



**REPUBLIC OF KENYA**

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

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 16 OF 2004**

**(From Original Conviction and Sentence in Criminal Case No. 1651 of 2003  
of the Chief Magistrate’s Court at Mombasa J.S. Mushelle Esq., Principal  
Magistrate)**

**ERNEST ISINYA ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The Appellant Ernest Isinya, was charged and tried before the Senior Principal Magistrate at Mombasa with the offences of attempted rape contrary to section 141 of the Penal Code, assault causing actual bodily harm contrary to section 251 of the Penal Code and, malicious damage to property contrary to section 339(1) of the Penal Code.

After trial the Senior Principal Magistrate acquitted the Appellant of counts two and three but convicted him and sentenced him to twenty years imprisonment with hard labour. He has appealed against both conviction and sentence.

Mr. Ouma for the Appellant argued, *inter alia* , that the charge was incurably defective for failure to state in the particulars that the attempted carnal knowledge was “unlawful”. In support of this argument he cited the Court of Appeal decision in the case of **Daniel Nyarem Achoki Vs Republic [2000]2 EA 283**.

The particulars of the offence of rape were that:-

**“ERNEST ISINYA: On the 13th day of June 2003 at [particulars withheld] in Mombasa District of the Coast Province, attempted to have carnal knowledge of N.A.O without her consent”**

Section 139 of the Penal Code defines the charge of rape in the following terms:-

**“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by any means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape”.**

It is clear from this definition that lack of consent on the part of the woman or girl is at the core of the offence of rape. The section nonetheless also includes the word “unlawful” in the definition. Does failure to include the term “unlawful” in the particulars of the charge make it incurably defective?

Miss. Mwaniki, learned State Counsel, does not think so. She submitted that failure to include that term in the particulars of the charge does not make it incurably defective. The defect according to her is cured by section 382 of the Criminal Procedure Code. She further submitted that when the charge and the particulars thereof were read over to the appellant he pleaded not guilty meaning that he understood the charge and he was therefore not prejudiced in any way.

Whereas I agree that when an accused person understands the charge he is facing he may not be prejudiced nevertheless the charge and the particulars thereof must disclose an offence known to law. If they do not, then the accused is definitely prejudiced as he will stand charged with an offence which does not exist. In the said case of **Daniel Nyarera Achoki Vs Republic** the particulars of the charge of attempted rape did not include the expressions “unlawful” and “without her consent”. The Court of Appeal stated that an offence without those ingredients is unknown to law and held that the charge was incurably defective. After considering the importance of lack of consent on the part of the woman or girl the Court stated at page 284 that:-

**“... a charge of rape must allege in its particulars:**

**(i) that the act of sexual intercourse was unlawful;**

**(ii) that the act of sexual intercourse was without the consent of the woman or girl.**

**We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is “unlawful” and “without consent” and the prosecution would be well advised to use both. 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 [carnal or] attempted unlawful carnal knowledge was without the consent of the woman or girl”**

I do not only agree with this decision of the Court of Appeal but I am also bound by it. Accordingly I hold that charge in this case was incurably defective. Having so held I do not need to consider the other grounds of appeal and the arguments made thereon.

I therefore allow this appeal quash the conviction and set aside the sentence and order that the appellant be set free forthwith unless he is otherwise lawfully held.

DATED this 29th day of June 2004.

**D.K. Maraga**

**Ag. JUDGE**