



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 173 OF 2004

(From original conviction and sentence in Criminal Case No. 6035 of 2002 of the Chief Magistrate’s Court at Kibera: Ms. Shiganga, S.R.M.)

ISAAC GITAU KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, **ISAAC GITAU KARANJA** Criminal Appeal No. 173 of 2004, was charged and convicted of the offence of **INDECENT ASSAULT ON FEMALE**, contrary to Section 144(1) of the Penal Code particulars of which were as follows:

On 10/8/03 at Ongata Rongai Township in Kajiado District, within Rift Valley Province unlawfully and indecently assaulted **T W W** by grabbing, hugging and kissing her on the cheeks. The case was heard in Criminal Case No. 6035 of 200 before the Chief Magistrate’s Court at Kibera. Being dissatisfied with both the conviction and sentence, he has appealed in this court on the following grounds:

- 1. That conviction was against the weight of evidence and the charge of indecent assault was not proved:**
- 2. The conviction was unlawful as the accused was not properly identified.**
- 3. A sentence of 10 years imprisonment with hard labour for kissing complainant on cheeks was not only excessive but unwarranted.**
- 4. The trial court should have preferred other modes of sentencing like probation or discharge for a period on condition that he did not commit any other crime for a certain period, or fining him since was a first offender.**

Briefly, the prosecution case was that on 10/8/03 the complainant (P.W.1), a school girl, aged 16 years, in the company of her classmate **R W S** – P.W. 2 – walked from school to go to church, about 2 kilometers from the school. On reaching Rongai Shopping Center, the appellant emerged from P.W. 1’s right hand, grabbed P.W. 1 and kissed her on her right cheek, then walked away. This was between 8.30a.m. and 9a.m. and P.W. 1 and P.W. 2 proceeded to Church and P.W. 1 turned to school at 1.00p.m. when the Principal, who is also P.W. 1’s father, was not present. P.W. 1 reported the matter to the Principal – P.W. 3, the following day.

P.W. 2 – R W S – testified to the same effect as P.W. 1 , and identified the appellant in court. The following day, P.W. 2 left school with P.W. 1’s father- the Principal and went to Rongai where P.W. 2 pointed out to the Principal, the appellant, who was standing at the bus stop. The appellant was then arrested

. P.W. 3 testified on how P.W. 1 and P.W. 2 reported to him in his office, as the Principal of Magnata High School, how the previous day – a Sunday – they were on their way to church when appellant emerged, pushed P.W. 2 aside, and kissed P.W. 1 on the right cheek and then walked away. P.W. 1 and P.W. 2 told P.W. 3 that they could identify the appellant and P.W. 3 took P.W. 2 together with the school captain, to the bus stop where P.W. 2, pointed out the culprit to them. P.W. 3 identified the appellant in court. P.W. 3 knew the appellant, as a matatu tout prior to the incidence. P.w. 3 went and reported to Ongata Rongai Police Station, and all of them, went back to the bus stop where appellant was arrested by the police.

P.W. 1 also testified that wherever they go to church the touts at the bus stop sexually harass them.

P.W. 4, P.c. Joseph Mutua, was the officer to whom the appellant was pointed by the complainants, in the presence of P.C. George Ndungu and P.W. 3, at the bus stop. He arrested the appellant.

On cross examination, P.W. 4 said that, he was the investigating officer and the appellant was identified to him by the complainants, because of the hat/cap the appellant was wearing. But the cap was not produced in court.

In his unsworn defence, the appellant said that on 11/8/03 he was at work when two police officers arrived, arrested him, and took him to Ongata Rongai Police where he was put in custody for days, and later charged with this offence about which he knows nothing. He called no witness.

I have carefully gone through the record in the lower courts file, and have reevaluated the evidence vis-a-vis each of the grounds of appeal.

I begin with the question whether or not the charge of indecent assault was proved. That is the appellants first challenged of his conviction by the lower court. The offence of assault transcends both the law of torts and the criminal law. In the law of torts, any unauthorized touching of another person constitutes a trespass or an assault. The Penal Code talks of unlawful, which is for all purposes the same as unauthorized touching. Both acknowledge that so long as the touching is authorized/or lawful, in the legal meaning of “consented touching” then there is no offence – civil or criminal.

From the evidence in the lower court’s record, not even the appellant has denied touching the complainant. There is no evidence from the appellant to controvert the prosecution’s evidence that P.W. 1 was assaulted by the appellant. The two eye witnesses – P.W. 1 – and P.W. 2 – gave the best evidence – direct evidence that the appellant kissed P.W. 1.on the cheek.

Turning to the element of indecent, counsel for the appellant argued vigorously on this element of the offence. He literally admitted that there was touching – but heavily dwelt on whether or not that touching was indecent. The thrust of his submissions seemed to be that unless the two components are proved, that is touching and indecent, the offence of indecent assault can’t be completed. That is granted. But his submissions on what constitutes indecent were quite interesting.

For many decades the offence of indecent assault has been associated with assault accompanied by utterances suggestive of sexual intercourse, or assault by touching the breasts or private parts of a female without necessarily being accompanied by utterances suggestive of sexual intercourse. This was the ratio in **JOHN NJUGUNA GITAU V. REPUBLIC (1982 – 88) 1 KAR 148.** This is the authority relied upon by Counsel for the appellant to support his submissions that without utterances suggestive of sexual intercourse or the touching of the private parts of a complainant, there could be indecent assault.

In my view, the above submissions reflect an outdated view of unchanging concepts of indecency.

One needs to re-think of whether what constituted indecency in the 19th century still hold water today. What are the private parts of a female and or a man? What part of one's body – female or male – are not private and can be touched at will without the persons consent or touched unlawfully? If it is indecent assault to touch the breasts of a female just as it is to touch her private parts, as was held in JOHN NJUGUNA GITAU V. REPUBLIC, are the breasts and the private parts the limits of what would constitute indecent touching? I am of the view that what constitutes private parts of a person cannot, and should not, be limited to any part or limb of one's body. The whole of a person's body should be private, and to continue with hangover of sexual connotations or associations with the touching misses the sensitivities which go with privacy. Can it be seriously contended that a woman's breasts are more private or sensitive in terms of arousing feelings than the lips, cheeks, or the back of her buttocks? I hold not.

My fear and concern is that continued hanging onto traditional perceptions of what constitutes private parts, which I feel no exhaustive definition of such parts has been given so far, can lead to impunity to touch other persons bodies, apart from those traditionally acknowledge ones.

In brief, if touching of the breasts of a female constitute indecent assault, I see no logical distinction with touching her lips and/or cheeks. My concerns and fears are reinforced by part o the contents of the petition of appeal where the learned counsel for the appellant submitted that kissing of the cheeks of a school girl should not warrant a 10 years sentence!!

One wonders whether such discriminatory psychology should be encouraged? Human beings are equal, young or old; big or small and to suggest that the sentence might be justified for some and not others, is dangerous.

I now turn to the issue of identification. The appellant challenged the conviction on the basis that he was not properly identified.

My review of the evidence and the Judgment leaves me with no doubt that the appellant was positively identified by P.W. 1 and P.W. 2.

At J2, the Learned Trial Magistrate adequately dealt with the issue. The incidence took place during broad day light – 8.30 or 9.00a.m. and P.W. 1 and P.W. 2 clearly saw the appellant. The evidence of witnesses who saw the appellant under such conditions and, hence were able to identify him to the police at the bus stage, two days later, cannot seriously be faulted.

I can find no reason to disagree with the conclusions of the lower court. Accordingly, this ground of appeal is dismissed as baseless.

The third and fourth grounds of appeal touch on the sentence. On the third ground, the appellants counsel, submitted that 10 years imprisonment with hard labour for kissing the complainant on the cheeks was excessive and unwarranted. I uphold the learned magistrate's sentence on the following grounds:

- a. The sentence for indecent assault, under Section 144(1) of the Penal Code, is imprisonment with hard labour for 21 years. In the instant case, the appellant was given only 10 years, less than a half of the prescribed maximum I can find no ground to disagree with the fair sentence imposed by the lower court.
- b) Section 26 of the Penal Code gives the court the principle upon which to sentence in a case like this. The Statutory provision creating the offence – that is – Section 144(1) of the Penal Code properly fits into those of Section 26(1) of the Penal Code.
- c) Throughout the proceedings, and even at mitigation stage – J2 the appellant never showed any remorse. Under those circumstances, the learned trial magistrate demonstrated the court's magnanimity in the sentence she imposed of 10 years with hard labour.
- d) Ground four of the appeal, calling for probation or discharge for a period on condition that

the appellant commits no other crime for a certain period, would send the wrong message about the seriousness of the offence committed.

The human rights of women, and young persons, as in this case, call for firm stand to all those who think that some human beings are better than others.

For all the above reasons, this appeal is hereby dismissed. I confirm the conviction and uphold the sentence of the Learned Trial Magistrate.

DATED and delivered in Nairobi this 16th Day of May, 2005.

O.K. MUTUNGI

JUDGE