REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL 5 OF 2006

WILSON NTHIGA NJAGI……...……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted rape contrary to section 141 of the Penal Code. The office was committed on 25/2/2001. However in the particulars of the offence the words "unlawful" between" to have" and "carnal knowledge" the words unlawful" were omitted by the prosecution. Therefore the charge sheet was fatally defective on count 1. The State Counsel Mr. Kimathi conceded the appeal in this count one (1) on that ground. However the State Counsel urged the court to sentence the appellant on the alternative charge of indecent assault on a female under Section 144 (1) of the penal code saying that there was on record sufficient evidence to support that charge.

I have perused the record and it is clear the appellant pleaded not guilty" to the alternative count. The prosecution evidence is that the Appellant forced himself on the complainant demanding greeting by force and forcing himself inside the complainant's one roomed house. He forced her onto the bed in the room. He tried to remove the complainant's underclothes and he touched her breasts with his hands. PW5 Dr. Joseph Jumlea examined the complainant and found her with bruises on right breast. The trial Magistrate found that the assault was indecent accompanied by act of tearing the woman's underpants and injuring her breasts. These acts constituted the offence of indecent assault. The trial magistrate found the offence of attempted rape not proved. But she convicted on the offence of indecent assault and sentenced the accused to serve 4 years imprisonment. It was therefore unnecessary for state to concede appeal on count number one on charge sheet. The petition of Appeal filed by the Appellant clearly shows that the Appellant was convicted on the alternative charge. His grounds of appeal refer to the conviction on the charge of indecent assault saying that there was no corroboration, the trial magistrate erred and misdirected himself when he reduced the charge. On this ground the appellant was convicted on the alternative charge set out in the charge sheet and therefore there is nothing to complain about. And it had been indicated earlier the record shows that the Appellant pleaded not guilty on that court. He was aware that he was on trial on that count. The other ground is that his defence was not considered.

Upon perusing the record at page 19 and 20 where the Appellants defence is recorded it will appear that the defence was "I did not do those things" "The charges are untrue." This was a simple demand without substance. And the prosecution evidence was overwhelming against this appellant. The appellant has raised the issue of section 200 CPC concerning the change of Trial Magistrate. On 31/5/2004 (see page (46) record) Mr. G.C. Mutembei Senior Principal Magistrate was presiding and ordered the trial to start De Novo.. However on 12/8/2004 Senior Principal Magistrate Gitari was presiding and she reversed that order and ordered that the hearing to proceed before the first Magistrate Mr. Kiarie Principal Magistrate. However the Appellant was not able to produce his witnesses and he requested the court to proceed to Judgment which was made by J. Kiarie on 17/9/2004 and read by

L.W.Gitari Senior Principal Magistrate on 4/1/2006.

I find no prejudice was suffered by the Appellant by this procedure. The provisions of Section 200 CPC were applied until the Appellant requested the court to read Judgment as his witnesses were not available.

On the issue of the fact of touching the complainant in her private parts, I find that the offence was proved. By the act of tearing the complainant underpants the Appellant was touching her private parts. Also by the act of touching her breasts and causing injury it constituted the act of indecent assault. The breasts of a female person form part of her private parts.

In the circumstances stated above the State Counsel did put forward his support of conviction on the alternative charge. The Appellant has also put forward his grounds of appeal. After considering both sides of the submissions, I am convinced that the Trial Magistrate Mr. Kiarie did convict on safe evidence. I see no reason for interfering with the conviction or sentence which I find not harsh or excessive. I therefore uphold the conviction and sentence. The appeal is therefore dismissed.

Dated this 3rd April, 2008.

J. N. KHAMINWA

JUDGE

3/4/2008

Khaminwa – Judge

Njue – Clerk

Mr. Omwega for state

Appellant – present

Judgment read in open court.

J. N. KHAMINWA

JUDGE