REPUBLIC OF KENYA

IN THE COURT APPEAL

AT NAIROBI

(CORAM: MADAN, MILLER & POTTER JJA)

CRIMINAL APPEAL NO 102 1981

KIHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

March 23, 1982, Madan JA delivered the following Judgment.

The appellant was convicted of indecently assaulting a female on February 7, 1978, contrary to Section 144 (1) of the Penal Code. He was sentenced to receive corporal punishment as well as the maximum term of five years imprisonment with hard labour. His appeal to the High court was summarily rejected under Section 352(2) of the Criminal Procedure Code. W N, the female concerned testified that the appellant, whom she knew, caught hold of her. She escaped from him and went into A's house. The appellant followed her there, and knocked her down. He then pulled her out and took her to his own house where he had intercourse with her by force. She screamed. A, her son M and one N came there. The appellant released her and she left. She made a report to the police. She denied that the appellant had given her Kshs 20 to go to his house. N was not called as a prosecution witness. The appellant made an unsworn statement. He said he paid Kshs 20 to W. She agreed to come to his house. On the way she went into the house of one J. He went in to collect her after a while. She refused to go with him to his house. She also refused to return his Kshs 20. She agreed finally and they went to his house. They had intercourse. W later left with her son M who came there. The police arrived. He told them he had paid W Kshs 20. W's son M was a prosecution witness. He testified that the appellant opened the door of his house when he called his name outside. W came out. She did not say anything. M said he did not know what happened. He did not hear a scream or any other noise from the appellant's house.

J W was also a prosecution witness. She said she heard a scream and opened her door. She saw W, the appellant and A (W) outside. The appellant was holding W by her frock. He demanded Kshs 20 from her. She denied having got it. W escaped from the appellant and dashed into J's house. The appellant pulled her out and took her with him. H W and A W were witnesses for the defence. The magistrate said in his judgment: "The prosecution has shown that there was an arrangement made between the accused and (W) and that for her own reasons she did not go to the accused's house as arranged I believe that the accused gave (W) Kshs 20 and when she changed her mind he was annoyed and forcibly took her to his house and assaulted her." The magistrate failed to give proper weight to the evidence of W's own son that he did not hear a scream or any other noise from the appellant's house; also that W did not say anything when she came out of the appellants house. He was the first person she met, her own son. M was corroborated by H who also said she did not hear any disturbance in the appellant's house that night. The magistrate also failed to resolve the serious conflict between W who claimed that the appellant knocked her down in A's house. A denied that W was beaten in her house by the appellant; she said the appellant told W that if she refused to come to his house she should give back his Kshs 20. W then peacefully went towards the appellant's house. It may be that W decided to play honest and give the appellant his Kshs 20 worth of love.

The magistrate further failed to give any weight to the evidence of H who testified that she also did not

hear any disturbance in the appellant's house on the night in question. The importance of J's evidence lies in the support it gives to A's evidence when she said the appellant took W with him. W does not seem to have struggled or refused to go with the appellant. The petition of appeal to the High court urged that the evidence against the appellant was circumstantial only. That raised a point of law. His appeal ought not to have been summarily rejected. We do not think it safe to allow the appellant's conviction to stand. It is quashed and the sentence set aside. If we decided to sustain the conviction, we would have made an order substantially reducing the appellant's sentence which, in the circumstances, was both wrong in principle and manifestly excessive.

This case makes us feel sad. The appellant was arrested on February 7, 1976. He was convicted of the offence with which he was charged on April 14, 1978. His appeal to the High Court was not summarily rejected until August 26, 1979. His appeal to this court was forwarded to the District Registry, Nakuru, on October 13, 1978, where it lay unattended with some somnambulant Deputy Registrar, perhaps more than one in succession, until the present session of this court held during the month of March, 1982. The appellant had been in prison for more than three years for an offence, of which he has now been acquitted today. We were informed that the appellant was released from prison on August 14, 1981, which must be after he had served his sentence in full. We direct that our remarks be brought to the notice of the Ag Chief Justice. As Miller and Potter JJA agree, it is so ordered.

March 23, 1982

MADAN, MILLER & POTTER JJA