



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OMOLO, O’KUBASU & ONYANGO OTIENO, J.J.A.)**

**CRIMINAL APPEAL NO. 164 OF 2005**

**BETWEEN**

**SOSPETER MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from Judgment of the High Court of Kenya at Eldoret (Dulu, J) dated 3<sup>rd</sup> February, 2005**

**in**

**H.C.CR.A. NO. 6 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant, **SOSPETER MWANGI**, with another person called **RONALD SIMIYU NAMBAFU** were tried and convicted on one joint charge of rape contrary to **Section 140** of the Penal Code. The particulars contained in that charge were that on 16<sup>th</sup> day of October, 2000 at [Particulars Withheld] in Lugari District within Western Province, the appellant and Ronald Simiyu Nambafu jointly had carnal knowledge of

J W C without her consent. Upon them being convicted on that charge, the trial magistrate sentenced each one of them to ten years imprisonment. It appears that the appellant separately appealed to the High Court and pursuant to that appeal, the appellant’s conviction was “*quashed*”, the sentence set aside and a retrial ordered. Ronald Simiyu Nambafu also appealed separately and we were informed by Miss Oundo, the learned State Counsel who represented the Republic before us, that his appeal was allowed and the conviction quashed; no retrial was ordered in respect of Nambafu. The appellant appeals to this Court with regard to the order for retrial. In Ground 1 in the Memorandum of Appeal dated 17<sup>th</sup> March, 2005, the appellant complains:

***“His Lordship erred in failing to hold that the charge the accused was facing and which he was***

***convicted of was fatally defective unsustainable in law”.***

This point was raised before the superior court but the defect which was there being complained about appears to have been that as the particulars of the charge left out the word “*unlawful*” that by itself made the charge fatally defective. We agree that in a charge of rape the particulars of the charge should state that an accused person:

***“..... had an unlawful carnal knowledge of a complainant without her consent”,***

so that the provisions of the now repealed **Section 139** of the Penal Code are complied with. But the basic ingredient of a charge of rape is the absence of consent on the part of the complainant and if the words “*without her consent*” are left out from the particulars of the charge, that charge would be fatally defective. However, leaving out the word “*unlawful*” does not appear to us to be such a grave matter for the unlawful nature of the act of rape is encompassed in the absence of consent. We think that where the word “*unlawful*” is left out in the particulars of the charge, as was the case here, the irregularity would be one curable under **Section 382** of the Criminal Procedure Code.

However, that is not the end of the complaint in ground one. The charge alleged that the appellant and his confederate “*jointly*” had carnal knowledge of the complainant without her consent. In our combined experience, we have never come across a joint charge of rape because we cannot envisage how two men can jointly commit a rape. The common practice, which is based on common sense, is to charge each participant in a rape case separately so that in a case such as this one, the appellant should have been charged in count one and Ronald Simiyu Nambafu should have been charged alone in count two. The joint charge was accordingly fatally defective and it was on this ground that Miss Oundo reluctantly conceded the appeal.

A retrial would not normally be ordered if the effect of that would be to give the prosecution a chance to rectify mistakes made before or during the abortive trial. A retrial is ordered on the charge upon which the abortive trial was conducted and if the charge itself is fatally defective then there is nothing upon which an accused is to be retried – see for example ***FATEHALI MANJI VS. THE REPUBLIC*** [1966] EA 343. In this appeal, therefore, there was no valid charge upon which a retrial could have been ordered as the learned Judge purported to do and that being our view of the matter, we allow the appeal and set aside the order for retrial of the appellant. Those shall be the order of the Court on the appeal.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of September, 2006.**

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR