REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 132 OF 2013

FRANCIS CHEGE MAINA……..……..APPELLANT

VERSUS

REPUBLIC ……...……...RESPONDENT

(Being an appeal against conviction and sentence in Kangema Principal Magistrate's Court Criminal Case No. 43 of 2010 (Hon. D. Orimba) on 26th April, 2010)

JUDGMENT

The appellant was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act, No. 3 of 2006. According to the particulars of the charge, on the 1st day of February, 2010 at [Particulars Withheld] in Murang'a district, within central province, the appellant intentionally and unlawfully attempted to have carnal knowledge of a woman, L W G without her consent.

In the alternative the appellant was charged with the offence of indecent assault contrary to section 11(A) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on 1st February, 2010 at [Particulars Withheld] , Murang'a district within central province, the appellant indecently assaulted one L W G by touching her private parts namely buttocks.

The appellant was also charged with the second count of creating disturbance contrary to section 95(1) (b) of the Penal Code. In this count, it was alleged that on 1st February, 2010 at [Particulars Withheld], in Murang'a district within central province, the appellant created disturbance in a manner likely to cause a breach of peace by calling one L W G a dog and rubbish.

The appellant pleaded not guilty to all the charges against him. According to the complainant, on 1st February, 2010, the appellant found her working at [Particulars Withheld] where she had been employed in a hotel. The appellant immediately started insulting her calling her a dog; besides the insults, the appellant physically attacked the complainant and pulled off her dress. The complainant ran to her employer who advised her to report the matter to the chief. She instead reported the case to the police because, according to her she did not find the chief.

The complainant's employer, Justine Maina indeed testified and confirmed that he runs a hotel at [Particulars Withheld] and that the complainant was her employee in that hotel. This witness told the court that he had seen the appellant at the hotel and at one point, he argued with the complainant. In order

to avoid them interfering with his business the witness attempted to restrain the appellant and the complainant from arguing. He, however, did not see the appellant pulling the complainant's dress off.

Although the complainant stated in her evidence that she did not find the chief, one John Irungu Mwangi testified that he was the assistant chief of Kahuti sub-location and that on 1st February, 2010, the complainant had come complaining to him that the appellant had tried to remove her clothes and had touched her private parts. This witness said that he referred the complainant to the police.

Police constable Pius Wasike who was the investigating officer in the case against the appellant confirmed that he was on duty at Kahuti police patrol base on 1st February, 2010 when the complainant came at the station and reported that the appellant had insulted her and called her "dog and rubbish". He testified that apart from insulting the complainant, the appellant had removed the complaint's skirt and left her naked.

The appellant in his defence gave a sworn statement; in summary, he said that he worked at Kahuti and on the material day, he went to the hotel where the complainant worked. He was served by the complainant's employer and after he had eaten he left and went back to his place of work. He was later arrested though he was not informed why he was arrested.

The appellant testified that at one time before this incident, the complainant had vowed to teach him a lesson because he had allegedly informed one of the guests at the hotel that complainant was once married. This infuriated the complainant because according to the appellant, the appellant was "spoiling for her". In the appellant's view, the complaint against him and the subsequent charge for which he was convicted were the lesson that the complainant vowed to teach him. In other words his prosecution was not in good faith.

After considering the evidence by the prosecution and the appellant, the learned magistrate concluded that the prosecution had proved its case against the appellant beyond reasonable doubt. He convicted the appellant on the alternative count of indecent assault and sentenced him to ten years imprisonment. On the second count of causing disturbance, the appellant was imprisonment for six months. The sentences were to run concurrently.

The appellant was dissatisfied with the learned magistrate's decision; he appealed against both the convictions and the sentences. The appellant argued that his trial was a nullity since the charge was defective and it was wrong for the learned magistrate to have proceeded to take evidence and convict the appellant on the basis of a defective charge sheet. In the appellant's view the charge sheet should have indicated the means by which the complainant's buttocks were touched.

In addition to this contention, the appellant argued that the complainant never said in her testimony that the appellant touched her private parts.

The learned counsel for the state opposed the appeal both on conviction and sentence. The state contended that there was no particular defect in the charge sheet and even if such defect existed there was no prejudice caused to the appellant.

Section 11A under which the appellant was convicted states as follows:-

11A. Any person who commits and indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand or to both.

An indecent act is defined in section 2 of the Sexual Offences Act as an unlawful intentional act which causes-

a. ***Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act which causes penetration.***
b. ***Exposure or display of any pornographic material to any person against his or her will.***

For purposes of this appeal part (a) of the definition is more pertinent. For one to be liable for the offence of indecent assault under section 11A as read with section 2 of the Sexual Offences Act, the prosecution must prove that there was contact between any part of the appellant's body and the complainant's genital organs, breasts or buttocks. The contact must have been unlawful and intentional.

The only question in this appeal is whether the elements of this offence were proved to exist beyond reasonable doubt and in this regard the evidence of the complainant, her employer and that of the investigation officer is quite pertinent.

The complainant said that the appellant insulted her and later removed her clothes. According to the investigating officer, it was a skirt that was removed. Nobody else witnessed this incident. All that the complainant's employer saw was the altercation between the complainant and the appellant. Indeed he said that he tried to separate the two parties but was categorical that he never saw the appellant remove the complainant's clothes.

The complainant herself never mentioned that the appellant ever touched her private parts, buttocks or breasts. There was no evidence of contact between any part of the appellant's body and the specific parts of the complainant's body. It would be presumptuous to assume that if the appellant removed the complainant's skirt, he must have touched the restricted areas of her body. A conviction based on such presumption would not be a safe conviction; the prosecution must always prove its case beyond reasonable doubt. I find that that the offence of indecent assault as contemplated under section 11A of the Act was not proved against the appellant beyond reasonable doubt.

One more thing about this offence is that even if one was to be convicted, the maximum sentence is five years imprisonment or a fine of Kshs. 50,000/- or both the fine and the sentence. The learned magistrate sentenced the appellant to serve ten years imprisonment. This was obviously in error and the sentence was no doubt unlawful, assuming that the appellant was properly convicted.

On the second count of creating disturbance contrary to section 95(1)(b) of the Penal Code, the only available direct evidence is that of the complainant herself. The altercation between the appellant and the complainant was in broad daylight in a public place. It is intriguing that nobody else ever heard the abusive words that the appellant is said to have uttered.

From the record, the credibility of the complainant as a truthful witness should have been an issue that should have concerned the trial court. The complainant said that she did not find the chief and therefore went to report her case to the police. The assistant chief testified that she referred the complainant to the police who, indeed told the court that when the complainant reported the incident she said that she had been referred to the police by the chief. The complainant's contradictory evidence cast doubt on her credibility.

In addition, the appellant's defence should not have been disregarded without any reason. His defence that the complainant had a grudge against him prior to this incident raised doubts whether the complainant's complaint was made in good faith or was malicious. The prosecution did not clear this doubt.

My conclusion is that there was no sufficient evidence to convict the appellant on any of the counts of the charges against him. The appellant's appeal is merited and it is allowed. The appellant is therefore set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 17th day of February, 2014

Ngaah Jairus

JUDGE