



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.219 OF 2000

(From original conviction and sentence in Criminal
Case No.2169/97 of the Senior Principal Magistrate's
Court at NAIVASHA - M.M. MUYA(S.P.M.)

PETER MUHIA WAGATU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant has appealed against the conviction for charge of RAPE contrary to Section 140 of the Penal Code. He was charged with an alternative count of INDECENT ASSAULT OF A FEMALE contrary to Section 144(1) of the Penal Code.

The particulars of the charge he was convicted of read:-

“On the 7 th day of December, 1997, at [particulars withheld] in Nyandarua District of the Central Province had carnal Knowledge of S.N.N Without her consent.”

The trial court in his judgment had this to say about the evidence before him.

“I am further fortified in my conviction that the Accused had sexual intercourse with the Complainant without her consent...”

It is very clear that even in the court's mind the ingredients of the offence of rape was sexual intercourse without the consent of the Complainant. That is misleading. Section 139 of the Penal Code defines what constitutes a charge of Rape thus:-

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

Dealing with the issue of the charge of rape and what constitutes it, the Court of Appeal in Daniel

Achoki –v- Rep Cap No.6 of 2000 stated:-

“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 well be advised to use both.”

The particulars of the charge before court did not allege that the Appellant had “unlawful” carnal knowledge of the Complainant. In omitting the word “unlawful” in the particulars rendered the charge defective and one that disclosed no offence. In the same case quoted above, the Court of Appeal held that in absence of the word “unlawful” in the particulars then the Appellant could not be convicted on it. Likewise in the case before the court the Appellant could not have been convicted of the charge being defective and unknown to the law.

The lower court made no finding on the alternative charge of Indecent Assault leaving it open for this court to make a finding on it. The particulars of the charge do allege that the Appellant “unlawfully and indecently assaulted the Complainant. The evidence accepted and believed by the court was that the Appellant lured the Complainant to his house, locked her in, switched on the radio loudly then held her by the neck and threatened to kill her if she screamed. She was then stripped of her skirt, petti-coat and under pant and had sexual intercourse with her. In the same quoted authority the Court of Appeal held that the charge of Indecent Assault was proved on following evidence:-

“The evidence which was accepted by the Magistrate and confirmed by the superior Court was that the Appellant accosted the Complainant, knocked her down, tore away her knickers and lay on top of her. He was at the same time lowering his own trousers and he tried to get in between her thighs... These facts apart from supporting a charge of attempted rape which charge, as we have said was incurably defective, also supported the alternative charge of indecent assault Under Section 144(1) of the Penal Code.”

In Gitau –v- Rep 1983 EA 222 Madan, Potter, JJA and Chesoni, Ag. JA held that ***“to strip a female naked constitutes indecent assault even if it is done for the sake of it.”***

The facts of the instant case do support a charge of indecent assault. Indeed I am satisfied it could have supported a charge of rape except that the particulars of that charge were incurably defective.

Accordingly I do set aside the conviction recorded under Section 140 of the Penal Code and substitute it with that of indecent assault under Section 144(1) of the Penal Code. I also set aside the sentence of eight years imprisonment and substitute it with that of five years imprisonment with hard labour. I confirm the 4 strokes of the cane imposed. I further order that the Appellant should serve the full five years imprisonment without remission of 1/3 sentence.

Orders accordingly.

Dated and delivered at Nakuru this 25th day of March, 2003.

Read signed and delivered in presence of Mr. Onderi for State.

Appellant in person.

JESSIE LESIIT

JUDGE