



**IN THE COURT OF APPEAL OF KENYA  
AT NYERI**

**Criminal Appeal 352 of 2007**

**JULIUS MAINA KARIUKI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya*

*Nyeri (Makhandia, J.) dated 26<sup>th</sup> November, 2007*

**in**

**H.C.C.R.A. NO. 216 OF 2005)**

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**JUDGMENT OF THE COURT**

The appellant was charged before the Senior Resident Magistrate’s Court at Kigumo with the offence of rape contrary to **section 140** of the Penal Code. Alternatively, the appellant was charged with the offence of indecent assault on a female contrary to **section 144(1)** of the Penal Code.

At the conclusion of the hearing in the magistrate’s court, the court’s assessment of the evidence laid by the prosecution had established beyond reasonable doubt that the appellant had committed the offence of attempted rape contrary to **section 141** of the Penal Code. The court reached the conclusion that the main offence of rape as initially charged had not been proved. Accordingly the court proceeded to substitute the charge from rape to attempted rape, convicted the appellant and sentenced him to ten years imprisonment with hard labour.

The appellant filed an appeal in the superior court. In the appeal the appellant relied on five grounds which challenged both the conviction and sentence. The superior court after analysing and evaluating the evidence as required in law, came to the conclusion that the entire appeal lacked merit and went on to dismiss the appeal.

Arising from the concurrent findings of the two courts as set out above, the appellant filed an appeal to this Court on 24<sup>th</sup> January, 2008. It is a home-made memorandum of appeal consisting of seven grounds of appeal.

Upon being asked by the court to prosecute his appeal, the appellant said he wanted to pursue only one ground of appeal, namely the severity of the sentence imposed. For this reason, the Court finds it unnecessary to set out all the other grounds.

The learned Principal State Counsel Mr. Orinda opposing the appeal, submitted that all the grounds in the appellant's memorandum of appeal were based on facts and therefore not for the court's consideration. In addition, he reminded the court that it can only interfere with the sentence if the sentence was unlawful and this was not the case.

This being a second appeal, this Court is only concerned with matters of law, and on this we uphold the learned State Counsel's submissions. As held in a number of decisions of this Court – see the case of **OBANDA v. REPUBLIC [1983] KLR**, holding 3, this Court cannot go beyond points of law. **Section 361** of the Criminal Procedure Act, provides that severity of sentence is a matter of fact. This Court would not therefore be entitled to interfere with a lawful sentence.

The facts that gave rise to the trial in the lower court and before the appeal in the superior court were that on 13<sup>th</sup> October, 2004 at about 9.00 a.m. PW1, **JM** (the complainant in the trial court) was going to the river to fetch water. On her way, a person whom she identified as the appellant emerged from a maize plantation. He pinned her down, removed her pants and undressed himself. He then laid on her, forced her legs apart and attempted to insert his penis in the complainant's vagina. The complainant screamed and her mother (PW2) who was going to the same river and had stopped to chat with a friend came to her aid. On seeing PW2, the appellant ran away. The appellant was well known to both PW1 and PW2 as they came from the same neighbourhood.

The superior court after independently analysing and evaluating the evidence afresh, reached the same findings of fact as the trial court.

It is therefore necessary for this Court to consider the implications of concurrent findings of fact by the two courts and to restate its role, on a second appeal.

This Court had occasion to consider the point in the case of **NJOROGE v REPUBLIC [1982] KLR 388** and held: -

**“On a second appeal the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts unless those findings were shown not to be based on evidence.”**

The appellant has not shown any grounds of law in the appeal for consideration by this Court. The appeal is hereby dismissed.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of May, 2009.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**