REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Crimnal Appeal 122 2005

(From the Original Conviction and Sentence in Criminal Case No. 93 of 2005 of the Resident Magistrate's Court at Wundanyi E. Mwaita, Resident Magistrate)

ELKANA KILUGHA MACDONALD ………...…… APPELLANT

- Versus -

REPUBLIC …………………………...………… RESPONDENT

Coram: Before Hon. Justice L. Njagi

Mr. Monda for the Respondent

Appellant in Person

Court clerk – Kinyua

J U D G M E N T

Against the first complainant, the appellant was charged with two counts. The first count was indecent assault on a female contrary to section 144(1) of the Penal Code, and the second count was assault causing actual bodily harm contrary to section 251 of the Penal Code. As against the second complainant, he was charged with a third count of attempted rape contrary to section 141 of the Penal Code and, in the alternative, with indecent assault on a female contrary to section 144(1) of the Penal Code. The fourth count was assault causing actual bodily harm to the second complainant contrary to section 251 of the Penal Code.

At the close of the prosecution case, the court found that no prima facie case had been established in counts 2 and 4 to warrant the appellant being put on his defence and he was accordingly acquitted under section 210 of the Penal Code. However, he was put on his defence on counts 1 and 3.

The evidence in support to those two counts was given by the two complainants themselves. The evidence of the first complainant, who testified as P.W.1, was that on the material date at about 8 p.m., she was with her sister in what they both described as their hotel. This was seemingly a place where they used to cook and sell food to members of the public. The relevant excerpt from her evidence in chief runs as follows:-

"… **I was in the hotel with my sister. I was getting out and there was a curtain on the door. As I went out, the accused came and touched my breast and pressed them by force. I told him that we respect each other.**

The accused then went to the kitchen. I continued to remove the bricks. I then heard screams from the girl in the kitchen saying 'leave me, leave me'.

I went there and already found the accused on top of her and she was on the ground. When he saw me he hit me with his fist on my left face. I pulled him from my sister but he kept kicking me and in the process the door got damaged …

My sister got burnt on the hand since she was near the jiko. Accused had inserted his hands in her vagina. Her clothes were torn. Even her bra was torn. I got injured on the breasts. There are scars on my right breast. After that we decided to leave and close the hotel …"

In cross examination by the appellant, she is recorded as having said:

"… **Your were drunk. You really wanted to rape my sister. You inserted your hand into her vagina. She told me. As I was going out, you got hold of my breast and pressed by force and I even bled on the breast. We were two by then and later some customers came. When I heard her screaming I rushed there and found you in the kitchen. You were on top of her and you then started to attack me …"**

Pausing there for a moment, the first complainant alleged that she met the appellant as she went out of the hotel and that the appellant then touched her "breast and pressed them by force".

By that time, P.W.2 is depicted as having been in the kitchen. It is not alleged or even suggested that P.W.2 saw the appellant touch and press the breasts of P.W.1, and probably she may not have been able to witness it from the kitchen where she was. I therefore find that P.W.1's evidence about the appellant touching and pressing her breast is not corroborated.

To the extent that P.W.1 also testified that when she was pulling the appellant from her sister she got injured on the breasts, and that there were scars on her right breast, it may well be that the injury or injuries to her breasts originated from that scuffle, but not from the willful act of the appellant in touching and pressing P.W.1's breasts. Where breasts get injured in a scuffle, that cannot be classified as an indecent assault. For an assault to amount to an indecent assault, it should constitute of a hostile act accompanied by circumstances of indecency. As that is not shown to be the case, I find that it was unsafe for the appellant to be convicted of indecent assault against the first complainant. His appeal against conviction on that count is accordingly allowed.

The second conviction of the appellant was on the count of attempted rape or, in the alternative, indecent assault. The particulars of the indecent assault were that the appellant –

"**On the 20th day of February, 2005 at Taita Taveta District within Coast Province, unlawfully and indecently assaulted MC by touching her private parts namely vagina."**

P.W.1's evidence on both counts is reproduced above. On her part, P.W.2, the complainant herself, testified as follows in her examination in chief –

"**On 20/2/2005 I was in the hotel with my sister. I was in the kitchen adding charcoal on the jiko. My sister was taking out the bricks. He came to the jiko, got hold of me and he removed the leso, and then inserted his hand into my private parts. I screamed and P.W.1 came. She pulled him out and they fell. He injured me on the hands. I got burnt on the hand in the process. He pressed me on the ground. This is my skirt and he teared (sic) it …"**

In cross examination by the appellant, she respondent as follows –

"… **You got hold of me from behind and pulled the leso and then got hold of me and then you overcame me and you pushed me to the ground and you slept on me. You tore my skirt then in the process … you touched my vagina in the kitchen and my sister saw you. She came to the kitchen and you were already on top of me. We came to the AP offices and we reported that you wanted to rape me and that you damaged our goods in the hotel …"**

The count of indecent assault is premised on the allegation that the appellant touched the second complainant's vagina. In her evidence in chief, this complainant said that the appellant went to the kitchen where the second complainant was, removed her leso, and then inserted his hand into her private parts. In cross examination, she maintained that the appellant touched her vagina in the kitchen and that her sister saw him. But in her evidence, her sister, P.W.1, did not say that she saw the appellant insert his hand or finger in her sister's private parts. Instead, she testified that it was P.W.2 who told her. In the light of that contradiction, I don't think that it would be safe to convict the appellant of indecent assault on the second complainant as well. However, the evidence on record is sufficient to sustain a conviction on a charge of attempted rape. The second complainant testified that the appellant approached her from behind, got hold of her, pulled her leso, overcame her, pushed her to the ground and slept on her. He tore her skirt and bra in the process. When her sister heard the second complainant's screams, she came and found the appellant on top of her. This would tend to corroborate the charge of attempted rape on which the appellant was properly convicted. I accordingly uphold that conviction.

In his submission, the appellant alleged that the trial magistrate did not consider his defence. That is not correct. In his judgment, the learned trial magistrate clearly said that he did not believe the defence raised by the appellant and gave three reasons why he did not do so. If the appellant had been set upon by the two complaints as he alleged, he would have reported it to the appropriate law enforcement agencies. He did not do so. That is not compatible with an assault on his person. Furthermore, his own witness testified that when he passed by the hotel, he found the chaos going on, and he never knew how it started. He did not see the appellant being slapped at all, but he was pushed. The defendant's own witness accordingly took the view that it was the appellant himself who was in the wrong, and that was why he pulled the appellant out of the hotel. That defence was rightly rejected.

The appellant also argued that this matter was not investigated. Again that is a non starter. The matter was investigated and the investigating officer collected the exhibits which were produced in court.

In sum, the appellant's appeal against conviction on the counts of indecent assault is allowed, the conviction quashed and the sentence set aside.

The appeal against conviction on the charge of attempted rape is dismissed. As the charge carries a maximum sentence of life imprisonment, I don't think that a sentence of five years imprisonment is either harsh or excessive; nor did the trial magistrate overlook some material factor, take into account some immaterial factor, or act on any wrong principle of law. The appeal against sentence on that count is accordingly also dismissed.

The appeal therefore succeeds to the limited extent above stated. It is so ordered.

Dated and delivered at Mombasa this 16th day of October, 2006.

L. NJAGI

JUDGE