

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 293 of 2004

JAMES NGUGI MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

[Being an appeal filed against the conviction and sentence of R. N. Muriuki, Senior Resident Magistrate in Criminal Case No. 340 of 2004 at Kangema.]

JUDGMENT

The appellant was charged with attempted rape contrary to section 141 of the Penal Code. He was also charged with an alternative count of indecent assault on a female contrary to section 144 (1) of the penal code. The particulars of the charge of attempted rape are as follows:-

“James Ngugi Maina on the 30th day of December, 2003 at [particulars withheld] village in Midrange District within Central Province, attempted to have Canal Knowledge of BWM without her consent.”

Section 141 of the Penal Code requires that the charge would specifically include in its particulars that the attempted rape was unlawful. As can be seen from the particulars above they do not include the word unlawful. The court of appeal in the case *Achoki vs Republic (2002) 2 E.A.* held that a charge for attempted rape had to have in each particulars that the attempt was unlawful. The pertinent section of that judgment is as follows:-

“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 C K K (pw1). That charge did not disclose an offence known to the law and the appellant was wrongly convicted on it. The court find him therefore is that the appellant was convicted in the case of 1st count for a charge unknown to the law. “

However as stated before the appellant was also charged with an alternative count. What the court needs to find out is whether the evidence on record can support the alternative charge. Pw2 stated that on the 30th December 2004 at about 8.00 pm he was at home with his sister the complainant B W. The appellant entered the house and thereafter the pw2 went out of the house. On returning to the house when he heard the complainant scream pw2 found the door closed. He was able to push it open and found the appellant struggling with his sister on the ground. He also noted that the appellant was strangling his sister. It was not until he grabbed hold of the appellant that the appellant let his sister go. He was however able to notice that the appellant had tried to remove his sisters skirt. The complainant confirmed that on the date stated she was at home at 8.00 pm. The appellant came into the house then her brother pw2 went outside. The moment her brother went out of the house the appellant closed the door with a stool and put off the lamp. The complainant attempted to light a match stick but the appellant grabbed her, threw her on the ground and lay on top of her. When the brother managed to open the door because of her screaming he found the appellant on top of the complainant. She confirmed that it was her brother who pulled the

appellant jacket. At that moment the appellant went away. Pw1 is the mother of the complainant on the material date she confirmed that she was not at home. The complainant did report the incidence to her and it was her who reported the matter to the police. On being found that the appellant had a case to answer the defence that he offered was that he was not at the complainant house but rather that he was at his home. He denied the offence. On being convicted of the offence of attempted rape the appellant was sentenced to 7 seven years imprisonment. Having being re-examined the evidence tendered at the lower court I do find there is evidence beyond a reasonable doubt sufficient to convict the appellant on the alternative count. The incident was indeed tantamount to indecent assault to the complainant.

Accordingly, I do hereby set aside conviction recorded by the lower court under section 141 (1) of the penal code and do hereby substitute a conviction under section 144(1) of the penal code. For that conviction the appellant is sentenced to serve the same sentence passed by the lower court on 20th August, 2004.

Dated and delivered at Nyeri this 28th September, 2007.

MARY KASANGO

JUDGE