



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Criminal Appeal 84 of 2005

KASSIM ALI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Khaminwa J) dated 15/3/2005

in

H.C.CR.A NO 11 OF 2004

JUDGMENT OF THE COURT

The appellant was charged before the Chief Magistrate Mombasa with the main offence of rape contrary to **section 140** of the Penal Code and an alternative count of indecent assault contrary to **section 144 (1)** of the Penal Code. He was acquitted of the main offence of rape but convicted of the alternative offence for which he was sentenced to 10 years imprisonment with hard labour. His first appeal to the superior court was dismissed.

AA (PW1) the complainant, is a confessed brewer and seller of changaa, an illicit local brew. Her evidence which was accepted by the two courts below was briefly as follows:-

On 21/11/2002 at about 1.00 a.m the complainant was arrested by two police officers from Changamwe Police Station in possession of a 5 – litre jerrican of changaa. She offered Kshs. 1,000 as a bribe to the police to buy her freedom but they refused demanding Kshs. 5,000/- which the complainant did not have. She was taken to a police booth at Jomvu where she found two other police officers. She was told to sit down to await transport to take her to Changamwe Police Station. At about 3.00a.m the police took the Kshs. 1,000 she had offered before and released her to go home to get the balance of Kshs. 4,000 in order to have the changaa released to her. The police assured the complainant that the appellant who had just come to the police booth would safely escort her to her home. The complainant and the appellant started walking towards the house of the complainant about half-hour walk from the police booth. On the way the appellant removed a knife and diverted the complainant into a foot path. The appellant then pushed the complainant into the bush, knocked her down, tore her clothes and raped

her after which he went away. The complainant went to her house and immediately thereafter walked to the police booth to report the rape arriving at the police booth at about 5.45a.m. She found the four police officers still at the booth and reported the rape to them. The appellant came to the police booth ten minutes after and was arrested. The complainant was taken to hospital at 6.00 a.m and examined.

The appellant made unsworn statement at the trial. He denied raping the complainant. He explained that on the material day, on getting information that his younger brother Hamisi had been arrested by police, he went to the police booth at 6.00a.m to look for him and on arrival at the police booth, the complainant pounced on him saying that he had raped her.

Although the trial magistrate found the complainant to be a truthful witness, she nevertheless found that her evidence required corroboration as a matter of law which she found lacking leading to the acquittal of the appellant on the charge of rape. On the veracity of the evidence of the complainant ,the trial magistrate concluded:-

“the complainant in this case was an extremely eloquent witness. She was very truthful and described the events that led to her rape in great detail. She did not hide the fact that she brews changaa. She testified that she was arrested as she brewed her changaa and hauled to the Jomvu booth”

The trial magistrate in addition, found that although the complainant was examined by a doctor on 21/11/2002 when the offence was committed, the medical report was filled two months later by **Dr. Omar Said (PW4)** who is not the one who had examined the complainant. Indeed, Dr Omar Said admitted that the findings in the medical report that he prepared were made at the Coast General Hospital on the day the rape was reported. According to the report from the Coast General Hospital on which Dr Omar Said relied, spermatozoa was not detected and the complainant had no injuries. The original report was not however produced in the trial court. On the question of corroboration, the trial magistrate said:-

“The law requires corroboration in sexual offences. The corroboration would have come by way of medical evidence or if the police officers at the booth had not turned against the complainant and given evidence that was contrary to the allegation. The allegations which needed corroboration were that she had been arrested with changaa, that she had been given to the accused to escort her and that they knew who the accused was.”

On the alternative charge, the trial magistrate, believed the evidence of the complainant and found that the defence of the appellant had no merit.

The superior court (Khaminwa J) found that the evidence of the complainant did not need corroboration (by medical evidence) and that corroboration could be found in the surrounding circumstances: The learned Judge said in part:

“There is no need for corroboration in this case. The police placed the complainant in the hands of the appellant at night – they had no doubt that he had had sexual contact with the complainant. They had promised to take action against him if he mistreats her. Corroboration can as in this case be found around the circumstances surrounding the incident.

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The complainant produced the clothes which were torn as evidence that she was sexually assaulted by the applicant.”

There are seven grounds of appeal three of which raise relevant issues of law thus:-

“ 2. That the prosecution case has not no any (sic) sufficient independent corroborative evidence to incriminate the appellant.

3. The evidence of P.W.4 Dr. Said Omar Said totally belied of P.W.1’s false allegation of rape whereby failure of the same to be put into consideration in the below courts it occasioned pure prejudice upon the appellant.

7. That the two below courts erred in law and fact when they rejected the appellants unsworn defence in the absence of any reasonable cogent sufficient independent corroborative evidence.”

The rest of the grounds of appeal either raise matters of fact or of the credibility of the witnesses. Those matters cannot be considered at this level.

It is apparent that the trial magistrate, with respect, misdirected herself on the law on corroboration in sexual offences and the nature of such corroboration. It is clear that the appellant was acquitted of the charge of rape solely on the ground that the evidence of the complainant required corroboration as a matter of law.

The correct legal position is stated in the case of **Chila v. Republic [1967] E.A 722 at page 723 para C:**

“The Judge should warn ... himself of the danger of acting on 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 court is satisfied that there has been no failure of justice.”

Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see **Ongweya v. Republic [1964] EA 129**).

So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

However as we have said above, the appellant was acquitted, wrongly in our view, of the offence of rape. He was convicted of the alternative charge of indecent assault which we now consider.

The same principles of law stated in **Chila V Republic** apply to the offence of indecent assault on females.

In the present case, there was concurrent findings of fact that the complainant was indecently assaulted by the appellant. Like the trial magistrate the superior court found:

“the evidence of complainant clear truthful and consistent.”

The complainant reported the offence to the police immediately and identified the appellant without hesitation when he arrived at the police booth. The complainant’s evidence was consistent with the report she made to **CPL. Lydia Chizi Mambo (P.W.3)**, the investigating officer immediately after the assault. The torn clothes of the appellant were produced as exhibits in court.

In this case the two courts below were satisfied that the complainant's evidence was consistent and truthful. Thus, the complainant's evidence proved the appellant's guilt to the required degree.

Moreover the complainant's evidence was sufficiently corroborated by circumstantial evidence as the superior court correctly found.

In the circumstances, we are satisfied that the superior court addressed itself correctly on the law and that there are no grounds for interfering with the concurrent findings of fact.

In the result this appeal has no merit and is dismissed.

Dated and delivered at Mombasa this 21st day of July 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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