



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 737 of 2006

JOE MWANGI NJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original decision in Thika Senior Principal Magistrate's Criminal Case No. 278 of 2005 – S. Mokuu, SRM)

JUDGMENT

JOE MWANGI NJIRU, the appellant, was charged before the subordinate court with rape contrary to section 140 of the Penal Code. The particulars of offence were that on the 14th November 2004 at Makongeni Estate in Thika District within the Central Province had carnal knowledge of I N K without her consent. He was charged, in the alternative, with indecent assault contrary to section 144(1) of the Penal Code. The particulars of offence were that on 14th November 2004 at Thika District within the Central Province unlawfully and indecently assaulted I N K by touching her private parts.

After a full trial, he was acquitted of the main count of rape. He was however, convicted of the alternative charge of indecent assault and sentenced to 10 years imprisonment. Having been dissatisfied with the decision of the subordinate court, he has appealed to this court through his counsel M/s Muturi Njoroge & Company advocates. At the hearing of the appeal, Mr. Nyachoti for the appellant made submissions in support of the appeal.

The learned State Counsel, Mr. Makura, opposed the appeal. Counsel submitted that there was sufficient evidence to support the alternative charge of indecent assault, on which the appellant was convicted. Counsel contended that the prosecution had proved the case against the appellant beyond any reasonable doubt.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see OKENO –vs- REPUBLIC [1972] EA 32.

I have evaluated the evidence on record. In acquitting the appellant on the main count of rape, the learned Magistrate stated that the charge sheet did not state that the carnal knowledge was “unlawful”. It was therefore an acquitted on technical grounds. The acquitted was not based on the weight of the evidence. The evidence on record, infact, did not prove that the appellant committed the offence of rape. First of all, there was no proof of sexual penetration on or around 14/11/2004. The medical examination

on which the charge was based, was done on 17/12/2004, which was more than a month afterwards. Secondly, key witnesses, such as the watchman, were not called to testify. That witness (watchman) would have confirmed whether indeed he saw, noticed, or heard anything that could suggest forceful sexual intercourse. In my view, it is important, where two adults willingly go into a room together, late at night and apparently to spend the night, to have tangible evidence of forceful sexual intercourse, before a court can convict of rape. That evidence was absent in our present case.

I now turn to the offence on which the appellant was convicted. There is no evidence of indecent assault. Private parts have been defined as the genital organs see – Concise Oxford English Dictionary Eleventh Edition Revised, which defines private parts as a person's genitals. The allegation that the appellant indecently touched the complainant's private parts, was an issue which depend on who to be believed between the evidence of one person as against the other. The appellant gave sworn evidence which was believable. Secondly, if indeed the two were to sleep together on the same bed, they were going to physically touch each other anyway. Again there would be need for real tangible evidence to be adduced by the prosecution which would have to bring out the particular situation and incident, in which the appellant could be said to have indecently touched the complaint. That evidence was absent. That burden was on the prosecution, to prove their allegation of indecent touch without consent beyond any reasonable doubt. In a case where two adults go into a room late at night, and in circumstances in which the presumption is that they were going to spend the night or part of the night together, that burden would be quite heavy, but the prosecution cannot escape from proving the same. They did not prove that there was any indecent touch by the appellant to the private parts of the complainant.

In my view, the prosecution did not prove the alternative charge of indecent assault. I will quash the conviction and set aside the sentence on that count.

Consequently, allow the appeal, I quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 5th May 2008.

George Dulu

Judge

In the presence of –

Appellant in person.

Mr. Nyachoti for applicant

Mr. Makura for State - absent

Mwangi - court clerk