



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Criminal Appeal 104 of 2009**  
**F M.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(An Appeal from original conviction and sentence in Narok SNR R.M.CR.C.NO.1238/2004 by Hon S. M. Githinji, Senior Resident Magistrate, dated 29<sup>th</sup> October, 2008)*

**JUDGMENT**

The appellant was sentenced to five (5) years imprisonment after he was found guilty and convicted of the offence of **indecent assault to a female** contrary to **section 141(1)** of the **Penal Code**.

He was aggrieved by the finding and sentence hence this appeal. Briefly stated, it was the prosecution case that the appellant lured the complainant not to go to school, caused her to change into civilian clothes as he intended to spend the night with her. The complainant was, at the time of the alleged offence, fourteen (14) years old.

She left her bag at a cousin's house and went for lunch at Kim's Hotel with the appellant. As they ate "nyama choma" (roast meat) and ugali, the appellant touched complainant's breast and private parts. Word reached the complainant's mother that she had not gone to school and that instead she had been seen in town with the appellant. The complainant's mother went to town but was unable to trace

them immediately. She sought the help of the police and the complainant was arrested and detained at the police station for three days and thereafter released to go to school. The appellant was also subsequently arrested.

The appellant in his defence maintained that it was the complainant who sought his assistance to take her to her aunt's new house. They did not find her aunt at home. They looked for her all over town. As they were doing so, the complainant was arrested and later he was also arrested on allegations that he had taken school fees from the complainant. His father testified that the contention was that the appellant had taken the complainant's school fees and that he was ready to refund the same. That the complainant's mother demanded more money and that when they failed to agree the appellant was charged. Counsel for the respondent did not oppose the appeal on the ground that there may have been fabrication of evidence and that the complainant may have been intimidated

I have considered this evidence in the light of the appellant's grounds of appeal as well as his written submissions. Being the first appellant court, I must re-evaluate that evidence and arrive at my own conclusion. It is the appellant's contention that there was no evidence to support the allegations against him. That the prosecution witnesses were relatives whose aim was to settle personal scores with the appellant.

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There is no doubt that the complainant after being escorted to the bus stage by the mother and after boarding the matatu and the fare paid, disembarked and with the appellant left for her aunt's house where she removed her school uniform and changed into civilian clothes.

From there she accompanied the appellant to Kim's Hotel for lunch and were later seen holding hands in town. It is when they were having lunch that it is alleged that the appellant indecently assaulted her. The evidence of this assault came only from the complainant. Is that evidence credible? Taking into account the circumstances of the case, I find the complainant's evidence difficult to believe; that in a public place, a restaurant, the appellant touched her breasts and then squeezed his hands under her pants to touch her private parts and that she did not resist or scream or even alert the hotel attendants!

From the evidence of the complainant's mother and that of her aunt – P.W.1, the complainant appeared to be at home with the appellant, as if they were lovers, despite her age and the fact that they are related. They were seen walking together holding hands.

At some stage, the appellant's hand was around the complainant's shoulders. The complainant did not complain when the appellant touched her and only told the mother about this when she was about to be taken to the police station where she was held for three days. Indeed she did not record her statement immediately. There is doubt, therefore, that she was indecently assaulted. She made up the story to cover up her failure to go to school and for the fear of being detained by the police. That doubt is resolved in favour of the appellant.

This appeal succeeds. The conviction is quashed and sentence of five years set aside. The appellant will be set at liberty forthwith unless otherwise detained for lawful cause.

Dated, Signed and Delivered at Nakuru this 5<sup>th</sup> day of February, 2010.

**W. OUKO**

**JUDGE**