

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 37 OF 1999

JOHN GAKUO GITHINJI APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

John Gakuo Githinji (hereinafter referred to as the Appellant) was charged before the Principal Magistrate Nyeri on 22nd January 1999 with the offence of indecent assault on a female contrary to section 141(1) of the Penal Code. The particulars stated that on the 12th day of January 1999 at [particulars withheld] in Nyeri District of Central Province he unlawfully and indecently assaulted C N N by touching her private parts. His response to the charge was:

“ I deny the charge. There is a grudge between me and mother of this girl.”

The case was then fixed for hearing before the S.R.M. on 1/2/99. On that date the matter came up before Njuguna Kimani S.R.M. The proceedings are however totally confusing and it is difficult to decipher what transpired before the court. There is an indication of the charge having been read again to the Accused. His response however is inconsistent as he appears to be giving a statement of the facts. The Accused is not indicated as having pleaded guilty or not guilty. He is however indicated as mitigating, but the mitigations also contains some facts of the case like the complainant’s age and a report being made at Ndethi police post. Moreover the mitigation comes before the appellant’s conviction.

Obviously these proceedings cannot support a conviction as there is a plea of guilty to the charge. From the proceedings it is evident that the trial magistrate therefore wrongly convicted and sentenced the appellant.

Secondly the charge before the court was defective as the Appellant was charged under section 141 (1) of the Penal Code which does not exist, while section 141 of the Penal Code relates to a charge of Attempted Rape, and not indecent assault which the appellant was charge with.

The appellant’s conviction cannot therefore stand and learned state counsel rightly conceded the appeal.

I allow the appeal quash the conviction and set aside the sentence imposed. The appellant shall be forthwith set free unless otherwise lawfully held.

Dated signed and delivered this 4th day of August 2005

H. M. OKWENGU

JUDGE