

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELATE SIDE

HIGH COURT CRIMINAL APPEAL NO. 965 OF 2001

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL
CASE NO. 664 OF 2001 OF THE Snr. PRINCIPAL MAGISTRATE'S
COURT AT KIAMBU**

STEPHEN WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted of the offence of attempted Rape C/s 141 of the Penal Code and sentenced to 10 years imprisonment, ten strokes of the cane and hard labour. Being aggrieved by the said conviction and sentence he appealed.

The evidence adduced before the learned trial magistrate was brief and to the point. The complainant, a barmaid, was on her way home when she encountered five men. They attacked her and she screamed. She was filed and the men held her while some removed her trousers and pants. She struggled and in the process the police arrived.

It is not clear what happened to four of the five men. They may have run away. However, the appellant was arrested at the scene. He was known to the complainant. He was lying on her with his trousers picked half way down. The evidence of the two police officers who were attracted to the scene by the screams is in agreement.

The appellant gave his own version of what happened on that night which however rejected by the learned trial magistrate. He said it was the complainant who went to his house naked and demanded sex. He refused but still the complainant insisted. She poured water on his bed and followed him outside insisting on sex. The appellant allegedly slapped her and she screamed whereupon the police arrived. He was then arrested and charged.

I have made an independent evaluation of the evidence on record. The evidence of the complainant and the two police officers was cogent and consistent. It was corroborative. The defence of the appellant was rightly rejected. The conviction was well founded.

The sentence provided for under this section is life imprisonment and hard labour with or without corporal punishment. The appellant was said to be a first offender. He was sickly as he has said in his appeal. However the offence is serious and to say the least his defence was cheap and misplaced. That notwithstanding, I consider the sentence imposed, though legal, harsh and excessive in the circumstances of this case. I am therefore inclined to interfere with the same by setting it aside and in place thereof impose a sentence of 5(five) years imprisonment, hard labour and four strokes of the cane.

Otherwise this appeal is dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of December, 2002

MBOGHOLI MSAGHA

JUDGE