REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

AT MOMBASA
APPELLATE SIDE
Criminal Appeal 285 of 2004
(Being an appeal from Original Criminal Conviction and sentence in Criminal Case No.399 of 2003 of the Resident Magistrate's Court at Wundanyi – E. Mwaita, RM)

BONIFACE MADENDE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

Coram: Before Hon. Justice Mwera

Appellant in person.

Ademba for State

Court clerk – Kazungu – English/Swahili

J U D G E M E N T

In the lower court the appellant was charged under S.144 (1) Penal Code in that on 4- 4-2004 at Mwatate Sisal Estate, Mwatate, Taita-Taveta he indecently assaulted J.R. by touching her private parts namely breasts.

After trial he was convicted and given 5 years imprisonment plus hard labour. The appeal was on seven (7) grounds: that the evidence of PW.1 (or did he mean Pw.2?) contradicted that of the complainant (she was PW.1). And that the learned trial magistrate relied on evidence of one witness to convict. There are in fact three (3) witnesses for the prosecution including PW.1 and the eye witness Margaret Shake (PW.2). Other than claiming that the sentence was harsh and excessive, there was a claim that the appellant's defence was dismissed. Two grounds were not quite clear: "breaching and using the complainant's interest" and "failing to consider the ethnic difference portrayed in the witness testimony". Neither the written submissions nor the response to the learned State Counsel's reply clarified these.

The learned State Counsel went over the evidence of PW.1 (complainant) and that of her aunt PW.2, that while the two were walking along a lit spot at about 9.30 p.m, the appellant accosted them and started touching the complainant's breasts. That these were her private parts as per the charge. That the aunt protested as to this kind of behaviour. That PW.1 then went to a nearby police station, reported the incident whereupon P.C. Wanyoike (PW.3) came to the scene. There he found the appellant locked in a quarrel with PW.1's aunt (Margaret PW.2). That the appellant fled but PW.1 found him and got him arrested the following day. He was accordingly charged. So the learned State Counsel said the charge against the appellant was proved beyond a reasonable doubt and that the sentence of 5 years was not

excessive since S.144 (1) Penal Code provided for 21 years imprisonment.

As to the defence the State was of the view that it did not amount to much, particularly that Mwae Makonde (DW.3) who with the appellant met the two females, said that he left the scene as the appellant was seducing PW.1, an act that seemed to anger PW.2.

On its review of the lower court record, it is not in doubt that the appellant met these two females at the time and spot in question. He says so himself and his witness (DW.3). But while he denies touching the breasts of the complainant, he attributes the row with her aunt (PW.2) to the remarks by her that she told him that he was not worth talking to her niece (PW.1). On the other hand the appellant's own witness (DW.3) attributes the row to the appellant seducing PW.1 in presence of PW.2.

The learned trial magistrate went over all the above, including the defence and so it was unjustified for the appellant to claim that his defence was seemingly unfairly dismissed. It was considered and rejected by the learned trial magistrate on its worth and nothing turns on that.

On the aspect of contradictions between the evidence of PW.1 and PW.2, if that is what was intended in the appeal, such contradictions were not put forth and on its own, this court did not note any. This ground also fails.

As regards determining the case on evidence of one witness only, that has already been touched upon above. There were three (3) witnesses. Again it has been alluded to above that the appellant did not clarify for due attention of this court his claims of "breaching ------ complainant's interest" and "ethnic difference" The court was thus not able to consider those 2 claims <u>vis a vis</u> the case in the lower court. They are similarly dismissed.

The court however now focuses on the charge itself and whether it was proved or not. Under S.144 (1) Penal Code the offence is laid out thus:

> "144 (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for twenty one years. (2) ---------- (3) ----------"

The court opts not to go into the contents and import of the other aspects of the offence under this subsection (1) or the effects of subsections (2) and (3). But suffice it to say that the offence is committed if anybody unlawfully and <u>indecently</u> touches i.e. assaults a woman or girl. In the present case the assault took the form of touching her breasts. The witnesses said so and the learned trial magistrate so found in his judgment. For what constitutes indent assault we turn to the case of **<u>ISAAC OMAMBIA VS. R. CRIMINAL APPEAL NO. 47 OF 1995 (C.A)</u>**

In that case the appellant had been charged in the lower court with indent assault. The charge sheet contained particulars including an aspect that "the appellant had not only pushed his hand under the blouse of the complainant and touched her bottom, but had also pressed his exposed penis between her buttocks." The learned judges did not find such to constitute indecent assault, so they delivered themselves thus:

> "These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else than that the appellant touched with his hand the "private parts" of the complainant which, to give the well-known and ordinary meaning that phrase, means the genitals of the complainant and to no other part of her body, or as defined in the Shorter Oxford English Dictionary, the "pudenda" or "external genital organs."

With the above authority and from the particulars of the charge herein and the evidence led, the appellant did not commit the offence of indecent assault by touching the complainant's breasts at all. Such acts, objectionable as they may be when the victim has not consented, do not constitute a crime in law. Thus the charge was not proved and this appeal is therefore allowed.

Had the appeal been unsuccessful on conviction, the sentence of 5 years plus hard labour would not have been considered harsh or excessive in the light of the maximum of 21 years.

In sum the appeal is allowed. The appellant to be set free forthwith unless otherwise lawfully held.

It is added that even with the directive that each subordinate court be supplied with copies of the appeal judgments regularly as a routine exercise, the deputy registrar is directed to send a copy of this judgment to every magistrate in the region to see and appreciate.

Judgement and orders accordingly.

Delivered on 18th July, 2005.

J.W. MWERA

JUDGE