

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Appeal 33 of 2004

JOSEPH MURIITHI KITHUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of rape under section 140 of the Penal Code.

The particulars are stated “that on the 17th November, 2003 at Mariari village Kiambere Location Mbeere District within the Eastern Province had carnal knowledge of Lucy Njoki Nyaki without her consent. This charge is defective and fatally so. The definition of the offence of rape is set out under section 139 of the Penal Code. The State Counsel Mr. Omwega has realized the omission of the words “**unlawful**” in particulars of the charge and has decided to concede appeal the charge of rape.

However the charge sheet contains an alternative charge of indecent assault under the provision of Section 144 (1) Penal Code. The learned State Counsel has asked the court to convict the appellant on that charge as there is sufficient evidence to support the charge.

The evidence of the complainant PW1 shows that the Appellant held the complainant dragged her into the forest tore her clothes and underwear and forced himself into her private parts. The complainant reported the matter to the Chief who directed her to health centre. The following day she reported to the police. She was issued with a P3 form. The accused was known to the Chief.

PW2 said the appellant and the complainant were his pupils when he was a teacher.

PW3 also knew him when she gave him his name. The officer said there had been many reports against him at the chief’s office.

The defence by the appellant in his unsworn statement was that the complainant was his girlfriend. She promised to meet him and then she demanded money. He admitted they struggled for about 3 minutes. He admitted touching her hands and not her private parts.

Upon considering the evidence and admission of the appellant that he had met the complainant at about 11.00 a.m. and that he was struggling with her for 3 minutes, I am convinced that his story is unbelievable for why would there be a struggle unless there was resistance from the complainant.

On the charge of rape Appeal is allowed and the conviction is quashed and sentence set aside.

However the court convict the appellant in the alternative charge and sentence him to serve 10 years imprisonment.

Dated this 28th February, 2007.

J. N. KHAMINWA

JUDGE