



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MADAN, POTTER JJA & CHESONI Ag JA)

CRIMINAL APPEAL NO 140 OF 1982

JOHN NJUGUNA GITAUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appellant John Njuguna Gitau pleaded guilty to a charge of indecent assault on a female, contrary to section 144(1) of the Penal Code. The prosecutor related to the court the circumstances leading to commission of the offence as follows. On May 16, 1982' the appellant took the complainant Agneta to his house, and asked her to cook for him. He went to fetch water. Upon his return to the house, he accused Agneta of stealing his watch. He removed her clothes leaving her completely naked! He told her he would take her to the police station naked. On the way, they were stopped by the watchman of Miyako hotel when he saw Agneta naked. The watchman gave her a sack to cover herself. The appellant went off to the police station. The watchman arrived there with Agneta. The appellant was interrogated by the police. They took him and Agneta back to his house where Agneta's clothes and shoes were restored to her.

The appellant told the court he admitted the facts as narrated by the prosecutor. He was convicted on his plea of guilty.

The question on appeal to the High Court was whether the facts related by the prosecutor disclosed the offence of indecent assault. The learned judge in dismissing the appeal before him said in his judgement:

“Mr Kamau's arguments were that the facts given by the prosecutor did not support the charge preferred. In the first place there was no proof there was 'assault' which to be indecent must be accompanied by words suggesting intention on the part of the appellant to have sexual intercourse. Mr Kamau relied on the Tanzanian case *Hamisi v R* [1972] EA 367. It was held in that case that an assault 'becomes indecent if it is accompanied by utterances suggestive of sexual intercourse'. I think the decision is wrong. I am happy I am not bound by it.

I think the intention to have sexual intercourse is an ingredient of an offence under section 144 of the Penal Code. The offence is complete when a lady is indecently treated without a desire towards sexual intercourse, as for example, when a man touches a woman's private parts, or strips her naked, even for the sake of it. The '*mens rea*' alluded to by Mr Kamau is not towards sexual intercourse but rather general intention to do any indecent act on a female ...”

We do not find it easy to reconcile the learned judge's two contradictory statements that intention to have sexual intercourse is an ingredient of an offence under section 144, and also that the offence is complete without a desire towards sexual intercourse. These two statements seem to cancel each other out.

An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault, as also an assault by touching, for example, the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse. The simple issue usually is whether the assault was intentional and whether it was indecent. Utterances suggestive of sexual intercourse could change an otherwise simple assault into an indecent assault contrary to section 144(1). We agree that the offence is complete when a female is indecently treated by touching her private parts even if the intention is not sexual intercourse. The intention indecently to assault the female must however be evidenced by the assault itself.

In our judgment, to strip a female naked constituted indecent assault; even if it is done for the sake of it. It need not be accompanied by further indecent gestures either by speech or physical contact. To march a female who has been stripped naked in a street aggravates the indecent assault. Even though the prosecutor did not refer to any other indecent act on the part of the appellant, such as touching Agneta's private parts as stated in the particulars of offence, the offence was complete when the appellant stripped Agneta naked.

The appeal is ordered to be dismissed.

Dated and Delivered at Nakuru this 23rd March, 1983

C.B. MADAN

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JUDGE OF APPEAL

K.D. POTTER

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JUDGE OF APPEAL

Z.R. CHESONI

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Ag JUDGE OF APPEAL