months or so and not 9 months as the Judgment shows. In his sworn defence, it is instructive to note that the Appellant did not address the issue of his disappearance. The Counsel for the Appellant had submitted on appeal that the evidence of the Appellant’s disappearance was by the Complainant herself and that there was no corroboration. That statement was misleading. PW2 told the court the number of times he visited the Appellant’s house, which was next to his, in a bid to get the Appellant but in vain. He gave dates of 29.3.2002 and 24.5.2002. The advocate said further in his submissions that the evidence of Appellant having sent elders to the Complainant to ask to be forgiven was only by the Complainant herself. That also was misleading. PW2 corroborated the Complainant on that point and went further to say that in fact a meeting was held where Appellant offered to pay some penalty.

I do agree with the trial Magistrate that the evidence that the Appellant disappeared from the area after the alleged offence does corroborate the Complainant’s evidence.

In ***Malowa -v- Rep*** [1980] KLR 110 Madan, Law and Potter, JJA., confirmed that evidence of disappearance of an accused to avoid arrest affords corroboration to the evidence of the prosecution that he committed alleged offence. I do not find that the trial court’s so finding was correct. That indeed the Appellant’s disappearance after committing this offence was conduct that confirmed he had a guilty mind and that it corroborated that of the Complainant that he committed the offence of RAPE.

I do find that the court made a specific finding in its Judgment that the Complainant was a truthful witness:-

***“To this extent I believe the Complainant told the truth and I am convinced beyond any reasonable doubt that the Accused raped her.”***

Even if it was to be found that there was absence of corroboration in this case, I would still find that the court’s finding that the evidence of the Complainant was truthful cannot be faulted.

Even though the court did not caution itself of absence of corroboration, given fact it did find that there was presence of corroboration, which I also do confirm there is in the prosecution case; if indeed it can be said that such warning ought to have been made by the court to itself, I would still confirm the court's finding on the grounds that given all the evidence before the court there has been no failure of justice.

On the issue of alibi the trial court did consider it at length in its Judgment. Before this court, there was heated argument as to date given by the Appellant's alibi witness whether 22nd or 27th March, 2002, The certified copy reads 22nd but the hand written notes are not clear either way. The trial Magistrate took it to be 27th in his Judgment and came to the conclusion it was a made up story by the Appellant.

I find no reason to fault his finding of fact on the evidence adduced before him by both the prosecution and the defence.

On the sentence the maximum penalty provided under the Penal Code for the offence of Rape is life imprisonment. The Appellant was sentenced to 10 years imprisonment. The Appellant's counsel made no submissions on the sentence except to urge the court to set it aside.

In the petition of appeal, the Appellant pleaded that the sentence was manifestly harsh in the circumstances of the case.

The sentence of 10 years imprisonment was in my view not so harsh as to warrant this court to interfere with it. 2 strokes of the cane was lenient. The trial court however omitted a mandatory order for hard labour which is part of the sentence mandated for Rape cases.

I will confirm the sentence of 10 years imprisonment and 2 strokes of the cane and alter the sentence to order for hard labour in addition to sentence imposed.

This appeal is accordingly dismissed.

Dated and delivered at Nakuru this 3rd day of April, 2003.

**JESSIE LESIIT**

**JUDGE**