REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.344 OF 2001

(From Original Conviction and Sentence in Criminal Case No.71 of 2001 of the 1st Class
District Magistrate at Taveta –G.M. Gogwe, Esq., - DM.I)

DANIEL SOWENE OMAR…….……APPELLANT

V E R S U S

REPUBLIC…….RESPONDENT

JUDGMENT OF COURT

The appellant was charged with the offence of Rape contrary to S.140 of the Penal Code. He was convicted and sentenced to 6 years imprisonment with 6 strokes of the cane.

The prosecution case is that the complainant, PW.1, N.N.M, lived in [particulars withheld] in Taveta where also the appellant lived. On 24.1.200o at about 7 p.m. the complainant was on her way home from a church where she was attending some service with other women. She met appellant on her way and on greeting him, he did not reply. Appellant then suddenly held her by the back of her neck and pushed her into a bush. He hit her with fists and then knocked her down. He stripped her naked and had carnal knowledge of her without her consent, using force.He had to tear her knickers off before succeeding to do so. She screamed for held but no one at the material moment came to her rescue. When he finished, he ran away leaving her at the scene of crime. That is when one S.K.L, PW.2 showed up and asked the complainant and appellant as to what had happened, and the appellant is said to have answered that the said PW.2 should leave the appellant alone. Then the witness, before escorting the complainant to her home, noticed that she was stark naked because the appellant had allegedly run away with complainant's clothes. After arrival at her home, she went to Taveta Police Station to report the incident. The Police sent her to Taveta Hospital for medical examination and treatment. Later the Police issued her with a P.3 which was filled by PW.1, one Edward Cheluno Mwamuye, a Clinical Officer. It is in evidence that the Officer carried his examination of the complainant on 1.2.2000, about six days after the alleged incident. That is also when he filled the P.3 which he produced. He also admitted that he examined the complainant on 1.2.2000, which turned out to be about 6-7 days after the incident. The Clinical Officer found bruises on her left knee. There was a cut on her labia majora and her genitalia is said to have been found swollen. She complained of pains in her vagina and he noticed bleeding which suggested that forceful intercourse had been subjected to her.

The appellant gave a sworn statement denying raping the complainant and termed the totality of the evidence against him a fabrication arising from the fact that he had been charged in another case, No. 457 of 1999, for assault and alleged that this new case was brought merely because the family of the complainant felt that they were going to lose the earlier case and decided to stage the present case in order to get the appellant. He raised the fact that complainant was not really serious as he could not wait for so long before going to the Police and hospital if indeed she was raped.

The trial Magistrate having considered all the evidence on the record believed the prosecution case and rejected the defence evidence. He further concluded that while the complainant was screaming PW.2,

S.K.L came to her rescue. He went to the scene and saw the appellant, talked with him, asking him why he had raped the complainant after which the appellant left the scene. He believed the complainant was raped. The honourable Magistrate then finally made a curious statement about corroboration before stating that he believed the complainant's story and upon it he found appellant guilty and convicted him.

I have carefully considered the evidence upon which the conviction is based. The evidence suggests that the complainant was sexually assaulted on the 26.1.2000. She did not report to the Police until 6-7 days afterwards. There is no adequate explanation why she failed to be examined sooner after the alleged assault was committed. Six days are many days in such cases. The medical examination done in this came too late. It is surprising that the Clinical Officer would find 7 days after the incident that she was still bleeding. This exaggerated and falsified the trend of this case, which was quite unnecessary. Furthermore, the evidence of the complainant was not uncontradicted. She stated that when she screamed, PW.2, S.K.L, came to her rescue. At that moment the appellant had started to run away but that S.K.L must have seen him running away. This suggested clearly that S.K.L had no opportunity to talk to the appellant before he ran away if he was indeed there at all. She had indeed stated that she had to explain to S.K.L that the person running away had carnal knowledge of her without her consent. And yet again the complainant having said that the appellant ran away and that PW.2, S.K.L saw him ran away, she with same breath also claimed that S.K.L talked to the appellant who told him to mind his business. This again contradicts her evidence. How could S.K.L talk to the appellant when all S.K.L saw when he arrived was a person running away?Nowhere in her evidence did the complainant state that appellant was carrying a panga but PW.2 states that he saw him carrying a shirt and a panga. The witness was not attracted by any scream from the complainant. He claimed to have come along at the right moment. The witnesses did not see appellant carrying the complainant's dress or underwear except his own shirt and a panga. The complainant also claimed on page 4 of the proceedings that the appellant raped her during broad daylight and yet her earlier evidence indicated that the attack was at 7 p.m. or soon thereafter. She claimed that she reported to the Police the same night and was referred to Hospital. This is not true because the facts show that she reported to the Police on 27.1.2000 and she was not examined until 1.2.2000. The records further show from the evidence of PW.3 Pc. Johnson Murimi, that when she reported to the Police, she did not complain of rape but of beating. Having considered these contradictions, it is my findings that the evidence was not water tight. It was full of holes and cannot be held to have proved the case beyond a reasonable doubt as required by the law.

Secondly, this was a sexual offence in respect of which the trial court was under obligation, at least as a requirement of prudence to seek for corroboration. The law on corroboration in sexual offences is not any more in dispute in our courts. There is a requirement for corroboration in all sexual offences, although this is only a rule of practice. Where the court has fully accepted the complainant's evidence as truthful, it may proceed to convict on it but only after warning itself of the danger of basing a conviction upon an uncorroborated evidence of the complainant. In such a case the court must expressly warn itself so upon the record. But where the court as a matter of caution and better sense, decides to seek for corroboration then it may proceed to seek for such corroboration after also expressly warning itself of the need to do so. If it finds none on the record, it will proceed to give the accused the benefit of doubt and acquit. If however the court considers that there is corroborative evidence on record, it must expressly point it out before proceeding to convict. It is not enough to merely claim that corroboration is in the evidence of a given witnesses without clearly pointing out what that evidence is.

In the case before the court the trial Magistrate does not show whether or not corroboration was necessary before he convicted. He did not proceed to look for the actual corroboration from any of the witnesses. Indeed his finding where he quoted the word corroboration makes no sense as it did not expressly indicate or assert any of the principles of corroboration at all. This court has therefore to make an assumption that the issue of corroboration did not come up in the trial Magistrate's mind throughout and that this resulted into a conviction which could not have been arrived at if the court had considered the same.

The upshot is that the conviction of rape was based on evidence which clearly was not water-tight or reliable and which as well lacked corroboration as a matter of common sense and safe practice. The conviction is quashed and sentence set aside. The appellant is ordered released forthwith unless lawfully

held in prison. It is so ordered.

I once more make a recommendation that our Magistrates should keep themselves abreast with knowledge and information of case law. Many prisoners who should be punished for the crimes they committed are being set free probably to go back to the society and repeat the said crimes merely because our Magistrates are careless or have not decided to follow the latest in case development. A little consultation of the case precedents will make such a big difference.

Dated and delivered at Mombasa this 31st day of July, 2002.

D. A. ONYANCHA

J U D G E