

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.74 OF 2001

(From Original Conviction and Sentence in Criminal Case No.49 of 2000 of the Resident Magistrate's Court at Kwale –H.D. Mganga, Esq., DM.I)

COSMAS KYULE NGUNUU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was convicted for indecent assault contrary to S.144(1) and Personating a Public Officer contrary to S.105 of the Penal Code. The appellant appealed against the convictions and sentences. At the hearing of the appeal the Appellant clearly stated that the evidence upon which he was convicted was inadequate and that it was conflicting and concocted by the witnesses who were members of one family. He asked this court to disbelieve the evidence and reject it and thus allow the appeal.

The State Counsel submitted that she could not support the conviction either. She supported the Appellant's view that the evidence was in its totality, contradicting and could therefore have been concocted. She pointed out the contradictions. She also submitted that it was her duty to point out that the Appellant was very likely prejudiced because even upon the evidence which was clearly conflicting, the prosecution at the end of the prosecution case, with leave of court, substituted the original charges with fresh ones.

The Appellant pleaded not guilty but then the prosecution closed its case. This may have put the Appellant in a position of confusion. No explanation came from the court of the fresh charges. He may have been confused as to what charges he was being tried of and to which he was to answer. I have considered the grounds of appeal. I have taken into serious account the position the State Counsel took. It is my view that the arguments now on record are clear and in favour of the Appellant. I do hold that the evidence against the Appellant was conflicting and unreliable. The trial Magistrate should have so found and should not have based the convictions thereon.

The upshot is that it was unsafe to base the conviction on the said evidence which was of very poor quality indeed. The charges were accordingly not proved beyond a reasonable doubt. This appeal therefore succeeds. The conviction on both counts is quashed and the sentences set aside.

The Appellant is forthwith set at liberty unless lawfully held. It is so ordered.

Dated and delivered at Mombasa at Mombasa this 6th day of May, 2002.

D. A. ONYANCHA

J U D G E

