

Wepukhulu v Republic

High Court, at Nakuru November 5, 1982

Mbaya J

Criminal Appeal No 163 of 1982

November 5, 1982, Mbaya J delivered the following Judgment.

William Wasike Wepukhulu was charged with two offences namely stealing from the person of another contrary to Section 279(a) of the Penal Code (Cap 63) and indecent assault of a female contrary to Section 144(1) of the same Code. On conviction he was sentenced to three years' imprisonment for the first offence and 3 1/2 years' imprisonment and ten strokes of the cane for the second offence. The prison terms were to run concurrently. He now appeals against convictions and sentences.

The complainant (PW 1) testified that on January 29, 1982 she travelled from Turbo to Central Kwanza Location in search of land to buy. At a shopping centre in Kwanza she came to meet the appellant and inquired of him where she could buy a piece of land. The appellant then invited her to his house where they were to discuss availability of land. PW 1 and appellant reached the latter's house at 3 pm. They spoke to each other till 9 pm. Before sleeping at 9 pm the appellant said he wanted some money. Then says PW 1: "The accused became very harsh while demanding the money and started closing the door saying that if I refuse to give him some money he would kill me. I told the accused not to kill me. If it is money he wants he can take the whole money. I then removed the whole money I had, Kshs 5,500 and threw at him. He then told me that even if I have given him the money I will still be his wife till morning. He then threatened to kill me and he started having carnal knowledge of me.

On the following morning I left the house at about 8 am."

I have quoted PW 1 at length because this case has a peculiar and suspicious setting. If PW 1 is to be believed, then the prosecution should have charged the appellant with the offence of robbery contrary to Section 296 of the Penal Code and rape contrary to Section 140 of the same Code. The offences charged were not committed as such. Where was stealing as opposed to robbery and where was indecent assault as opposed to rape?

In his defence appellant denied he committed the offences charged. In his petition of appeal, appellant states categorically that complainant was his lover for a long time. In view of the casual conduct of the complainant in feeling comfortable and submitting to sexual intercourse with appellant in his house without protest I am of considered judgment that the appellant told the truth. Learned State Counsel does not support the convictions. I think he is right.

I allow the appellant's appeal and set aside the sentences imposed on him. He will be released forthwith unless lawfully held.