



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

Criminal Appeal 133 of 2011

OMAR KOMBO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case No. 411 of 2010 of the Chief Magistrate's Court at Malindi before L. W. Gitari – CM)

JUDGMENT

1. The appellant was charged with two offences in the Lower Court namely, Grievous Harm contrary to Section 234 of the Penal code and Indecent Act with an adult contrary to Section 11(A) of the Sexual Offences Act. Particulars of the two counts are as follows:

“Count 1: That on 16th April, 2010 at Malindi town, Malindi location in Malindi District within the Coast Province, unlawfully did grievous harm to L.N.

Count 2: That on the 16th April, 2010 at Malindi Town in Malindi district within the Coast Province, intentionally and unlawfully committed an indecent act by touching the genital organs namely buttocks of Lucy Nthambi, a woman aged 29 years.”

2. After a full trial he was found guilty, convicted on both counts and sentenced to seven years and five years respectively. The sentences are to run concurrently. He has now appealed to this court against both conviction. Through his lawyers, J. K. Mwarandu and Co. Advocates he filed an amended petition of appeal on 12th July, 2012, citing the following grounds:

“1. That the learned Honourable magistrate erred both in law and fact in that he did not properly consider the evidence of the prosecution witnesses and the appellant's evidence.

2. That the learned Honourable magistrate erred both in law and fact in that he shifted the burden for

poof of innocence on the appellant.

3. That the learned Honourable Magistrate erred both in law and fact in that he shifted the burden of proof of innocence on the appellant.

4. That the learned Honourable magistrate erred both in law and fact in that he convicted the appellant on insufficient grounds which did not meet the threshold of proof beyond any reasonable doubt.”

3. This being a first appeal, the court is obligated to re-appraise the evidence in order to draw its own conclusions (***See Okeno V R 19-1972EA 322***) The evidence adduced by the prosecution in the Lower Court was that L. N. (the complainant) worked as a bar attendant at Big Daddy Bar. She was on duty on 16th April, 2010 at 2.30am. The appellant who was one of the revelers in the bar touched LN's buttocks as she went about her duties. She expressed her displeasure with the appellant but proceeded with her duties. The appellant followed and fondled her again and when L. N. confronted him, he hit her on the mouths with a fist. LN's incisor tooth was knocked out. She screamed and people came to her aid. The matter was reported to police. The accused who had been apprehended by members of public was handed over to police. L. N. was treated at Malindi District Hospital and discharged.

4. The appellant gave a brief defence in which he stated that he was enjoying his drinks in the bar and was not involved in the scuffle, only to be restrained by guards.

5. For the appellant, Mr. Shujaa highlighted the inconsistency between the date of offence as per charge sheet and the date in the P3 form and submitted that the offence could not have occurred on 16th April, 2010 as the P3 form referred to 15th April, 2010. He further submitted that the complainant's evidence was not corroborated, that her oral evidence in court differed from statements made to police in respect of the assault. That the age of the complainant and genital organs touched were not established. Finally, he submitted that the trial court shifted the burden of proof to the appellant by expecting an explanation from the appellant for being framed.

6. Mr. Kemo for the State opposed the appeal. He asked the court to note the OB reference on the P3 forms, the age of the appellant as per the P3 form and the fact that offence occurred at 2.30am of 16th April, 2010. That the date error (15th April, 2010) in P3 form is a genuine error curable under section 382 of the Criminal Procedure Code. Regarding the assault he referred to the particulars of the charge sheet referring to the 'buttocks' as the private parts/genital area. He argued that the conviction was based on adequate evidence and that contrary to defence submissions the trial court having analysed the same could not find any reason for the complainant framing the appellant. And that was not equivalent to the court shifting blame on the appellant.

7. Starting with the latter point, the trial magistrate had stated in her judgment:

“Secondly, PW1 had no reason to frame the accused and the accused did not allege anything which could have made PW1 to frame him.”

This statement in my view must be read together with the accused defence which implies that he was framed. While it is true that the burden of proof never shifts during a criminal trial. I do not think it was misdirection, and in fact it was logical, in the trial court to consider if indeed the appellant was framed. The trial court analyzed correctly the evidence before it and concluded that there was sufficient corroboration of PW1's testimony in the evidence of PW3. I agree. The timing and sequence of events is such that even though PW3 did not witness the actual assault on PW1 his other evidence regarding the prior argument between the appellant and complainant and soon after the screaming by an injured complainant go to support the testimony of the complainant. And so does the P3 form.

8. Again the evidence of Pc Mutua (PW1) that the complainant reported that the appellant “touched her private parts...” and “turned on her slapping her and knocking off her tooth” does not detract from the complainant's evidence.

The charge sheet particulars stated clearly that the appellant touched the “genital organs, namely buttocks” of L.N. In common parlance private part means genital organs, buttocks, etc. Section 11A of the Sexual Offences Act provides that:

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

Under section 2 of the Sexual Offences Act “indecent Act” means 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 that causes penetration.

9. The complainant herself was very expressive in her testimony: she referred to 'buttocks' rather than the usual polite terms “back or private parts”. PW4 as a typical modest Kenyan may have chosen to use the word private parts. That does not in any way contradict or diminish the value of the evidence of the complainant. This also applies to the question whether the appellant slapped and/or hit the complainant with a fist. It is a matter of expression that does not take away the substantive proven fact: that the appellant hit the complainant on the mouth, dislodging her tooth.

10. As far as the conviction is concerned, this appeal has no merit. But regarding the sentence, I am of the view that 7 and 5 years imprisonment on Count Nos 1 and 2 is slightly on the higher side especially since the appellant was a first offender. I do order the sentence reduced to 4 (four) years imprisonment on Count 1 and 2(two) years on Count 2.

The sentences will run concurrently from the date of sentence.

Delivered and signed in Malindi on this **18th** day of **September, 2012** in the presence of appellant, Ms Mathangani holding brief for Mr. Kemo for Respondent, Court Clerks Leah, Evans.

C. W. Meoli
JUDGE