



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox JJA & Platt Ag JA)

CRIMINAL APPEAL NO. 147 OF 1985

BETWEEN

MALONZA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, O’Kubasu & Aluoch JJ)

JUDGMENT

The appellant appeals a second time to this court. His first appeal was dismissed. Thus the appellant’s conviction for rape contrary to section 140 of the Penal Code and sentence of 20 month’s imprisonment was confirmed. He has now served his sentence. But his conviction is a matter of importance to him.

Mr Onyango Otieno representing the appellant presented his case so well, that learned state counsel was persuaded not to support the appellant’s conviction. Unfortunately we are not of that opinion. Even though it must be conceded that the line of argument in the judgment of either of the lower courts is sometimes difficult to follow, the findings of the trial court will repay careful study.

It is permissible to state that without doubt both courts below found that the appellant had taken the 15 year old complainant J N to his house in the police lines on the night of January 9, 1983 and that they slept together in one room. During the night the complainant alleged that the appellant had raped her, a fact that the appellant denied. The next day she was found by her mother to have been sexually interfered with as her mother thought, and this was confirmed by the medical evidence. Penetration of some sort was proved by the rupture of the hymen. There was no direct medical or analytical evidence connecting the appellant with the defilement of the complainant. There was the allegation of the complainant, the opportunity presented by these two people sleeping together in one room, and the torn under-pants left behind by the complainant in the appellant’s room. The appellant washed the sheets that were on his bed the next morning. They were seized freshly washed from the appellant’s house and presented at the trial many months later in that condition.

The learned magistrate accepted the complainant’s account of what happened, and found it reasonable in all its aspects. Young J had been with her sister T N, at the family kiosk, when T had been arrested during a police raid for not wearing an apron. It was night time and J went to the police station with T. But while T was detained in the cells, J was free and complaining that she had nowhere to go. She was put in a land rover where she found the appellant who was the driver, and he gave the complainant a bed in his house for the night. Whilst another police officer thought this was safe because he had seen the appellant’s wife

that morning, the appellant stated in his inquiry statement that his wife had left that day. It seemed to the trial court that the predicament J found herself in, unable to be with her sister, and unable to go home or to anyone she knew, would leave her with no alternative but to go to the appellant's house for the night. He thought that as J had been taken in police land rover with her sister, the police would accommodate her safely for the night. He further found that absence of cries for help was due to the appellant's threats.

There was little she could do to resist considering her age and size. The learned magistrate noted that no complaint was made immediately. J however took the Kshs 10 the appellant gave her for her bus fare and went home. Her mother was not there and J slept until evening when her mother returned. J then told her mother.

There is no doubt that J's police statement is quite consistent with the state of her underpants which were in the appellant's house. She left them behind, because they could not be worn, the elastic having been broken. The nature of her wounds was consistent with forceable sexual intercourse and their age as described by the doctor fitted in with her account. All around the lower courts were satisfied with J's credibility.

The next step was to look for corroboration. The High Court quoted extracts from *Chila vs Rep* [1967] EA 722 and *Margret vs Rep* (1976) KLR 267. It is clear that without setting out the correct approach as indicated in *Chila*, the trial court found corroboration in opportunity. We must presume that the High Court did not consider such evidence to afford corroboration, but nevertheless found that the conviction was sound without it. The most important issue on the appeal is whether opportunity can afford corroboration, because the trial court in effect knew it ought to look for corroboration, and found it. It is no use to obscure these issues as the High Court appears to have done.

The value to be placed on opportunity was explained by the eminent Scottish Judge Lord Dunedin, which the Court of Appeal for Eastern Africa accepted in *R vs Erusani Sekni & Another* (1947) EACA 74 at page 76 Ainley, J giving the judgment of the court remarked:-

"This idea has been expressed in the Scottish case *Dawson vs Mckenzie* 45 SLR page 474 by Lord Dunedin, where he says "mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves amount to corroboration."

Lord Dunedin pointed to "circumstances and locality". No doubt each case will depend upon its own merits, and that these two considerations will not prove to be exclusive. They are however sufficient for the purposes of this case. The appellant took this young girl to his house in the absence of his wife. An upright policeman would not have done that; he would know that that would attract suspicion and alarm, and that if Sergeant Gitau and Corporal Davis had known that the appellant's wife had left, they would not have thought that "safe".

The appellant would not have been permitted to harbour the complainant. He was moreover intent on keeping her captive. He locked her in his house while he completed his duties. If further driving was to be done, surely the police could have taken the girl near her house. Later on there was no difficulty in Corporal Davis going to J's house. The raids went on until 2.00 am. The conclusion must be that the appellant created this opportunity; it was not proper for him to harbour the girl in the absence of his wife; it was not necessary as the girl could have been taken home; and the opportunity could only have been created for the purpose of lust. In this case the self-created opportunity corroborated the complainant's story. This may be strengthened by the fact that the girl alleged that she bled, and the appellant washed the sheet they had used, the next morning. In a word, the appellant engineered a situation in which he could take advantage of the girl, in the safety of his own house, and this situation, we think, is a very apt illustration of what Lord Dunedin had in mind. It is the exception to the general rule, that mere opportunity is not corroborative.

It follows then that the trial court acted within its rights to rely on opportunity in this particular case, and

the High Court missed this point in its judgment. The High Court ought to have faced up to its conviction. If it thought there was no corroboration, it should have said so, and give reasons why it was safe to rely on the evidence without corroboration. It was not possible to stray into the realm of circumstantial evidence. Circumstantial or not, was the surrounding evidence corroborative? If not, was the evidence strong enough to support the conviction if the magistrate relied on evidence which was not corroborative? But though the High Court's judgment lacks clear analysis and understanding, it did agree with the trial court on the facts found, and therefore we may substitute the reasoning which the High Court ought to have adopted, in supporting the decision of the trial court on the issue of corroboration.

The question of corroboration arising out of opportunity was really the main ground of the appeal. Various aspects of this question were taken in grounds 1,2, 3 and 6, and they have all been answered.

Two further questions were raised. The first was whether the learned magistrate was wrong to conclude that the sheets were washed a fact he could himself observe. It might seem at first sight that the magistrate was giving evidence himself. But after a moment's reflection it will be found that the learned magistrate did not misdirect himself. The police evidence was that the sheet used had been washed and folded neatly. The police had wanted to have it examined by the government analyst. They were foiled in this attempt because the government analyst did not examine it due to it having been washed. The sheet was kept in this state until produced as an exhibit. If the court sees a clean sheet rather than a used sheet, it may say that its observation bears out the evidence. It would certainly be expected to say that the sheet was not clean, if that were the fact, or that there were still stains on it. All that the magistrate was really saying was that as far as he could see the sheet appeared to him to be in a washed state, as the police witness conceded. While this state foiled further examination, it did tend to support the complainant's story that the appellant washed the sheet as she left his house. But it was not a matter of crucial importance.

The second point taken was the lack of complaint by the girl on the morning after the rape, and the excessive zeal exhibited by J's mother in making sure that the appellant was investigated. It is difficult to sympathise with Inspector Benjamin Wambura that it appeared odd to him that J's mother acted with excessive interest. Her daughter T had been kept in the cells overnight for not wearing an apron, a matter which does not immediately indicate high criminality. It might well arouse indignation that release on police bond was not thought sufficient. The next day T was fined. But a mother would naturally resent the unnecessary detention of T when the release of T would have secured the safety of J as well. The extraordinary part of this case is that outrage was not expected. At least it was merited.

Concerning the lack of report, it could not be expected that J would report to the policemen, who had left her to the appellant. She went home and went to sleep. When her mother came home, after securing the release of T from Kibera court, J told her. That would seem to have been a sufficient reaction from young J. At any rate, having looked at the evidence generally as to what happened, J's conduct does not strike us as invalidating her claim, nor casting doubt upon her evidence. It seems to us that the trial court was entitled to find J's evidence consistent, and to rely upon it.

It is our view therefore, which we have set out at some length in deference to counsel before us, that the appellant was justly convicted, and sentence rightly imposed. His appeals are therefore dismissed in their entirety.

Dated and Delivered in Nairobi this 7th day of March 1986.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR