REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

JOTHAM MWANGI KIBUCHI…….....…….APPELLANT

Versus

REPUBLIC…….……..……..……RESPONDENT

(Being appeal against the conviction and sentence of E. O. Obaga, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 1067 of 2003 at Kerugoya)

JUDGMENT

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

"***Charge: JOTHAM MWANGI KIBUCHI: On the 14th day of April 2003 at Kiamaina Village in Kirinyaga District within Central Province, had carnal knowledge of MARY WANGUI WANJIRU 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 for the prosecution's failure to state that the same was unlawful.

The Appellant did also face an alternative charge of indecent assault contrary to *Section 144(1)* of the Penal Code. The lower court did not make a finding on the alternative charge. It ought also to be noted that the Appellant was convicted on the second count of robbery contrary to *Section 296(1).* The evidence presented by the prosecution was as follows: P.W. 1, the complainant, stated that on the 15th April 2003 at about 2.00 a.m while she was asleep in her house with two of her children, she heard a knock at the door. The person knocking ordered her to open quickly. She did not open but she lit her lamp. The person hit the door and it opened. He entered and she was able to identify him since she used to see him in the village and knew him by the name of Isisi. The moment he entered he put off the lamp

and proceeded to rape her. She said that she did not resist because he was armed with a knife and threatened her that if she did not follow his instructions he would stab her. She did not know what she did with his clothes but stated that he did not remove them. After raping her the Appellant asked the Complainant for all the money that she had. She gave him Ksh.160/= that was on a cupboard. He then touched her in her vagina then left. The Complainant in the morning informed her employer of what had occurred. A week after that incident of rape in the night the Appellant went to her house and asked her why she had taken him to the Police. She said that she recognized him by his voice. She screamed and this caused him to run away. On being re-examined the Complainant said that as the Appellant entered her house the lamp was on. She also confirmed that she knew the Appellant. P.W.2 was the Complainant's employer who confirmed that the Complainant related to her about the incident of rape and that she identified the Appellant. She also related to her about the theft of money. P.W.2 on the 28th April 2003 on learning that the Appellant was at Kiamaina town, called the Police and he was arrested. On being arrested the Appellant did not deny having raped the Complainant. He asked P.W.2 to forgive him and she in turn informed him that it was only the Complainant who could forgive him. Evidence was given by P.W.3, a clinical officer. He examined the Complainant 15 hours after the incident. He gave the age of the Complainant as 23 years old. He confirmed that he detected spermatozoa and further that he found that the Complainant had pus cells suggesting that she had an infection.

The Appellant in his defence stated that on the material date he had gone to his employer's home to get his pay. As he was there he was served with a meal but then it began to rain and he was persuaded by his employers son to spend the night in their house. He confirmed that he spent the night there. It ought to be noted that in that defence the Appellant did not disclose the place of his employment nor did he disclose the name of his employer. In any case the employer and his son were not called as witnesses for defence. In his defence the Appellant did not deny having raped the Complainant.

In evaluating the evidence tendered in the lower court, I do find that it sufficiently can sustain the alternative charge of indecent assault. Further I do find that there is sufficient evidence which goes beyond reasonable doubt that the Appellant robbed the Complainant Ksh.160/=. That being the finding of this Court and having set aside the conviction under *Section 140* of the Penal Code, I do hereby substitute the Appellant's conviction under *Section 144(1)* of the Penal Code. Further I do hereby set aside the sentence of the lower court of 20 years and substitute it with a sentence of 10 years on the alternative count under *Section 144(1)* of the Penal Code. That sentence shall also in addition be with hard labour. The appeal in respect of the conviction and sentence on count II fails and is dismissed.

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

MARY KASANGO

JUDGE