Othulo v Republic

High Court, at Nairobi November 12,

1984

Abdulla J

Criminal Appeal 750 of 1984

Criminal law - indecent assault - allegation of frame up - whether the evidence was tainted to warrant reversal of conviction.

The appellant was convicted for the offence of indecent assault contrary to section 144(1) of the Penal Code. He was alleged to have indecently touched the complainant who was the wife of his junior. Testimony was received at the trial from the sister to complainant and an independent witness who was a neighbour to the complainant. The appellant appealed contending inter alia that the witnesses were actuated by malice and had conspired together to ruin him. He was a first offender and was sentenced to a fine of Kshs 10,000 or to 12 months imprisonment in default.

Held:

1. The evidence adduced was collaborated in material aspects by the evidence of an independent witness who was found by the magistrate to be honest and the evidence could therefore not be impeached.

2. It is well settled practice that if a sentence other than custodial is considered proper, such as fine, such fine should be such as is within the station and means of the offender and not so excessive as to deny him the opportunity to pay or that the custodial sentence becomes imperative and inevitable.

3. Being a first offender the sentence of a fine of Kshs 10,000 and in default 12 months imprisonment was excessive and the appeal against sentence would succeed.

Appeal against sentence allowed.

Cases

No cases referred

Statutes

Penal Code cap 63 section 144(1)

Advocates

M Njoroge for Respondent **November 12, 1984, Abdulla J delivered the following Judgment.**

The appellant was convicted of indecent assault contrary to section 144(1) of the Penal Code and was fined Kshs 10,000 or 12 months' imprisonment.

The appellant who is security officer at Kenya Railways and superior to the husband of complainant, went to the house of the complainant at 3 am on the night of March 2 and March 3, 1984 purportedly to look for the complainant's husband. At this time, the complainant's husband was away.

Upon his persistent knock, the complainant, who recognized the voice the appellant, opened the door. The complainant was not fully dressed, as is natural at that time of the night. The appellant touched her breasts and pushed her towards the bed saying "I know he is on duty". The sister of the complainant (PW 2), who was in that small room of 10' x 10' of Railway Landhies, witnessed the incident and shouted to him whether he wanted the brother in law or sister. Thereupon, the appellant retreated. A neighbour (PW 3), who came to the scene upon hearing the noises, saw the retreating figure of the appellant about 50 yards away. All these witnesses had known the appellant before the incident. The complainant went to her husband (PW 4), who was on duty and reported the incident to him. They reported the incident to police (PW 5), the following morning and the appellant was arrested.

The defence of the appellant was alibi and that this was a frame up set up by the complainant's husband, who did not get along well, because he nursed a grudge about an arrest for changaa for which the complainant's husband thought, the appellant was responsible. The wife of appellant, testified to support the alibi.

The learned Senior Resident Magistrate considered all the evidence and was satisfied that there was no substance in various defences raised by the appellant. He considered the evidence of the complainant, her sister and Mr Gatonye (PW 3), an independent witness and came to conclusion that, they were truthful witnesses who recognized the appellant who was well known to them. He found the appellant guilty.

The appellant complains that, the learned Senior Resident Magistrate erred in convicting him on tainted evidence of witnesses, because the complainant's husband was his junior at work, who could have sinister motives and all had conspired to put him in trouble. Further, the learned magistrate erred in accepting hearsay evidence of Mr Gatonye (PW 3), who had seen the appellant 50 yards from the house whilst the alleged the incident took place inside the house.

Mr Gatonye did not give hearsay evidence. He testified that, upon hearing noises, he went out to the house of complainant who told him what had happened and he saw the appellant's retreating figure 50 yards away by the lights of loco shed. The learned magistrate was quite correct in accepting such evidence, as leading support to the evidence of the complainant and her sister, that the appellant left the house after what he was alleged to have done.

As regards the truthfulness of prosecution witnesses and whether they were driven by sinister motives to implicate the appellant, the learned magistrate had opportunity to observe these witnesses, and form his own opinion with regard to their demeanor and credibility. He gave due and proper consideration to the allegations of the appellant and came to the conclusion, his allegations were baseless and that the witnesses told the truth and their evidence was for acceptance. I would not interfere with such findings unless ex facie, they appear to be perverse. Upon assessment of the evidence before the trial court, I am satisfied that, the learned magistrate was perfectly entitled and was correct to make the findings as he did. The appellant was properly convicted upon proper corroboration.

The appeal against conviction is dismissed.

As regards sentence, the appellant an elderly first offender, with family of wife and children, who was likely to lose his job, was quite properly fined for this foolish aberration in his otherwise unblemished cover of 16 years with the Railways. However, the fine of Kshs 10,000 or 12 months' imprisonment was manifestly excessive in the circumstances. It is well settled practice, that if sentence, other than custodial, is considered proper, such as fine, the fine should be such as is within the reach of the station of the offender and not so excessive as to deny him opportunity to pay the same nor such that the custodial sentence becomes imperative and inevitable. The appellant was a senior sergeant in the security division of Railways and could not be expected to earn a basic salary of an amount, which would have enabled him to pay a fine of Kshs 10,000. The appellant, who apparently had no money to pay the necessary fees for this appeal, has already served nearly six months of imprisonment.

In the event, I allow the appeal against sentence to such an extent as to substitute a sentence of imprisonment which will enable him to be released from the prison forthwith. I so order.