REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

CORAM: CHUNGA C.J, AKIWUMI & KEIWUA, JJ.A.

CRIMINAL APPEAL NO. 104 OF 2000

BETWEEN

BERNARD KEBIBA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Kenya
at Kisii (Mr. Justice Waweru) dated 15th October, 1999

in

H.C.CR. APPEAL NO. 197 OF 1999)
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JUDGMENT OF THE COURT

The appellant B.K, (herein referred to as the appellant) , was tried and convicted by a Senior Resident Magistrate Kisii on a charge of rape contrary to section 144(1) of the Penal Code (Cap 63) Laws of Kenya.

The particulars of the charge alleged thus:-
"B.K on the 21st day of June 1998 at [particulars withheld] in Nyamira District within Nyanza Province had carnal knowledge of E.G.A without her consent."

There was also an alternative count of indecent assault of a minor Contrary To ***Section 144(1)*** of the Penal Code Cap.63 Laws of Kenya. However, no finding was made on this, the appellant having been found guilty on the main count of rape aforementioned.

Upon his conviction, the appellant was sentenced to a term of 10 years imprisonment with ten strokes of the cane by the trial Magistrate.

Following conviction and sentence the appellant brought his first appeal to the High Court Kisii which, on 15th October, 1999 dismissed the appeal and confirmed conviction and sTehnutse,n cet.he appellant has now brought before us a second appeal which must be against conviction only. His advocate Mr. Soire, in a petition filed in this court on 16th November, 2000, took only one point in his first ground

which stated as follows;

"The learned Judge erred and misdirecte d himself that there was sufficient evidence to corroborate the appellant's testimony."

Before going into the issue raised by Mr. Soire, the facts of the case upon which the appellant was convicted may be stated briefly as follows.

The complainant was a 16 year old school girl named E.G.A . She gave evidence in the trial court as prosecution witness number one and will be referred to in our judgment as the complainant.

On 21st June 1996, at about 3.00 pm, the complainant was travelling from a place called [particulars withheld] to visit a brother-inlaw at a place called[particulars withheld] . On the way, the complainant met the appellant who was, infact, related to her through marriage. The complainant said that the appellant dragged her to his nearby house where the appellant detained her until 23rd of June 1998. During this period, the complainant alleged that the appellant undressed her and kept away her dress and underwear in his house. She also said that during the same period the appellant had carnal knowledge of her three times without her consent. She did not scream, either when the appellant dragged her to his house on 21st of June 1998, or during the period the appellant detained her in his house, because, according to her, she was suffering from a cold.

On the 23rd of June, however, the complainant alleged that she managed to escape from the appellant's house when the appellant left early in the morning to go and bring water for them to wash. Because her clothes were locked up in the appellant's box, the complainant claimed that she escaped only in her petticoat and the appellant's sweater which she wore to cover the upper part of her body.

Having escaped from the appellant's house, the complainant went straight to her brother-in-law one B.O.M, who gave evidence in the trial court as prosecution witness number two. This witness confirmed that the complainant was dressed in the manner the complainant claimed as already indicated. The complainant reported what had happened to the witness and the witness, in turn, informed other relatives of the complainant whereupon, the local Assistant Chief was also eventually informed of the incident. The local Assistant Chief, one P M, gave evidence in the trial court as prosecution witness number five. He confirmed receipt of the complainant's report on 24th June, 1998. According to this witness, he visited the appellant's home and arrested him. He recovered the complainant's clothes namely a blouse and a skirt from the appellant and from the appellant's mother.

The complainant was eventually examined by a medical doctor and the normal P3 form was completed with the doctor's findings and signed accordingly. However, the doctor was not called to give evidence in the trial court and the P3 form came to be produced only by a police officer. According to the form the following findings were recorded by the doctor:-

> "(a) A White Discharge
>
> (b) Epithelial Cells
>
> (c) Yeast Cells
>
> (d) No spermatozoa."

As the doctor was not called to give evidence, the findings as shown in the proceeding paragraph remained unexplained. We observe that, in cases of this kind, involving evidence of medical or technical nature, there is always a desirability to call the doctor or the expert concerned to give evidence in the trial and to explain whatever needs to be explained. Although this is not mandatory as Mr. Gacivih submitted before us, the need for it is more than obvious for the assistance of the court and, it must not be forgotten that the onus is on the prosecution to prove its case beyond reasonable doubt and therefore to explain, through expert witnesses, all matters which require explanation.

In his unsworn statement the appellant denied the charge. He said he was in the field working with his wife and three days later the local Assistant Chief arrested him. He said he was medically examined but found with no infection.

This was, indeed, a sexual offence. The only issue taken and argued before us by the appellant's counsel was on corroboration. He submitted that the learned trial Magistrate and the learned High Court Judge on first appeal, erred in finding that there was adequate evidence to corroborate the testimony of the complainant. He emphasised the prosecution's failure to call the doctor who examined the complainant as a witness to explain the findings on the P3 form. He pointed out that what the two courts below relied on as corroboration, was too weak and inadequate to provide corroboration to the evidence of the complainant.

Mr. Gaci vih the Senior Principle State Counsel who appeared for the state in the appeal, supported the conviction and the sentence though we should observe at the very outset, that, on second appeal, sentence is not in issue before us unless it was an illegal sentence. There has been no suggestion or submission from Mr. Soire for the appellant that the sentence was illegal or irregular and, therefore, we cannot entertain an appeal on it.

On conviction, Mr. Gacivih submitted that failure to call the doctor who examined the complainant was not fatal to the prosecution case. According to him it was not mandatory to call the doctor as there was overwhelming evidence to support the charge of rape against the appellant. Mr Gacivih emphasised that the requirement for corroboration was a rule of practice only and in the present case, according to him, there was sufficient evidence to corroborate the complainant's testimony. He referred, in this connection, to the complainant's clothes which were found by the Assistant Chief in the appellant's house. He also referred to the manner the complainant was dressed when she fled from the appellant's house. It was Mr. Gacivih's submission that the combined effect of all these factors provided full and adequate corroboration.

The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant.

Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result.

In the present appeal this is what the learned trial magistrate said on corroboration;

"I find no danger therefore, that the need for corroboration is meant to address. All the same, I find sufficient corroboration from evidence of PW2, PW3 a nd PW5. The defence raised is untrue from the way the evidence is adduced by prosecution."

Clearly, the learned trial magistrate was alive to the need of corroboration. Clearly, he did not treat the case as one where he was prepared to convict without corroboration. He therefore, looked for it and believed to have found it in the evidence of the witnesses he mentioned namely PW2, PW3 and PW5.

We repeat what we said earlier in this judgment. Where the trial court forms an opinion that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence and if the court finds it, the court must set it out expressly in its judgment. That was not done by the trial

Magistrate in this case. It is not enough merely to say that corroboration lies in the evidence of certain witnesses. The High Court, on first appeal, said this on corroboration:

"In sexual offenses corroboration of the complainant's testimony is necessary and desirable but not mandatory. The trial court must however, warn itself of the danger of acting on the uncorroborated testimony of the complainant. But having so warned itself the trial court may convict in the absence of corroboration if it is satisfied that the complainant's evidence is truthful. Where the trial court does not warn itself as above, the conviction will usually be quashed unless the appellate court is satisfied that there has been no failure of justice."

We must say that the High Court's direction on corroboration was impeccable. Indeed, the High Court relied on the reported case of ***CHILLA & ANOTHER VS REPUBLIC (1967) E.A.722.***

Having directed itself as above, the High Court proceeded to rely on the recovery by the Assistant Chief of the complainant's clothes from the appellant's house. The High Court also relied on the manner the complainant was dressed when she fled the appellant's house on 23rd June, 1998.

There is no doubt that circumstantial evidence can provide adequate corroboration. Indeed, in the great majority of criminal cases this is what happens whenever corroboration is an issue. Here therefore, we understand the High Court, on first appeal, to be relying on circumstantial evidence to provide corroboration of the complainant's evidence.

We should have been disposed to agree with the High Court but for what it said subsequently in the judgment as follows: "It is true that there was no corroboration of the complainant's testimony with regard to lack of consent and penetration, both essential ingredients of the offence of rape."

Clearly, the High Court found no corroboration that the appellant had carnal knowledge of the complainant without her consent. We bear in mind that the complainant was emphatic in her evidence that she was raped without her consent by the appellant three times during the two nights of her detention in the appellant's house. We also bear in mind that the complainant was examined medically by the doctor on 24th June, 1998 and that certain findings which we mentioned earlier in this judgment were made. However, as we pointed out earlier, the doctor who examined the complainant and completed the P3 form was not called and did not give evidence in the trial court. Consequently the meaning and significance of the findings in the P3 form remained unexplained and could not provide corroboration that the appellant had sexual intercourse with the complainant.

The result therefore is that there was no corroboration on two essential ingredients of the offence. On that finding we agree with the High Court on first appeal.

Having considered everything said before us therefore, we arrive at the conclusion that the conviction was unsafe, for the reasons we have given in this judgment. We accordingly www.kenyalawreports.or.ke 10 allow the appeal, quash the conviction, set aside the sentence and order the appellant to be set free forthwith unless otherwise lawfully detained.

Dated and delivered at Kisumu this 22nd day of November, 2000.

B. CHUNGA

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CHIEF JUSTICE

A. M. AKIWUMI

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR