

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 50 OF 2005

MOI DALUAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The appellant pleaded guilty to a charge of indecent assault contrary to Section 144(1) of the Penal code. The particulars of the charge were that on the 14th day of February 2005 at about 00.00 hours at Mariakani Weigh Bridge, Mariakani Location in Kilifi District of the Coast Province, unlawfully and indecently assaulted Saida Maluki by touching her private parts namely breasts and thighs. He was then convicted and sentenced to serve 7 years imprisonment with hard labour. Being aggrieved he now appeals to this court.

In his petition of appeal, the appellant has listed eight grounds of Appeal. A close perusal of the aforesaid grounds reveal that the appellant is bringing up new facts in mitigation. He has pointed out the following factors: First, that he pleaded guilty as a first offender. Secondly, that he is remorseful and that he is saved and unlikely to repeat the mistake. Thirdly, that he is young and he should not be mixed with hardcore criminals while serving his sentence. On the basis of the above mitigating factors the appellant has urged this court to interfere with the sentence.

On his part, Mr. Monda, the Learned State Counsel opposed the appeal. He urged this court to dismiss the appeal because all the mitigating factors were taken into account and that the sentence imposed was not harsh or excessive.

This is an appeal which is essentially against the sentence. The record shows that the appellant indicated to the trial court that he spoke and understood Kiswahili language which is the language of the subordinate court. In my mind since there is no averment or argument that the appellant did not understand the language of the court, then the plea is unequivocal in that score.

I have examined the charge and the facts read in support of the charge. It is evident that the ingredients of the charge which faced the appellant were established by the facts. The Court of Appeal considered the ingredients of what constitutes the offence of indecent assault in the case of GITAU –VS- R [1983] K.L.R. P 222 in which it held inter alia that:

1. An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault. The touching, for example, of the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse is also indecent assault. The test is usually whether the assault was intentional and whether it was indecent. A simple assault may constitute indecent assault if it is accompanied by utterances suggestive of sexual intercourse.
2. The intention indecently to assault the female must be evidenced by assault itself. The offence is complete if a female is indecently treated by touching her private parts even if the intention is not sexual intercourse.

The appellant admitted the facts when read to him pursuant to

Section 207(1) of the Criminal Procedure Code. The facts clearly stated that the appellant touched the complainant's private parts, breasts and all over the body while the complainant was asleep on her bed. In fact the appellant said he touched the complainant because he was high having taken too much palm wine. A critical examination of the appellant's admission of the facts will reveal that the appellant's admission was conditional. He raised the defence of intoxication which the trial magistrate misapprehended. The Learned State Counsel was of the view that the appellant's assertion that he was high did not amount to a defence under Section 13 of the Penal Code. I have considered the recorded proceedings vis-à-vis the Learned State Counsel's submissions.

The question which must be answered is whether or not the plea was unequivocal in view of this shortcoming? The provisions of Section 13(2) of the Penal Code clearly gives instances when an accused may set up the defence of intoxication in Criminal Cases. In this case the appellant said he took too much palm wine hence he was drunk at the time of committing the offence. The trial learned Resident Magistrate with great respect misapprehended the point when he failed to realize that the appellant had admitted the charge on the basis that he was under the influence of Palm wine. Consequently a plea of not guilty should have been recorded instead. I hold that the plea was equivocal. Having come to this conclusion I do not need to consider the appeal as against sentence. The State Counsel's submission that the appellant's defence did not fall within the provisions of Section 13 of the Penal Code cannot be sustained because that can only be established when the evidence is received and assessed.

In the final analysis therefore this appeal is allowed with a consequential order that the conviction is quashed and the sentence is set aside. The appellant may be released but may be re-arrested and tried afresh if the state so wishes.

Dated and delivered at Mombasa this 14th day of February 2006.

J.K. SERGON

J U D G E

In the presence of Miss Mwaniki for the Respondent and in the presence of the appellant.