

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 282 of 2003

(From original conviction and sentence in criminal case number 294 of 2004 of the

Senior Resident Magistrate – Voi)

PETER MWAWANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: BEFORE HONOURABLE JUSTICE D.K.

APPELLANT IN PERSON

KOLUCHE FOR STATE

COURT CLERK – MITOTO

J U D G M E N T

The Appellant was charged with the offence of rape contrary to section 140 of the Penal Code and in the alternative with indecent assault contrary to section 144(1) of the Penal code. After trial before the Principal Magistrate at Voi, he was convicted of the alternative charge and sentenced to 10 years imprisonment with hard labour. He has appealed against both the conviction and sentence.

At the hearing of the appeal Miss Koluche, learned state counsel conceded the appeal on the grounds that the prosecution case was riddled with contradictions and that the medical evidence was unsatisfactory.

I have perused the record myself. I agree with Miss Koluche that there were several contradictions in the prosecution case. For instance the crucial evidence of the complainant PW1 differed materially with that of her son PW2 who was with her at the time of the alleged rape. Whereas PW2 said that the Appellant snatched the key from his mother's hand, the mother herself said the key was in the key hole. PW2 also said that the Appellant had a panga. That does not find mention in the testimony of the complainant.

On the medical evidence the complainant and the investigating officer said the complainant went for treatment a day after the alleged raped. Dr. Maneno PW4, however, said he examined the complainant after two weeks and found no evidence of any sexual assault. That notwithstanding the trial magistrate believed the testimony of the complainant and found the Appellant guilty of indecent assault.

I agree with the learned stated counsel that the prosecution evidence is contradictory and does not therefore support the conviction of indecent assault. It is not clear for instance why the complainant's husband was not called to say whether or not he had indeed asked the Appellant to go and take maize from his house instead of demanding from him the money the Appellant had given him for fare to Nairobi.

In the circumstances I allow this appeal quash the conviction and set aside the sentence of 10 years imprisonment. The Appellant shall be set free unless otherwise lawfully held.

DATED and delivered this 6th day of February 2007

D.K. MARAGA

JUDGE