

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 335 of 2004

(From original conviction and sentence in Criminal Case No.1031 of 2004 of the Chief Magistrate's Court at NAKURU – H. WASILWA, P.M.)

BERNARD MWAURA GATUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted on a charge of indecent assault on female contrary to **Section 144(1)** of the **Penal Code**. It was alleged that on 2nd May, 2004 at Jawatho Estate, Njoro within Nakuru District of the Rift Valley Province he unlawfully and indecently assaulted Esther Mwhiki Ngatho by touching her private parts.

He also faced another count of grievous harm contrary to Section 234 of the Penal Code, the particulars thereof being that on 2/5/2004 at the same place as above he unlawfully caused grievous harm to Charles Ngatho Mwangi. For the first count, he was sentenced to 5 years imprisonment and for count two to 1 year imprisonment but both sentences were to run concurrently. Miss Njoroge for the appellant advanced seven (7) grounds of appeal which were all argued together during the hearing of the appeal.

Mr. Koech, Senior State Counsel, did not wish to oppose the appeal but that notwithstanding, this court has to consider the evidence that was tendered in the trial court, re-evaluate and re-assess it and reach its own independent conclusion; see **NJOROGE VS REPUBLIC** [1987] KLR 19.

In count one, the appellant was said to have touched the breasts and thighs of PW1. The learned trial magistrate held that the prosecution had proved that count as herein above set out.

Miss Njoroge for the appellant submitted that the count had not been proved and said that in law, a woman's "private parts" referred to her external sex organ only. She sought to rely on this court's decision in **MICHAEL ODHIAMBO V REPUBLIC**, Criminal Appeal No. 280 of 2004 (unreported) which cited the Court of Appeal decision in **ISAAC OMAMBIA VS REPUBLIC** Criminal Appeal No. 47 of 1995 (unreported) where it was held that the term "private parts" with reference to sexual offences meant a person's genital organs and not otherwise. The said Court of Appeal decision is binding upon this court and I must accept it. In light of that, the appellant's conviction in count one was wrongful and I hereby quash the same and set aside the five years imprisonment sentence that was handed down to him.

Turning to the second count of grievous harm, PW4 testified that on 2/5/2004 at about 7 p.m. he was in his house when he heard his daughter PW1 screaming. He rushed to the scene and found the appellant holding his daughter's T-shirt. He asked the appellant to leave his daughter alone but the appellant turned and kicked him causing one of his teeth to come out and others to get loose. The loose teeth were later extracted at a local Hospital. All of them were shown to court as exhibits. The witness further stated that he fell down and the appellant hit him severally. PW1 then ran and called the appellant's brother who rushed to the scene and separated the two. PW4 reported the matter to the police and was issued with a P3 form. That evidence was corroborated by that of PW5, Police constable Dorothy Keter.

A Clinical Officer at Mau Narok Hospital, PW6 testified and his evidence regarding the injuries that PW4 sustained corroborated the evidence of PW4. He produced the P3 form which he had signed. He added that they referred PW4 to Nakuru Provincial General Hospital for dental review where the loose teeth

were extracted.

In his unsworn defence, the appellant denied having assaulted PW4 and said that it was PW4 who assaulted him and he went to Njoro Police Station to report but was instead locked up.

I am satisfied that the appellant was rightly convicted on the second count of grievous harm. The sentence of one year imprisonment was, in my view, quite lenient. I see no basis of interfering with the discretion exercised by the learned trial magistrate in sentencing the appellant. Consequently, I uphold the said conviction and sentence. This in effect means that the appellant shall serve one year jail term with effect from 30/11/2004. It is so ordered.

DATED, SIGNED & DELIVERED at Nakuru this 15th day of July, 2005.

D. MUSINGA

JUDGE

15/7/2005