

REPUBLIC OF KENYA

High Court, at Nairobi

Criminal Appeal No 669 of 1987

Gathuri

versus

Republic

November 18, 1985 **Porter J** delivered the following

Judgment.

The appellant was convicted in the court below after trial of indecent assault on a female contrary to section 144 (1) of the Penal Code.

There are a number of matters in this case which cause concern. The first is that there were only two eyewitnesses, the complainant and a girl sitting in class near her. Both seem to have been about the same age, 14 years, and the learned trial magistrate did not conduct a *voire dire* examination, or consider at any time, even in the judgment whether these witnesses were capable of being sworn or not, they being of tender years. Although the witnesses were sworn, since they were of tender years and there is not finding that they were capable of being sworn, it must be taken that their evidence should not have been given on oath. If that is so then their evidence requires corroboration by law (section 124 Evidence Act), and they cannot therefore corroborate each other. For that reason only the conviction cannot be sustained.

The matter goes further though. It was suggested that the girl was asleep with her head on her desk as she had a headache, and the appellant touched her on her breast. The mechanics of the situation are very hard to understand if the account is true. That was the account of the complainant who said that the appellant just touched her breast and removed his hand immediately.

The other girl who said she was watching said that when the teacher came in they all stood up including the complainant, but that is quite contrary to the evidence of the complainant herself. PW2 said that the appellant held her breast for a long time, which is again different to the account of the complainant.

Early complaint (which is not capable of being corroboration, but only evidence of consistency GA 158/84 unreported) was made to the headmaster, but he said that the complainant told him that the appellant had pinched her breast. He said that what he meant was that they had been touched so that they were paining her, and that she was crying through the pain of being pinched. Again this is quite contrary to the evidence of the complainant herself, so that the early complaint did not even show consistency.

It is also true that for this to be a breach of section 144 (1), the assault must be in indecent circumstances. It seems to be accepted that the purpose in touching the girl at all was to wake her up, and if the complainant is to be believed then the touch was very fleeting. It is very hard to see how it could be considered that such a fleeting touch, although technically an assault, could be considered to have been in indecent circumstances when it happened in front of a classroom of children at the beginning of a period.

This conviction was not safe and the appeal will be allowed conviction quashed and sentence set aside.

Delivered on the November 18, 1985

Porter J