



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

Criminal Appeal 127 of 2007

MUSTAFA ELIMLIM EMEKWI.....APPELLANT

AND

REPUBLIC.....REPUBLIC

(Appeal from a conviction & sentence of the High Court of Kenya at Kitale (Ochieng, J)

dated 27th September, 2007

in

H.C.CR.C. NO. 88 OF 2006)

JUDGMENT OF THE COURT

The appellant herein, *MUSTAFA ELIMLIM EMEKWI* was arraigned before the Senior Resident Magistrate's court at Lodwar where he was charged on one count of assault causing actual bodily harm contrary to *Section 251* of the Penal Code and on a second count of indecent assault on a female contrary to *Section 144(1)* of the Penal code. The particulars of the offence in the first count were as follows:-

"MUSTAFA ELIMLIM EMEKWI: On the 14th day of July 2006 at Lokitaung Trading Centre in Turkana District within Rift Valley Province unlawfully assaulted JOHN KAPUA thereby occasioning him actual bodily harm".

The particulars of the offence in the second count were as follows:-

"MUSTAFA ELIMLIM EMEKWI: On the 29th day of June 2006 in Turkana District within Rift Valley Province unlawfully and indecently assaulted [J.L. A] by touching her hips."

During the trial before the learned Senior Resident Magistrate (*G.M.A. Ong'ondo*) the appellant kept on changing his plea but he was finally tried on both counts in which prosecution called a total of eight witnesses. At the close of the prosecution case the appellant was put on his defence and he elected to make a sworn statement. In that sworn statement the appellant admitted having committed the offences as charged. In the statement the appellant is recorded to have stated inter alia:-

"I know the charges that I face. I admit them. It is true I assaulted and harmed PW1 herein. I also unlawfully and indecently assaulted [J.L.] (PW4) by touching her private parts. I have nothing to add to that. I close my case."

In a reserved judgment delivered on 21st September, 2006 the learned Senior Resident Magistrate considered the entire evidence and convicted the appellant on both counts as charged. Before sentence the appellant told the trial court that his mother was a disabled person and so he (appellant) prayed for leniency emphasizing that he was his family's bread winner.

The learned Senior Resident Magistrate considered all that the appellant stated in his mitigation and proceeded to pronounce the sentence as follows:-

"I note that accused has been treated as 1st offender on each count and he has offered mitigation. I consider the nature of the charges and

maximum penalty (sentence) for each offence and conscious of the fact that the legislature enhanced sentences on sexual offences, thus their (crimes) seriousness in our society. Accused deserves deterrent custodial sentence on each count. Therefore, he shall serve forty five (45) months in prison in count I and ten (10) years in prison in count II. Sentences to run concurrently. Right of appeal explained to accused in Turkana language.”

Being dissatisfied by the foregoing the appellant filed an appeal to the High Court. The High Court (Ochieng, J) considered the appellant’s appeal but the learned Judge dismissed the appeal by stating inter alia:-

“In any event, the sentences meted out are both within the law. I find no reason to fault the manner in which the learned trial magistrate exercised his discretion in that regard. Accordingly, the sentences are both upheld.

In the result, this appeal is dismissed.”

Still dissatisfied by the foregoing the appellant now comes to this Court by way of second and final appeal. When the appeal was called to hearing the appellant who appeared in person addressed us briefly by stating as follows:-

“I want the Court to reduce the sentence. I was sentenced to ten years imprisonment.”

The learned Senior Principal State Counsel, Mr. Omutelema, also addressed us briefly submitting that the appeal was incompetent as it was against the sentence and that being so no appeal lies. He therefore asked us to dismiss the appeal.

Section 361(1) of the Criminal Procedure Code (Cap 75 Laws of Kenya) provides:-

“A party to an appeal from a subordinate court may subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section -

- a) on a matter of fact, and severity of sentence is a matter of fact or
- b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

Though the particulars of the charge were that the appellant indecently assaulted the complainant by touching her “hips” the facts which he admitted were that the appellant touched knickers and the genital area of the complainant.

In view of the foregoing we agree with Mr. Omutelema that this appeal is incompetent. As we have demonstrated, the appellant was sentenced by the subordinate court and the High Court dismissed his appeal. The appellant now comes to us complaining that the sentence of ten (10) years imprisonment should be reduced. We agree with the learned Judge of the superior court that the sentences imposed were lawful.

The upshot of the foregoing is that this appeal is incompetent and we accordingly order that the same be and is hereby dismissed.

DATED and DELIVERED at ELDORET this 27th day of February, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR