**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NYERI**

**CRIMINAL APPEAL 100 OF 2007**

**PETER MWAI KARIUKI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence in the Chief Magistrate's***

***Court at Nyeri in Criminal Case No. 4253 of 2005 by R. Nyakundi – C.M.)***

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

Commenting on how a charge of rape should be drawn and the particulars thereof given, the court of appeal in the case of **Daniel Nyareru Achoki v/s Republic, Cr. Appeal No. 6 of 2000** (unreported) once said:

"**..... So a charge of rape must allege in its particulars;**

**(i) That the act of sexual intercourse was unlawful.**

**(ii) That the act of sexual intercourse was without the consent of the woman or girl.**

**We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is "unlawful" and "without consent" and the prosecution would be well advised to use both whether the charge be one of rape under section 140 or attempted rape under section 141 of the Penal Code, the particulars must nevertheless state that attempted unlawful carnal knowledge was without consent of the woman ....."** It would appear from the foregoing that the inclusion of the words "unlawful" and "without consent" are mandatory in the particulars of a charge of rape. It would appear again that failure to state in the particulars of the charge those magic two words renders the charge fatally defective and beyond redemption.

In the circumstances of this case the appellant was charged, tried and convicted for the offence of rape contrary to section 140 of the penal code. The particulars of the charge were as follows:-

"**Peter Mwai Kariuki – on the 5th day of September 2005 at Nyeri District of the Central Province, had carnal knowledge of EN M without her consent....."**

The appellant pleaded not guilty to the charge and his trial ensued in earnest. The prosecution called a total of 4 witnesses. It was their case that **E N**, the complainant had been assigned some domestic chores

by her mother on the 5th September 2005. Upon finishing the duties she retired to bed at about 9 p.m. As she slept she felt someone touch her. That person then held her by the throat in a bid to strangle her. The same person removed her underpants and forcibly had sexual intercourse with her. The said ordeal went on for sometime despite the resistance put up by the complainant. In the course of the sexual ordeal, that person kept talking to her and it was then that she recognised the voice as that belonging to the appellant. The complainant went on to testify that she became unconscious and on coming round, the appellant had left and she screamed. Her mother, **J W** (PW3) responded to the screams, went to the complainant's house. The complainant told her that she had been sexually assaulted by the appellant. She observed the complainant's gentalia and noted that the complainant was bleeding therefrom. This prompted her to report the incident to the local assistant chief who in turn referred them to Kiamunyu Police Station. The report was received by PW4, **Cpl. Bernard Ndungu**. The police officer on booking the report took the complainant to Karatina District Hospital where she was examined and treated. Her P3 form was duly completed and tendered in Evidence by PW1, **Dr. Kahindi**. In his prognosis there was evidence of sexual encounter involving the complainant. The appellant was then arrested and charged.

Put on his defence at the close of the prosecution case, the appellant elected to give unsworn testimony. He denied the charge and attributed the complaint against him to the death of cows owned by the complainant's mother and which he had been detailed to take care of. The allegation according to the appellant was that the complainant's mother thought and believed that he had bewitched the cows.

The trial court having carefully weighed the evidence presented by the prosecution against the defence put forth by the appellant found for the prosecution, convicted the appellant and sentenced him to life imprisonment. It is against that conviction and sentence that the appellant preferred this appeal. The appellant has raised several grounds of appeal which I need not reproduce them here as I believe the decision of this appeal shall turn on whether the charge upon which the appellant was tried and convicted was proper or defective.

As I have stated at the beginning of this judgment and indeed reproduced verbatim, the particulars of the charge, one o the magical words "unlawful" was missing in the particulars of the charge sheet. It did not form part of the particulars of the charge. The omission or failure by those charged with drawing up a charge sheet of this nature to include the word "unlawful" in the particulars of the offence of rape rendered the charge sheet a nullity and or defective. This holding is in tandem with the decision of the court of appeal in the case of **Daniel Nyareru Achoki** (supra).

I appreciate that neither the appellant nor **Mr. Orinda**, learned Senior Principal State Counsel captured this issue in their respective submissions before this court. However since it is a point of law, I cannot simply ignore it. Indeed and on the authorities, the law is settled on the issue.

That being the case, I would allow the appeal, quash the conviction and set aside the sentence imposed.

Should I order a retrial? I do not think so as by so ordering, I will have accorded the prosecution an opportunity to correct their mistakes. That is not the purpose for a retrial.

The appellant should thus be set at liberty forthwith unless he is otherwise lawfully held.

***Dated and delivered at Nyeri this 29th day of January 2009***

**M. S. A. MAKHANDIA**

**JUDGE**