REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.390 OF 2000

(From original conviction and sentence in Criminal Case No.1405/2000 of the Principal Magistrate's Court at NYAHURURU - C. M. SIFUNA (R.M.)

SAMWEL KAMAU NGIGE…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

The Appellant was charged with one Count of RAPE contrary to Section 140 of the Penal Code and in the alternative with a count of INDECENT ASSAULT ON A FEMALE contrary to Section 144(1) of the Penal Code.

I have had occasion to read the particulars of both counts and do find that both do not disclose an offence known to law. In the main count of RAPE the particulars read:-

> ***"On the 3 rd June, 2000 at around 7.30 p.m. at Tumaini Villege OlKalou i n Nyandarua District within the Central Province jointly With another not before Court had carnal Knowledge of MARY NJOKI KAHINDI without her consent."***

It was held in the Court of Appeal case of **ACHOKI -V- REP** No.6 of 2000(KISUMU) that where the particulars of a charge of Rape do not allege that the offender **"unlawfully "**had carnal knowledge of the Complainant without her consent, then the charge was defective and any conviction based on it wrong.

This court is bound by that holding. The particulars of the charge that the Appellant faced did not allege that the carnal knowledge he had of the Complainant was unlawful. He was found guilty and convicted on that charge which is irregular and wrong.

Similarly the alternative count of INDECENT ASSAULT did not allege that the indecent act was unlawful. Again the particulars of tht charge were also fatally defective. The conviction was wrong.

I also wish to point out that the Court erred in entering a finding of guilt both in the main count of Rape and in the alternative count of Indecent Assault. The court had powers to enter finding of guilt, if at all, only on either one of the counts and on the other to enter no finding. The court's finding of guilt on both counts was therefore irregular.

The Appellant was sentenced to six years imprisonment hard labour and 10 strokes in count 1 and 4 years imprisonment with hard labour and 4 strokes of the cane in count 2 on 31.10.2000. He cannot be said to have served a substantial part of that sentence.

Accordingly I quash both convictions, set aside the sentence in its entirety and order that the Appellant be retried for the same offence before a competent court.

Orders accordingly.

Dated and delivered this 18th day of March, 2003.

JESSIE LESIIT

JUDGE