



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 479 of 2006

MARTIN NJOROGE WAIRIMU APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original decision in criminal case No. 447 of 2006 in the Senior Principal Magistrates Court at Kiambu-H. Nyakweba R.M.)

JUDGEMENT

MARTIN NJOROGE WAIRIMU, the appellant, was charged before the subordinate court with attempted defilement contrary to section 145(2) of the Penal Code. The particulars of the charge were that on 4th March 2006 at Kiambu District within Central Province, unlawfully and indecently assaulted C W a girl under the age of 16 years. In the alternative, he was charged with indecent assault on a female contrary to section 144(1) of the Penal Code. The particulars of offence were that on 4th March, 2006 at Kiambu District within Central Province, unlawfully and indecently assaulted CWW a girl under the age of 16 years by touching her private parts namely breast.

After a full trial, he was acquitted of the main count. He was however, found guilty on the alternative charge of indecent assault. He was sentenced to serve 10 years imprisonment. He has now appealed to this court against both the conviction and sentence. In addition to his petition of appeal, the appellant also filed written submissions, which he relied upon at the hearing of the appeal.

The learned State Counsel, Mrs. Obuo, opposed the appeal. Counsel supported both conviction and sentence. Counsel contended that there was adequate evidence to support the conviction. The complainant met the appellant t in broad daylight when she was on her way to school. The appellant dragged the complainant into the coffee bushes, and threatened to cut her with a panga and touched her breasts. Counsel emphasized that that the appellant was in the company of PW2, who witnessed the incident. There was therefore direct evidence on the commission of the offence by the appellant. In addition, the appellant was arrested on the same day at around 1pm, while hiding in the coffee plantation, which was suspicious conduct. That conduct confirmed that, indeed, the appellant was not innocent. Counsel also submitted that, regarding violation section 72(3) of the Constitution, the Court of Appeal had held that complaints regarding delays in bringing an accused to court should be raised at the trial. That was not done in the present case. Therefore, the complaint of the appellant on delays to bring him to court outside the time allowed by section 72 of the Constitution should be dismissed.

I have evaluated the evidence on record. The evidence that implicated the appellant with the offence, was the evidence of PW1 C W W (the Complainant) aged about 14 years, and that of PW2 R W, aged about 12 years. Both the two witnesses were minors. PW1 gave evidence on oath, while PW2 gave evidence, but was not sworn. PW1 stated that the appellant had sent a girl called Gladys to her twice, to convince her to have a relationship with him), but she declined. On the material date, as PW1 was going to school at about 8.00 am with PW2 and one Samuel Mbugua, they met the appellant cutting grass. The appellant took the opportunity grab the complainant, pulled her from the foot path, threatened her with a panga, and touched her breasts. The complainant resisted, screamed, and then went and reported the incident to the school teacher (who never testified in court). PW2 R W tendered evidence that supported the version of the complainant. PW2 stated that she saw the appellant drag the complainant and touch her breasts. The appellant was arrested at about 1.00 pm, by PW3 APC Geoffrey Muriuki. The appellant, according to this witness, was found after a search hiding in Mboi-Kamiti coffee plantation, about 2 Kilometers from the school (particulars withheld). I

In this defence the appellant gave unsworn testimony. He also called one witness. It was his defence that he was cutting nappier grass on 4.3.2006. While on his way home, he met police officers who ordered him to sit down and alleged that he had attempted to rape. They then took him to Kiambu police station. The defence witness was DW2 ANNE NYOKABI. She stated that on 4.3.2006, she heard that the appellant had quarreled with a school girl. She later met the appellant at Mboi-Kamiti cutting grass. The appellant was in the company of a woman called Njeri. The witness (DW2) went her way and arrived home a t about 2.00 pm.

The direct evidence regarding the actual allegation of indecent assault is therefore evidence of minors. The provisal to 124 of the Evidence Act (cap 80) states that, such evidence by a miner complainant in a sexual offence, does not necessarily require corroboration. It can be a basis for founding a conviction, provided the trial court believes in the same. It provides:-

“124.....

Provided that where is a criminal case involving a sexual offence that only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth”.

I am convinced, in the present case, that the minor victim PW1 was telling the truth. Her evidence was on oath and was not shaken in cross-examination. Secondly, there is consistency between her evidence and that of her school mate PW2, about what happened. Thirdly, the complainant made the report immediately, leading to the search and arrest of the appellant at about 1pm on the same day. Fourthly, the evidence on record is that the appellant was hiding in the coffee plantation when he was arrested. Fifthly, even the defence witness, DW2 ANNE NYOKABI, stated in examination in chief that she had heard that the appellant had quarreled with a school girl. This was before this witness saw the appellant, obviously before the arrest at 1.00 p.m. The appellant in his defence did not at all mention about this disagreement or quarrel with a school girl. In my view, the prosecution proved that the appellant touched the breasts of the complainant.

The learned magistrate was alive to the fact that the Sexual Offences Act 2006, had repealed some sections of the Panel Code, such as the one under which the appellant was charged. However, there were transitional clauses in the sexual offences act, which kept charges under such offences already preferred alive. Therefore, the charge could continue to be prosecuted under the Penal Code irrespective of the provision of the Sexual Offences Act.

The only problem with the conviction is the allegation

in the charge sheet that the indecent assault was committed when the appellant touched the private parts of the complainant. The said private parts as per the charge sheetm were the breasts of the complainant.

The breasts cannot be private parts. In the Concise Oxford English Dictionary, 11th Edition Revised private parts are described as follows:-

“Private Parts – euphemistic a persons genitals”

Therefore, the breasts of the complainant cannot be described as private parts. They were not the genitals. However, the offence of indecent assault, in my view, is not restricted to the touching of private parts. Section 144 of the Penal Code does not state that the indecent assault can only be committed by touching the private parts. The indecent assault was committed when the appellant actually touched the complainant’s breasts without her consent and apparently in the presence or in the sight of others. Therefore, in my view, the learned magistrate was right in convicting the appellant for the offence of indecent assault. I will uphold the conviction.

On the issue of contravention of section 72(3) of the constitution, the appellant states that he was arraigned in court after 72 hours, while he should have been brought to court within 24 hours of arrest. His contention is that the arresting officer, PW3 APC GEOFFREY MURIUKI, stated in evidence that he arrested the appellant on 4.3.2006, while the date on which the plea was taken by the court was indicated as 6.3.2006.

Indeed, section 72(3) of the Constitution requires that, for the offence for which the appellant was charged, an accused person should be brought to court within 24 hours of his arrest. The same section, however, provides that the person arrested should be brought before the court as soon as practicable. The section also allows the person who claims that an accused person has been brought to court within a reasonable time, to give an explanation to the court on the issue. The issue of delay in bringing the appellant to court was not raised in the trial court. There is also no agreement before me on the circumstances of the purported delay. As was held by the Court of Appeal in the case of MORRIS NJUGUNA –vs- REPUBLIC CRIMINAL APPEAL NO. 232 OF 2006 –

“If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the constitution to enable the relevant court to investigate to issue.”

The appellant not having raised the issue of delay in charging him with the court that could investigate the same, I dismiss that ground. The trial court could have determined whether there was any delay, and whether, indeed, the delay was reasonable or unreasonable. An application under the provisions the Constitution would also have made the court investigate the issue and make appropriate findings and decisions. As for this appellate court, I have to dismiss the ground of delays.

On sentence, the appellant was sentenced to serve 10 years imprisonment. The maximum sentence for the offence is 21 years imprisonment with hard labour. The appellant was a first offender. Though the magistrate stated that she had taken into account the mitigation, she sentenced the appellant to serve 10 years imprisonment. In the circumstances of this case, I am of the view that the severity of the sentence shows that the magistrate applied a wrong principle in sentencing. I am alive to the fact that sentencing is a discretion of the sentencing court, and an appellant court should be slow to interfere with that discretion. However, I find the sentence to be harsh and excessive in the circumstances of his case, as the indecency was a mere touch of the breast. I will reduce the sentence to 3 years imprisonment.

Consequently, I order as follows:-

1. I dismiss the appeal against conviction and uphold the conviction of the learned trial magistrate.
2. I set aside the sentence imposed by the learned magistrate and order that the appellant will now serve a sentence of 3 years imprisonment from the date on which he was sentenced by the subordinate court.

It is so ordered

Dated and delivered at Nairobi this 6th May 2008.

GEORGE DULU

JUDGE

In the presence of -

Appellant in person

Mrs. Obuo for state - absent

Mwangi - Court clerk