REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 171 of 2004

[ORIGINATING FROM VOI LOWER COURT RM CRIMINAL 553 OF 2003]

DANIL MUTUNGI……..……..APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

J U D G M E N T

The appellant was initially charged with three counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code; indecent assault on a female contrary to Section 144(1) of the Penal Code, and giving false information to a person employed in the public service contrary to Section 129(a) of the Penal Code. After the close of the prosecution case, the appellant was acquitted of count 1 under Section 210 of the Criminal Procedure Code. At the end of the trial, he was found guilty of the remaining counts of indecent assault on a female and giving false information to a person employed in the public service in respect of which he was convicted and sentenced to three(3) years imprisonment with hard labour, and one(1) year imprisonment, respectively, the sentences to run concurrently. He has appealed to this court against both conviction and sentence.

At the hearing of the appeal, the appellant appeared in person while the State was represented by Ms. Mwaniki, and each of them submitted at length. After considering their respective submissions and re-evaluating the evidence and judgment of the learned trial magistrate, my observations are as follows. In the first instance, since the appellant was acquitted of assault causing actual bodily harm, it will serve no purpose to go over and over again the facts surrounding that alleged offence except for the purpose of determining whether the appellant was guilty of giving false information by alleging that the complainant had assaulted him.

With regard to the offence of indecent assault, the complainant stated that the appellant touched her right breast. The two points to be determined are whether the appellant assaulted the complainant and, if so, whether it was an indecent assault. The record of proceedings depicts the appellant as saying in his evidence in chief-

"…***I never touched that lady…***

There was no need for me to touch her breast…"

The complainant, PW1, testified as follows-

"***Accused came and went to the toilet…***

When he came back from the toilet,

He came and touched my right breast.

I pushed his hand from my breast and he hit me on the right side of the face. I fell down."

In cross examination, she maintained-

"… ***I saw him going to the toilet and when he came back I did not see but he touched my breast and I just pushed the hand and by then he was in my back. He then hit me on the eye…."***

In further cross examination, she insisted-

"***I was serving beer to the customer Gregory, I was opening it by then with an opener. He touched my breast. I had the opener on my right hand. I pushed the hand while holding the opener…"***

This evidence was corroborated by PW2, Gregory Wandela, who stated-

"***On 27/3/03 at 11.30p.m. I was at Gloria bar taking beer. I had finished first bottle. PW1 came to open for me the 2nd bottle. While doing so, the accused came and touched the breast for the complainant. She removed the hand for Mutungi in the process, she hit the accused with her hand and the accused hit the complainant on her left hand eye…."***

While the appellant denies touching the complainant's right breast, there is not only the complainant's evidence to contend with, but also corroboration by PW2. The appellant is therefore not telling the truth. When he further submitted that the two witnesses of indecent assault never corroborated, he could not be more mistaken. I find, as the learned trial magistrate did, that the appellant did touch the complainant's breast, and to use his own words, there was no need for him to do so. Yet, he did exactly that which he had no need to do.

There is no doubt that the appellant assaulted the complainant. The second issue to be determined is whether the assault was indecent. In ***GITAU*** **v.** ***REPUBLIC*** ,[1983] KLR 222, the Court of Appeal laid down some guidelines to be applied in determining whether indecent assault has been established. They said at page 224-

"***An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault and also an assault by touching for example, the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse. The simple issue usually is whether the assault was intentional and whether it was indecent…We agree that the offence is complete when a female is indecently treated by touching her private parts even if the intention was not sexual intercourse. The intention indecently to assault the female must however be evidenced by the assault itself***."

What was the appellant's intention in touching the complainant's breast? Only he can tell us, but it was clearly indecent of him to touch the complainant's breast, and by so doing he committed an indecent assault on her. He was therefore properly convicted of that offence.

The third count with which the appellant was charged was giving false information to a person employed in the public service. To sustain a conviction on this count, it must be proved that the appellant gave information to a person employed in the public service which information he knew or believed to be false. I have perused the lower court's record and the judgement of the learned trial magistrate. These establish that after the bar incident, the appellant went to the police station and reported that the

complainant had assaulted him. According to the testimony of PW3, Number 67195 PC Peter Mbugua, the appellant had no visible injuries and no marks to show that he was injured. He was referred to Voi Hospital for treatment and he never came back to the police station. PW4, Number 58549 PC Simon Musili, testified that while he and PW3 were on crime standby, the appellant went to the police station with a report that he had been assaulted by the complainant. He was referred to Voi Hospital so that he could be attended to, and was advised to come back to the station. He never came back.

A few minutes later, the complainant came to report that the accused had assaulted her.

While at the hospital, the appellant was attended by DW2, Veronica Mwademu, who was a Clinical Officer at the Hospital. In a nutshell, she said that she did not see any swelling, injury or a cut on the complainant. In cross examination, she said, inter alia-

"…***There was no swelling no cut on the accused. Nothing was visible. He was complaining of pain. So I prescribed pain killers aspirin. He did not collect the drugs…"***

These words tend to corroborate the testimony of PW3 who testified that when the appellant reported the alleged assault, he had no visible injuries and no marks to show that he was injured. This also reinforces the evidence of PW4 when he said in cross examination-

"***The accused's report was false because at first, when he reported, he had no visible injuries. He did not come back when we referred him to see the doctor in the hospital. If he had internal injuries the doctor could have disclosed."***

The learned trial Magistrate took all this into consideration and rightly reached the conclusion that the appellant had given false information to PW4, a police officer employed by the Government of Kenya, to the effect that he had been assaulted which was not the case. There were no visible injuries; he never came back to the police station to update the police officers on the outcome of his examination by the doctor; and worst of all, according to DW2, he never collected the drugs from the hospital pharmacy. How could he have failed to take the prescribed drugs if he was in pain? There is one plausible explanation. After realizing that he had exposed himself to a possible prosecution, he decided to steal a march on the complainant by reporting to the police a feigned assault that never was. In order to give it a semblance of credibility, he had to be seen at the hospital. So, after being referred there by the police officers, he made a technical appearance at the hospital where the Clinical Officer did not diagnose any injury, but because the patient was complaining of pain, she prescribed aspirin. Of immediate concern to the appellant was the need to obtain evidence that he had gone to hospital and was treated as a victim of an assault. He wanted that evidence badly, and that is why he says in his evidence in chief-

"***I was given a document that I was treated."***

On that note, he reckoned that he had covered himself adequately and decided not to collect the drugs prescribed. After all, those drugs were not of any use to him, and he was not going to take them anyway, since he was never in any pain.

This is the basis on which the learned trial magistrate, after evaluating the evidence, arrived at the inexorable conclusion that the appellant had given false information to a public officer. I agree with his analysis of the evidence before him, and find that the appellant was properly convicted on that count as well.

As for the sentences being excessive, it is instructive that the maximum sentence for indecent assault is 21 years imprisonment. The trial magistrate imposed a sentence of 3 years. I agree with Ms. Mwaniki for the Republic that such a sentence is neither harsh nor excessive.

The same goes for the sentence for giving false information for which the maximum prescribed is 3 years. After taking into account the mitigation and the fact that the appellant was a first offender, the trial magistrate sentenced him to one year imprisonment on this count. I do not think that the term of one

year imprisonment on that count was excessive

For these reasons, I am satisfied that the conviction of the appellant was safe on both counts and the sentence fair. The appeal against both conviction and sentence therefore fails and it is accordingly dismissed.

The appellant's bond is hereby cancelled.

Dated and delivered at Mombasa this 19th day of September, 2006

L. NJAGI

JUDGE