

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

Criminal Appeal 302 of 2004

DAVID MUCHEMI MWANIKI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against the conviction and sentence of R. N. Nyakundi, Magistrate, in the Chief Magistrate's Criminal Case No. 2200 of 2004 at Nyeri)

JUDGMENT

The Appellant in the lower court was charged with rape contrary to *Section 140* of the Penal Code. The particulars of that charge as follows:

“DAVID MUCHEMI MWANIKI: On the 29th day of June, 2004 at Nyeri district of the Central Province had carnal knowledge of C W M without her consent.”

Section 140 of the Penal Code provides as follows:

“Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life”

As can clearly be seen, the particulars upon which the Appellant was convicted do not state that the rape was unlawful. In the case of **ACHOKI -V- REPUBLIC (2002) 2 E.A. 283**. The Court of Appeal considered an appeal under *Section 141(1)* of the Penal Code. The finding of the Court in respect of that appeal where as similar to this case the particulars had not stated that the rape was unlawful, the court had the following to say:

“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 the attempted unlawful carnal knowledge was without consent of the woman or girl.

The particulars of the offence of attempted rape upon which the Appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without the consent of Caren Kemunto Kombo (PW 1). That charge did not disclose an offence known to the law and the Appellant was wrongly convicted on it.”

Accordingly, the conviction of the Appellant under count one for rape contrary to *Section 140* of the Penal Code was wrongful because of the prosecution's failure to state that the same was unlawful.

In this case the Appellant was not charged with an alternative charge that the Court could consider whether it could be supported by the evidence presented in the lower court. Accordingly since the charge that the Appellant faced in the lower court is not one known by law, the conviction against him by the lower court is hereby quashed and the sentence against him is set aside. The Appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE