

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 111 of 2001

(From original conviction and sentence in Criminal Case No.2945 of 1999 of the Senior

Resident Magistrate Court at MOLO – J. KIARIE (S.R.M.)

NAHASHON KIPKURUI LANGAT.....
.....APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

J U D G M E N T

The Appellant has appealed against conviction for a charge of INDECENT ASSAULT contrary to Section 144(1) of the Penal Code for which he had not been charged.

He had been charged with DEFILEMENT contrary to Section 145(1) of the Penal Code and with creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1)(b) of the Penal Code.

The State Counsel does not support the conviction on grounds that there was no evidence to support the charge of defilement and also that Appellant was convicted of indecent assault. He argued that since the Appellant did not say what the Appellant did to her then no charge was proved. The evidence of the two minor children PW1 and PW2 was that the Appellant lied to them that their family animals were in his shamba and then he directed PW2, the minor boy to go one direction and the Complainant PW1 to go the other to drive them out. He followed the Complainant PW1. PW1 on her part testified and said that the Appellant pointed a knife at her and threatened to kill her if she talked. He held her neck. He held her mouth and a tooth came off. He then lifted her skirt and removed her under pants. He also strangled her and threw her under pants inside the bamboo. She screamed and her mother, PW3 came upon which the Appellant ran away.

PW3, the Complainant's mother confirmed going to the scene in answer to the Complainant's muffled cries. He saw the Appellant release the Complainant leaving behind his hat. At the scene which had bamboo bushes, she saw the Complainant's pants thrown down.

The court accepted the evidence of the Complainant and found PW3's evidence corroborated it on material particulars. He found that the charge of defilement had not been proved but that the offence of indecent assault was proved. He then convicted on that lesser charge under Section 186 of the Criminal Procedure Code.

I am satisfied that the evidence accepted by the court was sufficient to support a charge of indecent assault. The Appellant had removed the Appellant's panty and was strangling her. PW3, Complainant's mother and others went to the scene prompting the Appellant to run away.

The court did find that the Appellant removed the Complainant's pant. I am satisfied that that is an unlawful and Indecent Act. I do understand the State Counsel's predicament that the prosecution must prove particulars of an offence of Indecent Assault in line to the Omambia's case (Cap No.47 of 1995) where no particulars are framed, as in this case, the evidence must show that some indecent assault was unlawfully committed against the Complainant. In this case, the court found that the Appellant's act of

driving the Complainant, a little girl into the bush and by holding her forcefully and removing her pants, that act constituted an offence of Indecent Assault.

I am satisfied that the court's finding was correct. I do find that the evidence before court did support the offence Appellant was convicted of. I am also satisfied that it was within the court's power to convict on the said charge. I reject the appeal against the conviction.

On sentence of 4 years and 8 strokes of the cane, the Appellant was treated as a first offender. The offence was indeed serious. While I do not find 4 years imprisonment excessive as to deserve this court's intervention, the sentence of 8 strokes of the cane was excessive.

I confirm the sentence of 4 years imprisonment but reduce the strokes of the cane to 4. I also confirm the sentence of Hard Labour. The appeal against sentence succeeds to the extent hereof.

Dated and delivered at Nakuru this 27th day of March, 2003.

Read signed and delivered in presence of Appellant

Mr. Mutuku for State.

JESSIE LESIIT

JUDGE