IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Platt, Gachuhi JJA & Masime Ag JA)

CRIMINAL APPEAL NO 26 OF 1987

BETWEEN

PATRICK MWAI THUO..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court at Nairobi, Rauf & Mbaya JJ)

JUDGMENT

January 15, 1988, **Platt, Gachuhi JJA and Masime Ag JA** delivered the following Judgment.

The appellant, a school master, was found to have raped the complainant, one of his pupils. He was convicted of rape c/s 140 of the Penal Code and sentenced to 2 years' imprisonment. His first appeal was rejected. The appellant appeals to this Court. He has served his sentence but seeks to clear his name.

The offence is alleged to have taken place in a classroom with other pupils outside, some peeping in, at about 4.30 p.m. on 8th November 1985.

According to the complainant the sexual act caused a lot of pain and shame, an act which she had not experienced before. She said that there was blood on her petticoat. This story was apparently not entirely true.

The first point stressed in this Court and the Court below, was that themedical report stated that there was "no medical evidence of rape." Therewere no injuries and the complainant was not virgin. There was no blood.

But Mrs Chana stoutly protested that the Court must not turn the complainant, who was the victim, into an accused person. None of this mattered. The evidence of the complainant was on record, it was corroborated, and the appellant was certainly guilty. Mr Richard Ngobi, who represented the appellant, presented a careful argument which continued on the theme of lack of medical evidence. Not only did the medical report state that there was no medical evidence of rape, but the Doctor did not give evidence at all. That was fatal to the production of the medical report. It is difficult to imagine how that was not observed by the trial court, which could have called the Doctor, or had his report produced in his absence under section 33 of the Evidence Act (cap 80) if that provision applied. The government analyst's report could be produced under section 77 of the Evidence Act without his attendance. But that depended on the medical report on the point that the Doctor took the blood samples of the appellant and complainant. Two

separate Police Forms 3 for medical examination were issued by Constable Alex Njogu to each of the appellant and complainant. Later, the reports somehow came to the hand of the Constable with the blood samples. He forwarded them to the government analyst. Both police Forms 3 were produced, without their maker or makers being present and giving evidence. The result is that they became inadmissible, and lost with them was the chain of evidence leaving the blood samples with the Analyst's blood grouping.

Without that link the further catastrophe befell the prosecution that the semen, on the underclothing of the appellant and complainant, was not shown to be of the blood grouping of the appellant.

It has become noticeable of late that there has been a tendency to leave out the chain of evidence in relation to exhibits and reports of them. This is very much to be deplored. It is the kind of evidence which avoids mistakes, and produces a convincing picture of guilt or otherwise. It ought to be automatic. It is the function of the magistrate or a judge to direct the course of the trial in a business-like manner, not permitting inadmissible evidence on the record, so that matters can be put right. This has always been the law, and it is easily undertaken.

Without any medical evidence there is only the complainant's version of what happened. If other persons saw the act being performed, or such facts from which that act could be inferred, and in such circumstances that the complainant had not consented, the prosecution may succeed.

But without supporting medical evidence of any sort, the rule as to corroboration would be especially important. In *Chila v R* [1967] EA 722 it was held in the case of another schoolgirl that:-

> "The Judge should warn the assessors (if any) 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 is given then the conviction will normally be set aside unless the Appellate Court is satisfied that there was no failure of justice."

Neither of the lower Courts put this warning forward specifically, but they both found corroboration in the following facts. There was the evidence of semen on the complainant's petticoat of the same blood group as the appellant. Secondly there were the accounts of what the girls Gladys Kamau and Theresia Njoki (P Ws 2 and 6) saw happening in the classroom. Thirdly there were the complaints made to the mother of the complainant and police.

On the first type of alleged corroboration, the foundation was removed by not calling the doctor to give evidence as we have said above. What is now for consideration, is whether the lower Courts would have come to the same conclusion without that evidence.

On the second point, what Gladys and Theresia saw does not tie up with the story alleged by the complainant. It was not a case of the appellant holding the complainant's arm and pulling her while she held on to the door (Glady's version) or holding her hand (Theresia's version); it was that the appellant asked the complainant to give him a book in the classroom which she did, and then he grabbed her, covering her mouth with his hand, and laid her down on some cartons on the floor. The two girls were seen looking in, and the appellant did chase them away but that was after the act was completed according to the complainant. The girls did not see the act at all, although it was alleged by the complainant that at the crucial time the children were laughing and mocking them from outside, even screaming so much that the complainant did not need to scream, even if she could. Well, after all, they saw something which the complainant herself did not relate and it is difficult to put that evidence, into the complainant's narrative of events. It does not fit with the episode of the book or at the end where the complainant says that she was locked in the class. It is especially difficult to fit in Sporrah Wanjiru's evidence (P W 3) that at 4 p.m. before the alleged rape, Helen had been kicked in the face by the teacher Ndungu, and that the complainant said she would go home. Then Sporrah heard that the complainant had been locked in the classroom and the appellant chased the girls away. It would seem that the girls peeped into the class after all was over, or saw nothing incriminating. The alleged incident apparently followed an unpleasant incident with another teacher. It then seems odd that the complainant did not scream at any stage, even at

the end, or report to other teachers immediately. She had been outrageously treated by two teachers.

It must be emphasised that the complainant's evidence should be trustworthy as the foundation of the prosecution case. The corroborative evidence must then support the complainant's evidence in some material particular. If the alleged corroboration does not bear out the complainant, but emphasises something that the complainant does not rely on, the socalled corroboration may detract from the complainant's story.

The third aspect, the complaints, show consistency and not corroboration.

As was said in *Chila's* case, other motives such as fear can cause a complaint to be made. Here the complainant felt very much ashamed. But there is one further feature, that the parties had been in the classroom and the complainant later recognised the appellant's underpants. That is ambiguous, if the parties have known each other for some time. By themselves those facts would not afford corroboration for rape, because they might be explicable on other grounds.

In these circumstances, if the lower Courts had really analysed the evidence carefully, they would have found no real corroboration. It would then have been their duty to warn themselves of the danger of acting on the uncorroborated evidence of the complainant. It is very doubtful that they would have come to the same conclusion. It would be unsafe to allow the conviction to stand.

The appeal must therefore be allowed, the conviction quashed, and sentence set aside.

Dated and delivered at Nairobi this 15TH day of January , 1988

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.RO. MASIME

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AG. JUDGE OF APPEAL