



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CRIMINAL APPEAL NO 122 OF 2005**

**HENRY KARANI NJOGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

On the 28<sup>th</sup> day of January 2005 about 3.30 p.m., A.W.M, hereinafter referred to as the complainant, then a form 3 student at K Secondary School was walking back to school from G trading centre. She took a path which cut through a coffee and tea plantation. While on her way, she heard somebody approach from behind her. He grabbed her by her ribs and she turned to see who it was. The person is said to have covered her eyes but not before she saw him. She said that she was able to identify him and described him as a “dark young man dressed in blue jeans and a red sleeveless T-shirt”. The young man covered her eyes and pulled her into the coffee plantation where he and 3 others raped her in turns. After the ordeal they left her in the plantation and fled. She gathered herself together and walked to school where she reported the matter to the principal who testified as PW2. The matter was also reported to the Area Assistant Chief and the police. Several men were arrested and taken to Kianyaga police station where they were charged with raping the complainant in the charge that read as hereunder

***1. HENRY KARANI NJOGU (Appellant) 2. DOUGLAS KAMAU NJIRU 3. HANIEL MUNENE NGARI 4. WYCLIFFE KINYA MBOGO:- On the 28<sup>th</sup> day of January 2005 in Kirinyaga District within Central Province, had carnal knowledge of A.W.M without her consent”.***

They all pleaded not guilty and the matter proceeded to full hearing following which the 3 others were acquitted but the Appellant herein was convicted and given a life imprisonment sentence. Predictably, being aggrieved by the said conviction and sentence, he filed this appeal. He proffered 5 home made grounds of Appeal. I shall not repeat the same here for purposes of this judgment. At the hearing of the Appeal, he filed a written submission to buttress the said grounds.

Surprisingly, Ms. Matiru Counsel for the state opposed this appeal and urged the court to dismiss it.

I need not re-evaluate the evidence adduced before the trial court because this Appeal must succeed on a point of law.

Firstly, the charge as particularized above was fatally and grossly defective. It is trite law that persons cannot be charged jointly for the offence of rape. The main ingredient in a charge of rape is the act of penetration. That act cannot be humanly performed jointly on one complainant. That is why I said at the beginning of this judgment that she was raped in turns. The charge should not therefore have been a joint charge. Each accused should have been charged in a separate count and not jointly. That alone would spell success for this Appeal.

Secondly, the charge is also fatally defective because as pointed out in the Court of Appeal decision of **ACHOKI VS REPUBLIC (2000) 2 EA 283** and many other subsequent decisions, a charge of rape must include the words “unlawful” and “without consent”. These words were clearly included in Section 139 of the penal code (now repealed) which defined the offence of rape.

For these 2 reasons, this Appeal must succeed. I allow the same and quash the conviction herein and set aside the sentence imposed by the learned trial magistrate. I therefore order that the Appellant herein be set at liberty unless he is otherwise lawfully held.

**W. KARANJA**

**JUDGE**

Signed by the above but delivered and dated at Embu this 24<sup>th</sup> day of February 2011 by:

**M. WARSAME**

**JUDGE**

**In the presence of :- The Appellant, Ms. Matiru for State.**