REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, J A Chesoni and Nyarangi, Ag JJ A)

CRIMINAL APPEAL NO 32 OF 1984

BETWEEN

FRANCIS NDIRANGU GITAHI …… APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 24th May 1983 IN Criminal Appeal No 430 of 1982)

JUDGMENT OF THE COURT

The appellant was charged with rape, contrary to Section 140 of the Penal Code and alternatively with indecent Assault of Female, contrary to Section 144(1) of the Penal Code. The particulars of the two charges alleged that the appellant committed the offences on the 6th of August 1979 at [particulars withheld]in Nyandarua District of the Central Province.

In her evidence M.N.G, the complainant, said she was a pupil at [particulars withheld] Primary School during 1979, and that, on 6th August 1979 at 3 pm while returning home, she met the appellant at [particulars withheld] river. She knew him as a local resident. She said the appellant asked her where she was going. She kept quiet, whereupon the appellant held her by her arm, knocked her down and lay on top of her. She screamed and K came. The appellant tore her knickers and threw them to the river before K came, to find the appellant on top of her. The appellant ran away when K arrived. After the incident, she ran home and reported to her father, and she was later taken to hospital by the Kipiriri Police officers. The complainant did not state her age. Nor did her brother, PW2, who said that on 6th August 1979 he was returning from selling charcoal together with the complainant, and that the appellant, whom he knew before, got hold of the complainant at the arm and knocked her down. The complainant screamed and as he intervened, the appellant threatened him with a stick. PW2 ran away and called K. The two of them returned to the scene and found the appellant lying on top of the complainant. The appellant ran away on seeing K and PW2. K heard screams near [particulars withheld] river and a few minutes later, PW2 came and told him that the complainant was being

> “killed by someone at the river.”

K rushed towards the river, found a woolen bag and a sack lying on the ground, proceeded on and found the appellant lying on top of complainant. The appellant, who was known to K stood and disappeared into

the bush. K then led the complainant to her father. The complainant reported to her father that she had been raped by the appellant. Cross-examined, K replied that, the appellant tried to prevent him from coming to the scene by

> " waving me to go back as he lied on top of the complainant."

The complainant's father told the court, of his daughter's report of indecent assault by the appellant. He said she was crying when she was brought home. After the close of the prosecution's case, the trial magistrate stated that, he considered the charge of indecent assault had been established, and acquitted the appellant under Section 210 of the Criminal Procedure Code of the substantive charge. The magistrate yet, complied with Section 211 of the Criminal Procedure Code.

The appellant denied the charge in an unsworn statement. He agreed he met with the complainant , asked her for rope but she declined. PW2, who was with the complainant, ran away. The appellant said he then, went away and met K hurrying to scene. The appellant denied indecently assaulting the appellant and said he did no more, than touch the rope she had.

We would observe that, the trial magistrate misdirected himself in finding that the alternative charge of indecent assault contrary to Section 144(1) of the P.C. had been established, before putting the appellant on his defence, hearing his case and considering the entire evidence. But the trial magistrate complied with Section 211 of the Criminal Procedure Code, enquired of the appellant if he had any witnesses, and proceeded to take what appears to be a full note of what the appellant said, in an unsworn statement. It is clear from the judgment of the magistrate that, he considered the appellant's statement.

We are of the considered view that, the error we have referred to above did not in fact, occasion any failure of justice and is therefore, curable. The appellant was put on his defence and thereafter the trial magistrate complied with the procedure. The appellant was charged with a sexual offence. It was therefore, necessary as a matter of law, for the complainant's evidence to be corroborated. There was no such corroboration in respect of the charge of rape and the trial magistrate could not have convicted the appellant on the evidence. The complainant's evidence was corroborated in material particulars by K PW3. The appellant disappeared into the bush when he noticed PW3 coming towards him. That conduct considered together with the appellant's earlier attempt to discourage PW3 from getting nearer the scene by waving him to go back, is clear indication that the appellant had a guilty conscience and he knew that, what he was doing, was wrong.

We are satisfied, having considered the evidence and the appellant's unsworn statement together with the grounds of appeal, that the appellant was convicted on sound evidence. We reject his plea of autrefois acquit, raised for the first time in this Court. He had failed to turn up for trial in 1979. His appeal against conviction is dismissed. The sentence is lawful and is not manifestly excessive. We will not interfere with it. So the appeal against sentence is dismissed as well.

Delivered at Nairobi this 15th day of June 1984.

A A KNELLER

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JUDGE OF APPEAL

Z R CHESONI

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AG JUDGE OF APPEAL

J O NYARANGI

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AG JUDGE OF APPEAL

I certify that this is a true copy of the original

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DEPUTY REGISTRAR