



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 38 of 2006**

**OSCAR KIDUE SAFARI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Oscar Kidue Safari the appellant was charged and tried on the main count of attempted rape contrary to Section 141 of the Penal Code and an alternative count of indecent assault on a female contrary to Section 144 (1) of the Penal Code. After the trial the Senior Resident Magistrate at Voi found the appellant guilty on the count of attempted rape, convicted him thereon and sentenced him to 14 years imprisonment with hard labour. As the Learned Senior Resident Magistrate had convicted the appellant on the main count, he made no finding on the alternative count of indecent assault on a female.

The appellant was not satisfied with his conviction and sentence and has appealed to this court on the following grounds:

1. That the Learned trial Magistrate erred in fact by failing to notice that there was nothing produced in court to show that any kind of struggling took place.
2. That no witness testified that he actually met the appellant in the act.
3. That the Learned trial Magistrate erred in Law and fact by failing to consider that the appellant was drunk during the time of the incident.
4. That the Learned trial Magistrate erred in Law and fact by convicting the appellant on the charge of attempted rape rather than assault as per the evidence.
5. That the sentence is too long in the circumstances.

The particulars of the main count were as follows:-

“Oscar Kidue Safari on the 15<sup>th</sup> day of April 2005 at around 6.15 p.m. in Taita Taveta District of the Coast Province, attempted to have carnal knowledge of J M M without her consent.”

AND the particulars of the alternative count which faced the appellant read as follows:

“Oscar Kidue Safari on the 15<sup>th</sup> day of April 2005 at Taita Taveta District of the Coast Province, unlawfully and indecently assaulted J M M by touching her private parts namely vagina.”

The law as it then was prior to the enactment of the sexual offences Act 2006, defined rape in Section 139 of the Penal code as follows:-

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the true nature of the act, or in the case of a married woman by personating her husband, is guilty of the felony of rape.”

That definition used the terms “unlawful” and “without consent.” In Daniel Nyakundi Achoki –VS- Republic CR APPEAL No. 6 of 2000 (UR), the Court of Appeal stated that

“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.”

The same court emphasized that whether the charge be one of rape under section 140 or attempted rape under Section 141 of the penal Code, the particulars must state that the attempted unlawful carnal knowledge was without consent of the woman or girl.

In this case, the particulars of the offence of attempted rape upon which the appellant was convicted did not state that the attempted carnal knowledge was unlawful. That essential particular was absent and it was wrong to convict the appellant upon the defective charge.

The alternative count did not however suffer from the same defect. The same reads as follows;-

“Count II

Indecent Assault on female Contrary to Section 144(1) of the Penal Code.

Oscar Kidue Safari:-

On the 15<sup>th</sup> day of April 2005 at Taita Taveta District of the Coast province unlawfully and indecently assaulted J M M by touching her private parts namely vagina.”

The learned Senior Resident Magistrate made no finding on the alternative count. This court is entitled to make findings thereon. The evidence before the Learned Senior Resident Magistrate in brief, was that the complainant knew the appellant. On the day in question at 6.45 P.M. the complainant was on her way home from the shops when she met the appellant who held her by her collar and wrestled her to the ground. As he did so, he tried to remove her trousers. In the struggle the complainant’s jacket was torn. The appellant sat on the complainant’s thighs. She screamed which screams attracted members of the public including PW2 Herbert Mwasigwa Mwacheru. The complainant testified that at some stage during the struggle the appellant put his hands under her trousers in an attempt to remove her underpants. The appellant also touched her vagina. The Learned Senior Resident Magistrate rejected the appellant’s version of the events and held that the appellant lied to the court. I have on my own evaluated the evidence and find no basis upon which I should interfere with the Learned Senior Resident Magistrate’s findings of fact. Those facts also supported the alternative count of indecent assault under Section 144 (1) of the Penal Code.

In the end I set aside the conviction recorded under Section 140 of the Penal Code and substitute therefore a conviction under Section 144 (1) of the Penal code. I set aside the sentence of 14 years imprisonment and substitute it with one of five (5) years imprisonment with hard labour to run from the date of the original sentence by the Learned Senior Resident Magistrate.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE 2008.**

**F. AZANGALALA**

**JUDGE**

Read in open court in the presence of Mr. Ondari State Counsel and the appellant in person.

**F. AZANGALALA**

**JUDGE**

**16<sup>TH</sup> JUNE 2008**