



**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI  
CRIMINAL APPEAL NO.402 OF 2001**

FESTUS OPARA NYANGAI ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

FESTUS OPARA NYANGAI (the appellant) was charged in the Chief Magistrate’s Court at Makadara, Criminal Case No.2644 of 1998, with Rape contrary to Section 140 of the Penal Code in that on the 1st of March, 1998 at Umoja II Estate, Nairobi, he unlawfully had carnal knowledge of KEZIAH WANJIKU without her consent. In the alternative the appellant was charged with indecent assault contrary to Section 144(1) of the Penal Code in that on the same date and at the same place he indecently assaulted Keziah Wanjiku (the complainant) by touching her private parts.

On the 5th January, 2001, however, Mrs. Kimingi the Principal Magistrate, convicted the appellant of attempted Rape contrary to Section 141 of the Penal Code. The trial magistrate, no doubt, invoked the provisions of Section 180 of the Criminal Procedure Code which states:

“S.180 when a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.”

The evidence which the trial magistrate accepted was given by the complainant herself, the mother DINA NJERI (PW 2), the father Mwangi Maingi PW 3 and the investigating officers. Essentially it was put on record that the complainant was sent by her mother at around 8.00 p.m. to the shops to buy a pen. On her return journey to the house she met with the appellant, who she knew before, standing outside a bar. The appellant allegedly held her by the neck and pulled her to a corner of a house where there was waste dumping and where it was dark and told her to give him what he wanted. Instead the appellant knocked her down, removed her underpants, pinched her thighs and had sex. Then he ran away, taking her underpants along with him. She said she did not consent to the sexual act.

A report was made to PW 2 and PW 3 who took her to the Police and she was later issued with a P 3 form. The complainant said she was then examined by a doctor. Indeed Dr. Zephania Kamau (PW 6) examined the complainant four days after the alleged rape. He found the complainant had bruises on the back of the left hand and the inner left thigh caused by a blunt object. There were also bruises above the clitoris. But her hymen was intact, with no tears, save that she was in her normal mens. The vaginal swab taken showed no presence of spermatozoa. That medical evidence did not support the prosecution’s proposition that sexual intercourse between the appellant and complainant had taken place.

The trial magistrate made a finding that, by reason of the aforesaid matters, the sexual act was not complete and that the appellant could only have been guilty of attempted rape.

An attempt is defined in Section 388(1) of the Penal Code as follows:-

“388(1) when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence”.

With reference to this case, it had been shown that the appellant, while intending to have sexual intercourse with the complainant, manifested his intentions by knocking her down, removing her underpants but for some interruption or other reason, not actually having sexual intercourse at all.

The facts before the trial magistrate were, however, different. This is what the complainant herself said in her testimony:-

***“He held my hand and pulled me to the corner of the house where there was a waste dumping place which was a distance of about four metres. When we reached at the corner, th e accused again told me to give him what he wanted. I asked him what he wanted. I asked him what he wanted. He did not tell me. He knocked me down and started removing my pants as he pinched me here and there (showing) at my thighs. Accused had sex wi th me from behind and also turned me and had sex with me from the front. He took my pants after he finished and said he would not return it to me. He had sex with me two times”.***

It is clear from that evidence of the complainant, is it not, that the sexual act was complete. The appellant had set out to have sexual intercourse with the complainant and had manifested his intentions by having sexual connection with her twice, one from the rear and the other from the front. According to the complainant’s own evidence, therefore, the sexual act was complete.

By holding that the sexual act was not complete, the trial magistrate must have rejected the complainant’s own evidence. Indeed, that evidence was rejection in view of the negative medical evidence. After holding the complainant to be untruthful the trial magistrate ought to have given the appellant the benefit of doubt and acquitted him.

During the hearing of this appeal reference was made to S.179 (2) of the Criminal Procedure Code as entitling the trial magistrate to convict for a minor offence when the appellant had not been charged with it. However, Rape c/s 140 of the Penal Code and Attempted Rape C/s 141 of the same code each carry a sentence of life imprisonment with hard labour, with or without corporal punishment. Attempted Rape is therefore not a minor offence to Rape. Therefore the provisions of section 179 of the Criminal Procedure Code are inapplicable. A conviction for attempted Rape could also not be substituted.

For these reasons I hold that the conviction for attempted Rape was unsafe. This appeal is allowed, conviction is quashed and the sentence of eight years imprisonment and six strokes of the cane is set aside. The appellant is to be released forthwith from custody unless he is otherwise lawfully being held.

It is so ordered.

Dated and delivered this 5th July, 2001.

**A.G.A. ETYANG’**

**JUDGE**