REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

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

CRIMINAL APPEAL NO 53 OF 1988

BETWEEN

MOSES KAMAU WAWERU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Nakuru, Tunoi Ag J)

October 18, 1988, **Nyarangi, Gachuhi JJA & Masime Ag JA** delivered the following Judgment.

The appellant was charged and convicted of the offence of attempted rape contrary to section 141 of the Penal Code. He was sentenced to 21/2 years' imprisonment with hard labour and to receive 2 strokes of the cane.

His appeal to the High Court (Tunoi Ag J) was dismissed. He now appeals to this court on four grounds that the High Court erred in that:

1.The learned judge erred in law in holding that the charge against the appellant had been proved beyond reasonable doubt.

2.That the learned judge erred in law in holding that necessary testimony had been obtained.

3.The learned judge erred in law in failing to sufficiently consider the appellant's defence or at all.

4.That the learned judge erred in law in deciding against the weight of the evidence.

The facts of the case are that the complainant L W K , a medical nurse employed by *(particulars withheld),* had been at the material time staying at (*particulars withheld*) in the Nyandarua district of the Central Province. On December 12, 1986 at about 8.00 p.m she heard a knock at the door. When she opened it she saw the appellant whom she had known quite well for sometime as a brother to her boy friend. She allowed him in, the appellant had invited her to his birthday party which was being held at his

mother's house. As she was not feeling well, she turned down the invitation. The appellant insisted on getting wine so that they could celebrate his birthday. The complainant accepted the suggestion. The appellant left and returned after 30 minutes with a bottle of white wine. The complainant reluctantly took the wine for a toast because she preferred red wine to white wine.

After a while, the conversation and the merry-making changed into an unfriendly and threatening situation. As soon as the appellant finished drinking his glass, he threw it to the wall breaking it in the process. She asked him why he did that and requested him to pick up the broken pieces but he refused. He instead ordered her to pick them herself. He took the bottom of the glass with pointed sharp ends and threatened to destroy her face with it. She realized that she was in danger. She attempted to run to the door but the appellant kept her back by holding her by the hair. He slapped her on the face and consequently she fell down unconscious. He pulled her up. He sat on the ground chair and commanded her to take off his shoes which she complied. He stood up. He started to tear her blouse.

She beseeched him not to do something which he could regret later. He ordered her to unbotton her blouse. She also complied. He ordered her to undress by taking off the jeans trousers. Whenever she resisted he spat on her so she complied and undressed. The appellant started undressing himself and made her to undress his trousers. She took off her innerwear and the appellant raped her.

In her evidence, the complainant stated that the appellant forced his penis into her vagina to and fro. She was petrified and did not struggle. The appellant however never ejaculated. He suddenly stood up and took her to the living room. He started putting his penis into her vagina and told her that she was not moist. There was a knock at the door. She jumped to the door. There was nobody there. The appellant started talking to him. She pleaded with the person to help her as the appellant was raping her.

The appellant pushed the door and grabbed her by the neck and pushed her back into the room and slammed her on the bed and raped her the second time. He told her that she will not report on duty as he would keep her and kill her there. The appellant said that he would use an electric iron box as a weapon. As he was about to reach it, there was another knock at the door. The appellant opened the door. The complainant took advantage of the appellant going to the door, ran out of the room through the back door naked and went to the manager's house. The manager's wife gave her a '*kanga*' to wrap up herself. The manager with other members of staff took her to the police station and then to hospital. The complainant in cross-examination denied of having previously had sexual intercourse with the appellant. She regarded him as a brother and a friend.

The doctor's evidence was that she examined the complainant but could find no tears or stains on the complainant's clothes. However, there were bruises over the lower right side of the neck. There were scratch marks on the left lower arm. There was a small cut wound in dimension 2x2x1/2 inch.

On physical examination of the vulva the hymen was found broken but not bleeding. The vagina and labia majora were normal. The labia minora had no injury. There was no discharge. The vagina swab was not stained with semen. The P3 form was completed and produced in evidence.

The appellant's defence was a denial of the charge. He stated that the complainant was well known to her, and they were friends. They had an affair and used to make love together. He usually visited her in her room after work and that she used to open the door for him.

On December 12, 1986 they had a birthday party between 2 pm and 8 pm. There were many friends and there was a lot of drink. He could not recall having gone to the lodge. He could not recall whatever happened that night.

Mr Mungai for the appellant argued the second ground of appeal as the main ground in the appeal. He stated that it is trite law, which we do not dispute, that corroboration in sexual offences is essential. He further stated that corroboration could not be found in the complainant's evidence because whatever state of distress she was in only proved consistency. He referred to the case of *Abasi Kibazo v Uganda* [1965] EALR 507 where it was held that the trial judge placed far greater reliance on the evidence of the

complainant than was desirable in view of the contradiction and falsehoods in her evidence. In the case cited, there were contradictions and false evidence. In the present appeal, there is no contradiction of false evidence by the complainant shown by the appellant. The complainant's evidence was corroborated in part by the appellant in his unsworn statement after office hours and that she used to open the door for him. This shows that the complainant knew the appellant very well and that she was not afraid when he allowed the appellant into the cottage that night. Yet the appellant could not remember what happened that night of December 12, 1986. He could not remember whether he visited the complainant at her lodge as usual. This suggests that he was too drunk to be able to go to the lodge that night. He could not remember where he went after the party at 8.00 pm, but he remembers that the party went up to 8.00 pm. But whether he went to the lodge or whether he remained at his mother's home after 8.00 pm he couldn't remember. Yet the police could not find him after the report was made that night until after three days.

In the same authority cited to us, *Kibozo v Uganda* the Court of Appeal for Eastern Africa confirmed the trial judge's finding based on the authorities of *R v Zieliski* (1950) 34 Cr App R 193 and *R v Alan Redpath* (1962) 45 Cr App R 319 to the effect that in sexual offences the distressed condition of the complainant's evidence, but that this would depend upon the circumstances of the case and the evidence.

In the case of *R v Alan Redpath* the Lord Chief Justice stated as follows:

> "It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complainant. The girl making it might well put on an act and simulate distress."

The condition in which the complainant appeared at the hotel manager's house naked, distressed, terrified and reported to him how she was attacked by the appellant is not only the evidence of consistency. The manager also gave evidence that he saw bruises on the complainant's face and chest. All that was sufficient evidence of corroboration of the complainant's evidence. The injuries are also capable of displacing the suggestion that the complainant consented to making love with the appellant. There is concurring findings by the lower courts of physical stature of the appellant who appeared in court in his own dresses since prison uniform could not fit him. This also explains the complainant's evidence that she had to comply with the appellant's command because of fear of imminent danger she expected had she resisted the appellant's command.

Corroboration could also be found in the doctor's evidence on her findings when she examined the complainant. The scratch marks, bruises, pinkish four finger marks, a small cut and broken hymen although there was no bleeding or semen, is an indication of assault which corroborates the complainant's evidence.

We agree with Mr Mungai that the government analyst report could not be relied on as the chain of evidence was broken. However, the report could be taken in evidence under section 77 of the Evidence Act (cap 80).

Mr Mungai complains that the appellant's defence was not considered at all. The defence was considered by both the trial and the appellate courts. The trial court in rejecting the evidence of blackout, stated that, if the appellant was saying that he was too drunk to remember anything, then this could not be a defence since it could imply insanity which was not the case. The High Court rightly rejected the appellant's defence. Likewisewe dismiss this ground because we find that it was rightly considered and rejected.

Grounds 1 and 4, do not raise any points of law. The same grounds were raised on first appeal and dealt with.

Having considered the arguments by the counsel for the appellant and the learned state counsel, we find that there was corroboration in the complainant's evidence as required in law. The appellant was rightly convicted. This appeal is dismissed. That is the order of the court.

Dated and delivered at Nakuru this 18 th day of October , 988

J.O. NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR