



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 238 OF 1998**

**(From Original Conviction and Sentence in Criminal Case No. 4199 of 1997  
of the Chief Magistrate's Court at Thika)**

**PANCRAYS KINYANJUI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

Appellant was charged with offence of indecent assault contrary to section 144(1) of the Penal Code.

He was convicted for offence of attempted rape and sentenced to 3 1/2 years imprisonment with 4 strokes of light cane. He appeals against conviction and sentence. The learned State Counsel support the conviction, but leave issue of sentence to court. I have studied the grounds of appeal and the record of the lower court. The complainants evidence that appellant grabbed her from behind, knocked her down, tore her dress struggled to turn her holding her breast and private parts was overwhelming supported by PW2, PW3 and PW4 who went to the scene and found appellant struggling with complainant. The incident happened at about 5.30 p.m. The learned Magistrate believed the evidence of the witnesses. PW2 and PW3 know appellant before.

I do not find any good reason why the evidence should not be believed.

The offence of indecent assault on females under S. 144(1) of the Penal Code is distinct offence from offence of attempted rape in S. 141 of the Penal Code. Under S. 180 of the CPC which the learned Magistrate applied a person charged with an offence may be convicted of having attempted to commit that offence although he was not charged with the offence. S. 180 CPC could only have been applicable if appellant had been charged with offence of rape under S. 140 of the Penal Code. It is only then that he would have been convicted for the offence of attempted rape under S. 141 of the Penal Code.

In any case the offence of attempted rape is more serious than the offence of indecent assault on females. It is the offence of indecent assault of females which is a minor and cognate offence of attempted rape and not vice versa.

Thus the conviction for a more serious offence than charged was illegal. I allow appeal against conviction to the extent that I quash conviction for offence of attempted rape and substitute conviction for offence of indecent assault on females as charge.

The offence of indecent assault on females carries a maximum sentence of 5 years imprisonment hard labour with or without corporal punishments.

In passing a sentence of 3 1/2 years imprisonment the learned Magistrate considered that appellant had committed the offence of attempted rape. The appellant was treated as a first offender.

The sentence of 3 1/2 years imprisonment was manifestly excessive. For the above reasons, I quash conviction for offence of attempted rape and substitute conviction for offence of indecent assault on females c/s 144(1) of the Penal Code and reduce the sentence from 3 1/2 years imprisonment and 4 strokes of cane to 2 years imprisonment with hard labour and 2 strokes of the cane.

**E. M. Githinji**

**Judge**

**22.12.99**