



**REPUBLIC OF KENYA**

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

**crim app 269 of 02**

**SALIM KOYA MURAMBA ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

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

The appellant was charged with three Counts. On Count I he was charged with Rape Contrary to Section 140 of the Penal Code, and acquitted. On Count II the charge was that of Indecent Assault on a Female Contrary to Section 144(1) of the Penal Code for which he was convicted and Sentenced to 3 years imprisonment and on Count III he was charged with Creating a Disturbance in a manner likely to cause a breach of the Peace Contrary to Section 95(1) of the Penal Code and acquitted. He has preferred an appeal on the grounds that the evidence before the court was Contradictory and the complainant (PW1) was shifty in her evidence. In particular he said the complainant had reported to her husband PW1 and the police (PW3) that she had been raped by the appellant. However when she was seen by the clinical officer PW5 the next day she never told him that she had been raped and on examination he found she had soft tissue injuries on both hands and bruises on both legs. The other ground he raised was that the investigating officer had also recorded a charge and caution statement from the appellant.

The State Counsel supported both the Conviction and Sentence on the ground that the appellant had admitted the offence of indecent assault in his charge and caution statement. He however admits the charge under Count II should have been an alternative count but submitted the same could be cured under the Provisions of Section 383 of the Criminal Procedure Code.

The evidence before the Trial court was that the appellant had on the evening of 8/7/01 taken the complainant PW1 and her husband PW2 to show them a house they wanted to let. They saw the room which apparently still contained furniture said to belong to the landlord and they agreed to occupy it. PW2, then left PW1 in the said room saying he was going to ferry their household goods from their old house. He never returned although PW1 says he returned at 6.00 a.m. but PW2 said it was PW1 who followed him to his workplace. It was her evidence that while she slept in the said Room with the Radio on, the appellant went to her room and enquired why she had not switched off the radio. He then proceeded to forcefully rape her. She said she screamed and someone knocked at her door but does not say what happened next. In cross examination, she however said she did not scream. The next day according to her, PW2 returned and she reported to him but Appellant could not be found. They reported to the police and the appellant arrested on 27.10.01 about 4 months after the incident.

On his arrest a charge and caution statement was taken by PW4 AG.IP. DANIEL CHACHA in which the appellant did admit to indecently assaulting the complainant. The witness said he was In charge of Prosecutions at the station and not in this case. This case was investigated by PW3 who stated so in his evidence. In his unsworn Defence the Appellant said he had on the 16.6.01 deferred with PW2 over his girlfriend and that the matter was reported to the area chief but PW2 was not satisfied with the decision of the chief and threatened the Appellant. He did not disclose the nature of the threat nor call the chief as his witness. He also did not put the issue to PW2 in Cross examination and consequently agree with the prosecution his defence is a mere afterthought. I have also analysed the evidence of PW1 and note that it is full of contradictions. She did report to PW2 and the police that she had been raped yet she never told the clinical officer. In her evidence in chief she said PW2 had returned to the scene at 6.00 a.m. the next

day but PW2 said he did not return there but PW1 went to his place of work the next morning. The complainant does not strike me as a completely honest person. However as I had stated earlier, the Appellant had admitted to the indecent assault in his charge and caution statement. Taking all these factors into consideration I find the Conviction was safe but reduce the sentence to one of two years imprisonment. The appeal shall succeed to that extent.

**Dated and Delivered at Mombasa this 25th July, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**