REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO.111 2006

BETWEEN

DUNCAN KIOKO NZIOKA…..…….. APPELLANT

-AND-

REPUBLIC……..……...RESPONDENT

(An appeal from the Judgement of Resident Magistrate Mr. Oduor dated 16th December, 2004 in Criminal Case No. 4678 of 2004 at the Kibera law Courts)

JUDGEMENT

The charge against the appellant was indecent assault on a female, contrary to s.144(3) of the Penal Code (Cap.63). The particulars were that the appellant, on ***13th June, 2004*** at *[particulars withheld]* Estate, within Nairobi Province, with intent to insult the modesty of a woman namely ***R W N***, intruded upon her privacy.

PW1, ***R W N*** testified that she is aged 27 years and lives at the home of her father, in *[particulars withheld]* Estate. On 13th June, 2004 at 7.15 p.m. she had escorted a visiting family friend, within the Hillcrest area. As she returned home, which is located within a school in the area known as *[particulars withheld]* School, the watchman (the appellant) opened the gate so she may enter. As PW1 entered, the appellant followed her and grabbed her by the waist, uttering the words: "you refused to be my lover, and today [you will pay for it]." PW1 screamed, as the appellant dragged her towards the guard's house. The scream forced the appellant to let go. PW1 went into the house where she lived, and reported the matter to her sister, ***G N*** (PW2). PW2 then reported this incident to the school's security officer. The matter was later reported to Hardy Police Station (on 15th June, 2004), and the appellant was arrested.

On cross-examination, PW1 said she knew the appellant as ***Duncan,*** the school watchman. She confirmed that the incident had taken place on a Sunday, 13th June, 2004 at 7.15 p.m. She said she had screamed a lot when the appellant intruded upon her, but nobody had come along to rescue her. PW1 said her complaint was not actuated by the school's security officer egging on her to pursue the appellant, out of malice.

PW2, ***G N*** testified that she lived with the complainant in one house. On 13th June, 2004, at about 7.20 p.m. PW1 had escorted a visitor, returned home crying and panting. When PW2 inquired what was the

matter, the complainant told her that ***Duncan,*** the watchman, had attempted to molest her. PW2 and the school's security officer then went up to the gate, and questioned the appellant; and the appellant told them he had seen nobody enter through the gate earlier. As the appellant denied the incident, PW2 and the security officer reported the matter to the Headmaster of the School, who in turn, referred them to the Police. The complainant then reported the matter to Hardy Police Station; and in the meantime the appellant abandoned his work station.

On cross-examination, PW2 said she was not aware that the appellant and the school's security officer had any differences between them. The security officer, one ***Duncan Njuguna*** who was the immediate superior of the appellant, had been inside his own house during the evening incident, and that is where PW2 had found him. PW2 said she no longer sees ***Duncan Njuguna*** at the school, and she has no idea if his services may have been terminated in the absence of PW2 who had some days of leave from her regular employment.

PW3, Police Force No. 72561 ***Police Constable George Ochieng*** of Hardy Police Station said he was the investigating officer in this case. He was on duty on 22nd June, 2004 when a report was brought to him by a lady and her sister, accompanied by the security officer of Hillcrest school. One of the two ladies reported that a school watchman had molested her. For some time it was said that the appellant had disappeared; but he was at the school on ***22nd June, 2004.*** It is the security officer who identified the appellant to the Police, and the appellant was arrested, held at the Police station, and charged.

On cross-examination, PW3 testified that he had visited the alleged scene of crime. PW3 did not interview other watchmen at the school. He said the guard room was far from the classrooms; and that those passing by, along the road on the outside of the gate, would not know what was happening at the guardroom. PW3 did not recover any exhibits. PW3 said the appellant had not reported to his work station for three days after the incident though he did not find out if, perhaps, the appellant was on authorised off-duty. PW3 testified that he had been communicating with the security officer, and with PW2 to locate the appellant's whereabouts, during the period the appellant could not be found. PW3 said he had no knowledge if the security officer with whom he was working, might himself have been involved in a theft at the school, during the period the appellant was detained at the Police station.

At this point, the prosecutor asked the Court to give him an opportunity to produce the school's security officer who was "said to be on leave." The appellant had no objection to that request, and the Court then gave a last adjournment at the request of the prosecution. The Court recorded as follows: ***"Further hearing on 21st September, 2004 for one witness*** [emphasis original]."

On 21st September, 2004 the prosecutor stated in Court: "There is one witness we could not locate. He was sacked. I close the prosecution case."

The learned Resident Magistrate adjourned to 24th September, 2004 when he ruled:

"I considered the evidence on record. I find that the accused has a case to answer."

The appellant elected to give an unsworn statement, and to call one witness.

In his statement which he made on 1st November, 2004 the appellant denied assaulting the complainant. He said he had been in the course of his duties on the material night, when the complainant came along, passed through the gate, and went to talk to the security officer. The security officer then came to the appellant, inquiring if he had seen *a child* pass through the gate; and the appellant told them *he had not*. The appellant was not able to find his witness; so he closed his case.

The relevant part of the learned Magistrate's judgement thus reads:

"The main issue for determination is whether the accused committed the offence alleged.

PW1 clearly narrated how the accused had grabbed her by the waist and pulled her towards the gate.

"The accused admitted that PW1 entered the gate and that he opened for her. PW1 knew the accused and her evidence on this issue and on the entire incident was lucid and coherent. PW1 testified under oath.

"She narrated the incident to her sister (PW2) who told the Court that PW1 had left the house in a composed state, only to return panting and crying. If the accused had certain grudges with the chief security officer of the school where PW1 lived, I do not see how PW1 gets involved in all this. Indeed she emphatically stated that she had nothing to do with the chief security officer.

"The accused's defence was a denial. He only said he was framed.

"I had the benefit of observing PW1's demeanour as she testified. Although no remarks regarding this were made on the record, she impressed me as being forthright, and this recollection is still clear in my mind.

"I therefore find that the accused grabbed PW1's waist from the front, which was not only terrifying to her given that he was dragging her to the guardroom and threatening her for refusing to be his lover – but also quite disdainful to her as a woman who had no romantic engagement with the accused and did not wish to be so engaged.

"It is noteworthy that the accused only left PW1 after she persistently screamed

"I find that the charge [is] proved beyond reasonable doubt."

After the learned Magistrate had heard the appellant's plea in mitigation, he sentenced the appellant to imprisonment for seven years.

Apart from the grounds stated in the petition of appeal, the appellant had filed written submissions to which learned counsel ***Ms. Gateru*** made a response. She opposed the appeal, and urged that the Court do uphold conviction, and confirm sentence.

Ms. Gateru submitted that the act of the appellant, in holding the complainant by the waist and dragging her towards the guardroom, proved the offence of indecent assault. She urged that even though the trial Court had relied on just the testimony of one witness, this was still reliable evidence, as the Court was satisfied that the witness was saying the truth.

I think this is perhaps the most typical case that demonstrates the disadvantage facing parties to criminal prosecution who do not have the assistance of counsel. It also shows that State counsel, as they strive to dispose of stupendous volumes of prosecution cases, sometimes miss out on the detail of the law which if not applied, may lead to injustice for accused persons.

The charge in this case was brought under Chapter XV of the Penal Code (Cap.63) which is captioned "OFFENCES AGAINST MORALITY" ? and that was in ***June, 2004.*** Certainly, the said section of the Penal Code (s.144(3)) was in force, and it was entirely lawful to bring the charge in the manner in which it was done. Liability, therefore, if found to be proved, would in law be liability under the *Penal Code.*

Subsequently, in ***2006***, the Sexual Offences Act (Act No. 3 of 2006) was enacted, its date of assent being ***14th July, 2006*** and its date of commencement being ***21st July, 2006***. The substratum of the said Chapter XV of the Penal Code (Cap.63) was transferred to the new statute, which now has a wider coverage centring on sexual offences. The new Act has the object defined in its long title: "***An Act of Parliament***

to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes."

If the offence charged in the instant case had been under the Sexual Offences Act 2006 (Act No. 3 of 2006), then most likely it would have been brought under s.11(6), which thus provides:

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

The foregoing provision is *much more severe* than the former Penal Code offence, i.e., s.144(3) under which the appellant herein had been charged. Section 144(3) of the Penal Code (Cap.63) under which the appellant was charged thus stipulates:

> ***"Whoever, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture or exhibits any object, intended that the word or sound shall be heard, or that the gesture or object shall be seen, by the woman or girl, or intrudes upon the privacy of the woman or girl, is guilty of a misdemeanour and is liable to imprisonment for one year."***

It is precisely the offence described in the foregoing provision as *"intrudes upon the privacy of the woman or girl,"* that I believe the learned Resident Magistrate to have found to have been proved, when he thus remarked:

> ***"I … find that the accused grabbed PW1's waist from the front, which was not only terrifying to her given that he was dragging her to the guardroom and threatening her for refusing to be his lover – but also quite disdainful to her as a woman who had no romantic engagement with the accused and did not wish to be engaged."***

I find, therefore, that the learned Resident Magistrate was dealing with a *misdemeanour* in the terms of s.144(3) of the Penal Code. Consequently, even if the trial Court properly convicted the appellant (a point which I will now consider), the maximum penalty which could, under the law, be meted out was a *one-year* term of imprisonment. But the trial Court, after hearing the appellant's plea in mitigation, thus ruled:

> ***"Mitigation considered. Also accused is a first offender. However, the offence is serious and prevalent. Accused to serve 7 years' imprisonment***."

Evidently, that sentence was not guided by the applicable law, and I will, therefore, set it aside.

The remaining question is whether, as specified in the charge sheet, the appellant did "insult the modesty of a woman, namely ***R W N*** by intruding upon her privacy."

The appellant stated his grounds of appeal as follows:

> the learned Magistrate erred in law and fact in convicting the appellant and sentencing him to a term of seven years' imprisonment without considering that the conviction was based on the evidence of just one witness;
>
> the learned Magistrate erred in law and fact, by relying on the evidence of PW2 who was not at the alleged scene of crime.

It is now well established as a matter of law, that a duty lies on a first appellate Court to review all the evidence emanating from the trial Court, and to arrive at its own decision on guilt or no-guilt independently (***James Otengo Nyarombe v. Republic***, Crim. App. No. 184 of 2002); and applying the said principle, I have carefully reviewed the evidence which was laid before the trial Court.

The complainant (PW1) gave sworn testimony that she was, on the evening of 13th June, 2004 engaged in

a wholly innocent, private engagement, that of escorting a family friend up to just a short distance from Hillcrest School where her home was located. She said that on her way back, the appellant intruded upon her in an indecent manner, manhandled her, and made sexy allusions. The complainant was so distraught and terrified, she screamed, and immediately reported this incident to her sister (PW2) even as she was panting and in shock. The learned Magistrate records in the judgment his perception of PW1's demeanour as she testified in Court; he formed the impression that PW1 was a truthful witness. In keeping with the principle laid down in ***Okale v. Republic*** [1965] E.A. 555 C.A., I will make due allowance for such evidence of demeanour and countenance, which I do not have the privilege of perceiving, that only the learned Magistrate could have had. So I take it that PW1 was indeed a truthful eye witness to the commission of the offence with which the appellant was charged.

Although, just as the appellant contends, PW2 did not perceive the alleged indecent assault upon the complainant, she did testify that she had observed a badly shaken PW1 who was panting, as she returned to the house after escorting the family friend. The testimonies of both PW1 and PW2, therefore, make up a scenario which indicates as a fact, that PW1 had undergone a disturbing personal experience as she went past the gate, where the appellant was stationed. The nature of that disturbing experience is the subject of PW1's testimony, which testimony, as I have already held, does carry veracity. It is my conclusion, in this context, that the appellant, indeed, had intruded upon the privacy of the complainant, and subjected her, as she avers, to an indecent assault.

Therefore, I will uphold the conviction of the appellant. Specifically, I will make orders as follows:

> **The appellant's appeal on conviction is dismissed, and the conviction is upheld.**
>
> **The sentence of seven years' imprisonment imposed by the trial Court on 16th December, 2004 is quashed and vacated.**
>
> **A sentence of imprisonment for a period of *eight months* is substituted for the term imposed by the trial Court.**
>
> **The new sentence is to be deemed to run from the date of the Judgement delivered by the trial Court, on *16th December, 2004.***
>
> **If the appellant will have served the term of imprisonment specified in the 3rd order herein, counting from *16th December, 2004,* then he shall forthwith be set at liberty, unless otherwise lawfully held.**

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 18th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung'u

For the Respondent: Ms. Gateru

Appellant in person