IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, Nyarangi JJA & Chesoni Ag JA)

CRIMINAL APPEAL NO 158 OF 1984

BETWEEN

REPUBLIC.....APPELLANT

AND

FRANCIS OTIENO OYIER.....RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

The respondent, Francis Otieno Oyier, was charged with and convicted of rape on count 1 and assault causing actual bodily harm on count 2 contrary to sections 140 and 251 respectively of the Penal Code (cap 63) and sentenced to 7 years' imprisonment plus strokes of corporal punishment and 3 years' imprisonment on the first and second counts respectively. His first appeal against the conviction and sentence was allowed by the High Court (Schofield J). This second appeal brought by the Republic is based on the following four grounds:

1. The learned judge erred in law in allowing the appeal after finding corroboration in the appellant's own evidence and in the bruises sustained by the complainant.
2. The learned judge erred in law in allowing the appeal after finding that the learned magistrate had properly addressed his mind to all the correct legal principles.
3. The learned judge erred in law in speculating on the reasons as to why the complainant didn't report the rape to the matron, when there was evidence explaining the reasons for not reporting.
4. The learned judge erred in law in that he didn't re-evaluate the evidence as a whole and proceeded to re-evaluate the defence in isolation. And he further erred in law in not making independent findings of fact as required of a 1st appeal court.

The complainant was a 19 year school girl and she was going back to school at [particulars withheld] Girls School when she got stranded at Ndori for lack of transport. She and two other women asked the respondent, a school teacher, to give them a lift to their various destinations and he agreed. The respondent was with another man in his car and after dropping the other two women, he, the other man and the complainant returned to Ndori because the respondent wanted to have a drink. They went to a bar where they had some beers. The complainant who said that they had persuaded her to go in the bar with them said that she never took any drink but the respondent and Otieno Ogondi Rangar (DW 2) told

the Court that she took beer.

At about 10.30 pm, the respondent, the other man and the complainant set off for the complainant's school which was about 9 kms away. It had rained that day and so after going for about 3 1/2 Kms, the respondent decided to turn and go back to his house at Ndori because he feared his car getting stuck in mud on the way to the school.

When they returned to Ndori, they went to a room where he persuaded the complainant and she agreed to share a bed with him although initially she had refused and wanted to sleep on the floor on her towel. He undertook not to ask the complainant for sex, but the promise was shortlived as before long, he asked her to remove her clothes and when she refused to comply he used physical violence which included slapping and punching the complainant and ended up by forcibly having sexual intercourse with her twice. The first time he had sexual intercourse with the complainant when she still had her pants on but the second time he had removed her pants. The respondent was naked and when the complainant told him that she wanted to go out to the latrine, he got up to put on clothes so as to escort her but the complainant who did not wait for him slipped out of the house into the dark and ran to the bush where she slept until the next morning when the respondent found her along the road and asked her to go back to his house and collect her belongings, which she did and after that he drove her to school. During her escape that night, the complainant was injured on the legs by a barbed wire. The respondent, according to her story, apologized to her for what had happened the previous night.

The complainant went through her ordeal the night of May 7, 1984 and on May 8, she went back to school, when at 6 pm she told the school matron that she was not feeling well and she had hurt her leg. The matron gave her pain-killers. On 10th May, she sent for the Deputy Headmistress to whom she revealed that she had been raped by a school master.

The respondent admitted that he had sexual intercourse with the complainant, but said that they were friends and she consented to the act and that was the fourth occasion they had made love. The necessary corroboration in sexual offence was therefore afforded by the respondent's own evidence. That was corroboration of the complainant's evidence that the respondent had carnal knowledge of her. The prosecution still had to prove the second element of the offence of rape, and that is lack of consent for as the predecessor of this Court said in *Upar v Uganda* [1971] EA 98, lack of consent always remains an essential element of the crime of rape and so it should be specifically dealt with.

The learned magistrate had the correct appreciation of the *mens rea* in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: *DPP v Morgan* (1975) 61 Cr Appl. R 136 HL The prosecution must prove either that the complainant physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist; *Archbold Criminal Pleading Evidence and Practice* 40th Edn pp 1411 – 1412 paragraph 2881 and *R v Harwood K* (1966) 50 CR App R 56. So if a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.

Mr Behan argued that there was no corroboration of the allegation that there was lack of consent. However, there was evidence from the complainant, which the magistrate believed, that she resisted physically and was beaten and punched by the respondent. The respondent himself said that she objected to intercourse because she feared she might get pregnant since she was not safe. It is apparent from the evidence on record that she physically resisted, and if she yielded she did so through fear of bodily harm or through duress. The first round of intercourse was when she was still had her

pants on which negates consent; however the pants had been removed during the second round. Nevertheless it was no excuse that she consented after the act. The conduct of the complainant in taking the risk of running from the respondent's house at night without her property was circumstantial evidence which strongly corroborated the lack of consent on her part and so was the circumstantial evidence in the conduct of the respondent in making no attempt to look for her that night when she ran away. This latter factor shows that whatever he did, including having intercourse with the girl, was without caring whether she consented or not. He said that the following day her clothes were soiled and she had been injured by some wire which was evidence of her running away in fear from some danger and we presume the danger of intercouse without her consent, the danger of physical harm if she did not submit to intercourse. There was abundant evidence from which the prosecution proved lack of consent beyond reasonable doubt. They also proved the fact of the unlawful sexual intercourse.

In a rape case the fact that a complaint is made by the victim shortly after the alleged offence is merely evidence of the consistency of the conduct of the victim with her evidence given at the trial and it cannot be regarded as corroboration of the story of the complainant; *Archbold*, *Ibid*, P 1413 para 2884; *R v Coulthread* 24 Cr App R 44. Mr Behan for the respondent agreed to this proposition but argued that the delay of two whole days before the complainant told the school authorities about the alleged rape dented her evidence. The complainant told the Deputy Headmistress about the incident on the third day from the date it took place. That was not an unreasonable delay as the learned judge appeared to have thought. She said that she was embarrassed and this was shown in her act of sending away a schoolmate who called the Deputy Headmistress for her before she told the latter about the rape.

Mr Behan contended that the complainant was untruthful. For example she said that she did not know the respondent when in fact she knew his name; she contradicted the doctor's evidence that she was not a virgin when she testified that no man had carnally known her before and she, in fact, admitted in court that she deceived the respondent that she had a relative at Ndori. These are matters of credibility and this being a second appeal, it is not for us to interfere with lower court's findings unless there are errors of law none of which have been disclosed. The trial magistrate found that the complainant was a truthful witness and the learned judge did not specifically find otherwise.

Furthermore the complainant's virginity could have been lost during the rape and even if not then the doctor was not asked to say what could have caused the loss of her virginity. She deliberately lied to the respondent about having a relative of Ndori in order to earn herself an escape from his claws but the trick failed.

As to the count on assault causing actual bodily harm, the complainant's evidence of being beaten and punched by the respondent and the injury to her back testified to by the doctor who examined her were not seriously challenged and the trial magistrate believed that evidence. It was a finding based on credibility of the witnesses and unless no reasonable tribunal could make such finding, the first appellate Court had to respect it. It was not shown that the magistrate erred in his findings, or that he acted on wrong principles. The respondent was properly convicted and consequently the learned judge erred in law in allowing the first appeal. The upshot is that we allow the appeal, set aside the High Court judgment and restore the resident magistrate's decision convicting the respondent on the two counts. We remit the case back to the High Court for consideration of the sentence by another judge. The respondent has been out on bail for a long time and the lower court will undoubtedly consider this factor, but in the meantime the respondent shall be held in custody. Those shall be the orders of this court.

Hancox JA & Nyarangi JA. We would add that we hope the judge to whom this case comes on the order of remission, which the majority of the court was made, will bear in mind when considering sentence the respondent's 13 years of professional life, his family circumstances and all that this

conviction will mean to him and, moreover, that he has had this charge hanging over him for well over a year.

Dated and delivered at Kisumu this 25th day of June , 1985.

A.R.W HANCOX

.....

JUDGE OF APPEAL

J.O NYARANGI

.....

Ag. JUDGE OF APPEAL

Z.R CHESONI

.....

Ag.JUDGE OF APPEAL

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

DEPUTY REGISTRAR