REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 137 OF 2018

BETWEEN

EVANS MUIVA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. S. Telewa, RM dated 3rd July 2018 at the Magistrates Court at Eldoret in Criminal Case No. 272 of 2016)

JUDGMENT

1. The appellant **EVANS MUIVA** was charged and convicted of two counts. The first was the offence of rape contrary to **section 3** of the ***Sexual Offences Act*** ("the ***Act***"). It was alleged that on the night of 15th and 16th November, 2016 in [particulars withheld] Sub-location Lugari Sub-County within Kakamega County he intentionally and unlawfully caused his penis to penetrate the vagina of GK by use of force. On the second count, he was accused of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. It was alleged that on the same night and at the same place he willfully and unlawfully assaulted GK thereby occasioning her actual bodily harm.

2. The appellant was convicted on both counts and sentenced to serve 10 years' imprisonment on both counts with both sentences to run consecutively. He now appeals against the conviction and sentence. In his grounds of appeal, he contended that the trial magistrate erred by failing to consider the defence without giving cogent reasons. He submitted that the prosecution failed to prove its case beyond reasonable doubt and the in fact the prosecution did not prove penetration. He complained that the prosecution witnesses were coached, full of hearsay and gave contradictory evidence. The respondent case was that the prosecution proved all the elements of the offence.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

4. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the ***Sexual Offences Act, 2006***;

> *A person commits the offence termed rape if –*
>
> *(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*
>
> *(b) The other person does not consent to the penetration; or*
>
> *(c) The consent is obtained by force or by means of threats or intimidation of any kind.*

5. I am satisfied that the appellant committed the act of rape and assault as the testimony of PW 1, who was aged 75 years, was that the appellant broke into her house, assaulted her as she tried to run away and then forcefully caused his penis to penetrate her vagina. She knew him as he came from the locality and in view of the moonlight and close proximity, I have no doubt that the circumstances of identification were favourable for positive identification.

6. PW 1's testimony of assault and rape were corroborated by PW 2 who saw her immediately after the incident and assisted her to get help and that of PW 5, the Clinical Officer. He observed that she had sustained deep cuts on the fore head, upper limb and fingers. Her private parts had been examined and the laboratory tests showed spermatozoa and epithelial cells which were indicative of penetration.

7. In addition to the aforesaid evidence, the appellant was found on the very same morning in PW 3's kitchen in blood drenched clothes. He could not account for the blood on his clothes and the inescapable conclusion was that he is the one who assaulted PW 1. The fact that he was found in PW 3's kitchen, displaces his defence that he had been arrested while drinking that night and put in Police Cells on the material night. Further, the appellant did not raise the issue of his arrest and custody when he cross-examined the investigating officer, PW 4.

8. I affirm the conviction on both accounts. However, the sentence on the second count is illegal as the maximum sentence under **section 251** of the ***Penal Code*** is 5 years' imprisonment. Moreover, the trial magistrate erred in ordering the sentence to run consecutively as the acts were part of the same transaction.

9. Consequently, I dismiss the appeal and affirm the conviction. I vary the sentence on count II to a term of 5 years' imprisonment and order that both sentences shall run concurrently.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Oduor, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.