



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 140 OF 2011

ELIJAH ANYANGO OGADA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(From original conviction and sentence in Criminal Case number 967 of 2010 of the
Principal Magistrate's Court at Winam – Mr. P. C. Biwott Esq.)**

JUDGMENT

The appellant was charged with the offence of committing an indecent Act with an adult contrary to Section 11 (A) of the Sexual Offences Act Number 3 of 2006.

The particulars of the offence are that on the 1st day of June 2010 at 9:00 a.m at Kondele area in Kisumu East District within Nyanza province intentionally and unlawfully touched the breasts and buttocks of **W S N** against her will. The appellant was convicted and sentence to serve five (5) years imprisonment. He has appealed citing the following grounds:-

- **The learned trial Magistrate erred in law and in fact by failing to appreciate that the evidence on record was not watertight enough to warrant a conviction.**
- **The learned trial Magistrate erred in law and in fact by convicting the appellant without sufficient evidence on record.**
- **The learned trial Magistrate erred in law and in fact by relying on evidence which was not corroborated and lacked probative value and therefore unsafe for a conviction.**
- **The learned trial Magistrate erred in law and in fact by failing to appreciate the defence evidence adduced by the Appellant.**
- **The learned trial Magistrate erred in law and in fact by shifting the burden of proof to the Appellant.**
- **The learned trial Magistrate erred in law and in fact failing to appreciate that the appellant was a first offender.**
- **That the sentence was excessive in the circumstances.**

- **The learned trial magistrate erred in law and in fact by failing to appreciate that in the case of indecent act the complainant must demonstrate the accused's act.**

Mr. Omollo for the appellant has argued that the prosecution failed to prove their case beyond the required standard.

The complainant on the material day was in their living room. At around 9:00 a.m according to her the appellant walked in and went straight targeting her. In the house was their maid as well as the complainant's brother.

The appellant after going round a table chasing the complainant managed to grab her from behind. He then proceeded to fondle her breast while attempting to kiss her. The complainant raised alarm and PW2 the caretaker walked in.

The said caretaker ordered the complainant to stop what he was doing and ordered him to set down.

The complainant told the trial court that the neighbours came after she raised alarm and later her father reported to the police and had the appellant arrested.

PW2 A B testified that he saw the appellant enter the complainant's house. Thereafter he heard the complainant screaming. He went into the house and found the appellant having grabbed the complainant from behind. He ordered him to sit down. The complainant parents came as well as other members of the public.

PW3 Roseline Nanjala a police Officer carried out the investigations and ordered the appellant arrested and charged.

PW4 D A was the house-help who was present with the complainant. She said that the appellant held the complainant by the shoulders. She equally confirmed that A PW2 came in to assist them.

In his unsworn evidence the appellant denied the offence but has confirmed that he went to the complainant's house. This being the first appeal this court is enjoined to reach a fresh findings, pursuant to the evidence adduced before the trial court.

The issues to be determined in this appeal is whether indeed the prosecution proved that the appellant touched the complainant's breast and buttocks. The other issue is whether the court judgment met the criteria envisaged by Section 169 of the Criminal Procedure Code and whether the sentence was excessive in the circumstances?

From the evidence on record, I have no doubt in my mind that the appellant and the complainant are well known to each other. The appellant did not object to the assertion by the complainant and her witnesses especially PW4 that previously he had been to the complainant house and he had been sent away.

What was the appellant's interests at the complainant's home? Why did he go there "as a gentleman" as he said in his testimony?. Did the complainant frame him?

From the evidence of PW2 and PW4 the other witness who saw the incidence, I am convinced that there was body conduct between the appellant and the complainant. The complainant said:-

"A the agent arrived. He found accused having held me from behind. He was touching my breasts and trying to kiss me. He could not reach my mouth. A pushed him away".

A on the other hand said:- **"The house maid called me. I entered and found accused having grabbed W from back. I separated them."**

On being cross examined he said:- **“I found you entangled with W. You had grabbed and held her from behind. I separated you from her”**.

I do not see how the appellant could be entangled with the complainant and failed to touch her buttocks. The chance of missing the buttocks and the breast of the complainant was too remote.

I do not agree with the appellant that he only touched the shoulders. Why touch the shoulders? Why touch her without her permission.

My finding therefore is that the appellant touched the complainant's breast and the buttocks. As a matter of fact the appellant did not deny the complaint's assertion that previously he had approached her.

Having reached the said conclusion the other issue to determine is whether the Judgment confirmed to the provisions of Section 169 of the Criminal Procedure Code. I do find that the same do not fit the whole ingredients and in particular that it does not raise the points or issues for determination. But does this error go into the root of the appellants case?. Not at all. There was no miscarriage of justice. As a matter of fact the appellant's testimony when put on his defence is not that long that it required a lengthy analysis.

The final issue for me to determine is the element of sentencing. The appellant has argued that the same was excessive. This fact has been supported by the respondent.

The period under Section 11 (A) of the Sexual Offences Act is a maximum of five (5) years or a fine not exceeding Kshs.50,000 or both.

Having looked at the circumstances of this case it would appear that the issue be deviling the appellant is what is commonly referred to as “blind love”. The appellant however should know the “gentleman's” way of approaching a woman. It is not entering into her house and in the presence of other person including her brother do what he did. The appellant has been in custody since 25th March 2011 which is over one (1) year.

I shall in the premises dismiss the appeal but for the sentencing find the period which the appellant has served to be an adequate punishment meted out again him.

I order that he be released forthwith.

Dated, signed and delivered at Kisumu this 24th day of September 2012

H. K. CHEMITEI
JUDGE

In the presence of:

Mr. Meroka for State Counsel

IN person Appellant

HKC/aao