IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 250 OF 2009

(From original conviction and sentence in Criminal Case No. 205 of 2009 of the Principal Magistrate's court

at E/Ravine – D.M. MACHAGE, RM)

EVANS TUITOEK KIPCHUMBA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

EVANS TUITOEK KIPCHUMBA was convicted of the offence of rape contrary to **Section 3(1)(a)** as read with **Sub - section 3** of the **Sexual Offences Act (SOA)** and assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** by the Resident Magistrate's court on 18th August 2009. The lower court did not make any finding on the alternative charge of indecent act contrary to **Section 11(1) of the SOA.** He was sentenced to 10 years and 6 months imprisonment respectively. Sentences were ordered to run concurrently. The appellant being dissatisfied with the conviction and sentence, filed a petition of appeal through Orina Advocate and Company on 1/9/09. The grounds of appeal set out in the petition are that learned magistrate shifted the burden of proof on the appellant; that the evidence was not sufficient to sustain a conviction; that the magistrate did not evaluate the evidence adduced before him; that the appellant's defence was not considered; that the magistrate failed to give reasons for the decision arrived at and lastly that the sentence meted on him was too harsh and excessive.

At the hearing of the appeal, the appellant asked the court to consider the evidence on record, conviction and sentence. The state was represented by Mr. Omwenga of the State Law Office who submitted that the appellant was known to the complainant; the offence was committed during the daytime and that the

complainant's evidence was corroborated by the evidence of PW2 who went to look for his wife and found her in the forest with the appellant. He also submitted that it is the complainant who gave the appellant's names to the police and that the doctor PW5 who examined the complaiant, found that the complainant had suffered forceful intercourse.

Even though no submissions were made on half of the appellant, this being the first appellate court, the court is required to analyse and review the evidence on record and come up with its own findings and that is what this court will do.

The prosecution called a total of 5 witnesses and the appellant made a sworn statement in this defence. Briefly the facts of the prosecution view is that R.C (PW1) at about midday on 6/2/09, she was in her shamba at N.K with her 6 year old child. She said the appellant appeared from the forest grabbed her by the throat and then nose and the child ran off screaming for help. He made her fall, tore her pant, her top (blouse), pushed her legs apart and raped her. She said that he raped her several times upto about 9.00 p.m. when she heard people speak and she screamed and it was her husband, J.K.K (PW2) with K . The appellant ran off when a torch light was flashed on him. PW1 also said that the appellant bit her twice on the right hand. She reported the matter to the police and was also treated at Esageri hospital. She handed over her clothes; black inner wear (torn), flowered blouse and inner top, red in colour which were produced in court by Cpl Julia Morop of Eldama Ravine Police Station as exhibit numbers 2, 3 and 4 and issued with a P3 form Exh.1.

J.K.K recalled that he had been at work upto 9.00 p.m. when he met his 6 years old child who informed him that T had attacked the wife. PW2 informed neighbours and they mounted a search using a spotlight and there was also moonlight. He said a dog also led them to where PW1 and appellant were and the appellant ran off. He said the appellant had same shirt he had on in court, black sweater and brownish trouser. He found PW1 bleeding from the nose, had scars on the throat and right wrist, her tops and pants were torn and he named the appellant as the person who raped her. He reported to Eldama Ravine Police Station. He was arrested when he went to the brother who had been arrested to be released. It is PW3 Aden Abdullahi Mursal who arrested the appellant. Doctor Kemboi produced the P3 filled by Doctor Marachi who examined the complainant. He noted scratch marks on the face, neck, neck was swollen and tender, bruises on nostrils, bruises on the labia minora and majora, HIV test was negative. He said the injuries on the minora and majora were evidence of forceful intercourse.

In his sworn defence the appellant admitted that the complainant is his neighbour. He said that on 14/2/09 he was at home when he was informed that his brother had been arrested and on going to enquire at the police station, he was also arrested. He denied having had a grudge with PW1 but had fought with her brother.

In analyzing the evidence the magistrate found that the incident was committed on 6/2/09 at about 3.00 p.m. till 9.00 a.m. However, from the complainant's evidence the appellant accosted her about midday. It is not clear where the magistrate got the time of 3.00 p.m. That finding is not supported by any evidence. The ingredients of rape are set out in **Section 3** of the **SOA**. That section reads as follows:-

"S.3(1) A person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

For the offence to be completed, two ingredients have to be proved (1) there has to be lack of consent by the victim (2) there has to be an act of penetration in the genital organs of the victim. Although the magistrate found that the appellant "forcefully penetrated" the complainant, I have read the evidence of PW1 who went in detail how the attack took place and force used on her. She was held by the throat, nose, beaten and her inner pants, blouses were all torn. The doctor found injuries on PW1 around the neck which was tender and bruises. I find that there was ample evidence that force was used by the assailant which is evidence of lack of consent.

The next question is whether there was penetration. I have read the testimony of PW1 and no where did she explicitly explain what happened. She said **"he pushed my legs a part and then raped me." She also says "he reached my inner panty and tore it. He also tore my top as well he then lifted my skirt and started doing me."** The use of the word rape does not tell the court exactly what happened. Rape is a legal term that needs to be backed by facts describing what happened. The court appreciates that the act of rape is an attack on one's privacy, is demeaning and most people will be shy to tell explicitly, what it is that took place. It is however, the court's duty to ensure that it seeks clarification from the witness on what happened. In this case, the complainant was an adult who understood what rape was and what a mere torch of one's genital organs entails. I am satisfied that the use of the words **'raped me**, or **he did me'** refer to the act of penetration. These are phrases commonly used by people for sexual acts involving penetration. Further to the above, PW5 found the complainant to have suffered bruises on the labia minora and majora which led him to conclude that there was forceful intercourse. That piece of evidence fortifies the complainant's assertion that the appellant had raped her several times between the time he accosted her till the time she was rescued at about 9.00 p.m. This incident occurred during the daytime. The applicant did admit that the complainant and husband are his neighborus. Since the attack was about midday to about 9.00 p.m. PW1 had more than ample time to see the assailant and I am satisfied that she was able to see appellant with whom she was in close contact. The appellant denied that he had any grudge with the complainant and I find that he was properly recognized by PW1 as the assailant and his identity is not in doubt.

The complainant testified that before and during the ordeal, the appellant, beat her up, bit her, scratched her. On examination by PW5, he found scratch marks on the face, neck, swollen neck, bruises on nostrils. He assessed the injuries as harm and opined that the possible weapon used was both sharp and blunt. In his sworn defence, the appellant made a general denial of both the main and alternative charges. He confirmed that he had no grudge with the complainant before this incident. There is therefore no reason why the complainant could come up with such serious allegations against the appellant. Though the lower court did not consider it, I find that the defence is a total sham, and I hereby dismiss it.

In conclusion, I do therefore agree with the magistrate's finding that the appellant forcefully had sexual intercourse with the complainant. The appellant was a person well known to her and they spent along time together during the encounter. I find that he is guilty of the offence of rape contrary to Section 3(1) as read with **subsection (3)** of **SOA**. I also find that the appellant assaulted the complainant and inflicted harm on her during the encounter. I find the conviction to be safe and I uphold it.

The appellant was sentenced to 10 years on the 1st count of rape. That is the minimum sentence prescribed under the law. However, having considered what the appellant did to the complainant, I find

that the sentence is too lenient and will enhance it to 15 years imprisonment. The court will not interfere with the sentence on the second count. The sentences will run concurrently. Orders accordingly.

DATED and DELIVERED this 21st day of January, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:
Appellant – in person.
Mr. Nyakundi for the State.
Kennedy – Court Clerk.