
Mukungu v Republic (2003) AHRLR 175 (KeCA 2003)

Mukungu v Republic

Court of Appeal, 30 January 2003

Judges: Kwach, Bosire and O'Kubasu

Previously reported: [2002] 2 EA 482 (CAK)

Constitutionality of the requirement of corroboration in for sexual offences

Evidence (corroboration regarding sexual offences, 9-14)

Equality, non-discrimination (discrimination on the grounds of sex, 12-15)

Kwach, Bosire and O'Kubasu JJA

[1.] Following his trial by the senior resident magistrate at Voi, for the offence of rape contrary to section 140 of the Penal Code, John Mwashighadi Mukungu, the appellant, was convicted and sentenced to ten years imprisonment with hard labour and was ordered to receive two strokes

of the cane. His first appeal to the Superior Court was dismissed on 28 February 2002 by GA Omwitsa, a commissioner of Assize. Being aggrieved by the said dismissal he brought the present appeal. This being a second appeal only issues of law may be canvassed.

[2.] The alleged offence was committed on 20 October 2000 at about 7:30 pm at Mwakingali estate in Taita Taveta district of the Coast Province. Clemence Wawuda, the complainant, was returning home from Voi township after some national celebrations, when she was accosted by the appellant who dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the appellant left her inside the house and went away after bolting the door from outside to prevent the complainant from escaping. Shortly later the appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him.

[3.] It was the complainant's testimony that several people saw the appellant pulling her to the house where he raped her, but when the complainant talked to them they did not bother to go to her assistance. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder who on account of ill health could not assist her. He, however, asked his wife and children to escort her to her house, which they did. She made a report the next day, to Phoebe Nanzala, a police constable, at Voi police station, who later arrested the appellant and charged him with the offence. Phoebe testified that the complainant reported to her that she had been raped by two men. Her evidence is however silent as to how she was able to know that the appellant was one of the two men who raped the complainant. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The complainant testified that the appellant was known to her before although not by name.

[4.] The complainant was medically examined. Her urine and a vaginal swabs were analysed. Some pus cells and spermatozoa were noted. Those confirmed she had recently had sexual intercourse. The appellant was not however, medically examined. So medical evidence did not connect him to the alleged offence.

[5.] The trial magistrate believed the complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the complainant whom she only knew by appearance. She observed that the complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist, and with her assistance they tried in vain to call the police. The

complainant allegedly gave her the appellant's name but which she could not recall. Nyange corroborated Jenta's story on the complainant's appearance on the material night. Those were circumstances which supported her story that she had been raped.

[6.] On the basis of the evidence we have outlined the trial magistrate found the appellant guilty, convicted him and thereafter sentenced him as we earlier stated. The Superior Court on first appeal, affirmed the decision and hence the present appeal.

[7.] The only point of law raised in the appellant's memorandum of appeal is that his conviction was based on uncorroborated evidence.

[8.] The other grounds, which include a complaint that the sentence imposed on the appellant was harsh, are clearly issues of fact. Under the provisions of section 361(1) of the Criminal Procedure Code, second appeals to this Court must only relate to matters of law. So this Court lacks the jurisdiction to deal with them.

[9.] In *Mutonyi v Republic* [1982] KLR 203, this Court reiterated the definition of the term 'corroboration'. The Court said:

an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it see *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61.

[10.] Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant. However, there have been instances, as in *Republic v Cherop A Kinei and Another* [1936] 3 EACA 124 and *Chila v Republic* [1967] EA 722 at 723 (CA), in which it was held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied, after duly warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence.

[11.] The need for corroboration in sexual offences appears to be based on what the Superior Court restated in *Maina v Republic* [1970] EA 370. There the Court said:

Before leaving the matter of the first two counts we would state in the hope it will be of use to the Magistrate on future occasions, as pointed out by the Court of Appeal in *Henry and Manning v Republic* 53 criminal appeal rep 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case.

[12.] It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences testimony of women and girls should be treated differently. Perhaps there was nothing objectionable about that discriminative treatment before Kenya became a republic in 1964. The Republic Constitution has various provisions against discriminatory treatment on the basis of, inter alia, race and sex. Section 82 of the Constitution, as material, provides as follows:

(2) Subject to subsections (6), (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[13.] Subsections (6), (8) and (9) are not relevant to the issue we are dealing with here. The Constitution has no provision authorising any discriminatory treatment of witnesses particularly with regard to matters of credibility. It is noteworthy that even the Evidence Act (Chapter 80) Laws of Kenya, has no provision on the issue of corroboration of the testimony of adult women and girls. Section 124 thereof makes provision for corroboration of the evidence of children. It is understandable as in their case children may be of such a tender age as not to understand the duty of telling the truth. In any case the treatment given to children under the aforesaid section is to them as children irrespective of their sex or race.

[14.] For the foregoing reasons we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.

[15.] Returning to the facts of the present appeal, the complainant's condition when she was first seen by Jenta and Nyange, on the material night clearly showed that she was in shock and distraught. She was half naked as she had only a sweater tied round her waist. She was carrying her skirt and blouse. That was consistent with the story she gave to the two witnesses that she had been raped in a nearby house, and that she had just escaped further sexual assault. The trial magistrate correctly observed, that her conduct and appearance at the time she was explaining her ordeal to the two witnesses was consistent with a person who had left in a hurry and who had been sexually assaulted. No doubt that material corroborated the complainant's story that she had been raped. But that evidence in no way points to the appellant as the rapist. Nor does it or any other evidence on record save that of the complainant tend to connect him with the alleged crime. If we were to rely on existing authorities, the corroborative evidence falls short of that required to support a conviction for rape notwithstanding concurrent findings of fact by the trial and first appellate courts that the complainant was a witness of truth. With such a finding, had the charge against the appellant been murder, robbery or any other non-sexual offence the appellant's conviction would certainly be held to be sound. We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution.

[16.] In the instant case the trial magistrate and the first appellate court having believed the complainant that she knew the appellant before, although not by name, and considering that the appellant was with the complainant long enough in a room with ample light she clearly was able to recognise him as one of the two men who raped her. She was able to point him out to the

police. In those circumstances and in view of the clear provisions of the Constitution against discriminative treatment on account of sex, we think that the appellant was properly convicted of the offence of rape contrary to section 140 of the Penal Code. Consequently his appeal has no merit. It is accordingly dismissed in its entirety. We so order.