



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU Criminal Appeal 102 of 2007**

**STEPHEN KIPNGETICH TONU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Stephen Kipngetch Tonui was charged with two counts (i) Rape contrary to section 140 of the Penal Code and (ii) Indecent assault on female contrary to section 144(1) of the Penal Code. The prosecution called four witnesses who testified against the appellant and the trial court found the appellant guilty on the two counts and sentenced him to ten years imprisonment with hard labour. The appellant has appealed to this court on three grounds.

On grounds 1 and 2 the appellant has contended that there was insufficient evidence to convict him. On the 3<sup>rd</sup> ground the appellant has contended that there was no evidence to show that he was a carrier of Sexually Transmitted Disease (STD) Gonorrhoea.

It is the duty of this court as the first appellate court to examine the evidence before court. PW1 was one Dr. Amwai Samuel from Elburgon Nyayo Hospital. He testified that he examined the complainant PW2 M. C at the request of the O.C.S. Elburgon Police Station on an allegation of rape. He testified that he found injuries on PW2's private parts who had earlier on visited the outpatient department and a vaginal swab was taken for analysis and found that she had a venereal disease. She had been infected with gonorrhoea. She had bruises on her vagina showing someone had forcefully had sexual intercourse with her. PW1 produced form P3 in which he had carried the examination. In cross-examination by the appellant the Doctor testified that he did not examine the appellant because he had not been asked to examine him.

PW2 testified that on the 31<sup>st</sup> day of December 2004 at about 7.00p.m. she was on her way home from her brother's house. On her way she found some people drinking liquor in the appellant's mother's house where she passed and the accused welcomed her. She knew him. He gave her two cups of busaa before 7.00p.m. At 7.00 p.m. the appellant offered to escort PW2 although she was not going far. She accepted the offer for escort and left the appellant's mother's home. The appellant followed her and asked her for sexual intercourse with him. PW2 refused and told him that was completely unacceptable. The appellant however grabbed her by the throat removed her pants and raped her once as she struggled with him. After that he removed Kshs 3,120/= from her left pocket and left her.

PW1 testified that she walked back to the appellant's mother's house and informed the mother that the appellant had raped her and stolen her money. The appellant's mother advised PW2 to sleep in her house so as not to meet the appellant again on the road. PW2 also testified that on the next morning between 5 a.m. and 6 a.m. PW2 went to the appellant's house to ask him to give her back her money and found that he was not present. She found the appellant's wife who informed her that the appellant had gone to his house shortly and left.

The appellant's wife suspected that her husband could be at B village where PW2 proceeded and met the appellant on the way.

PW2 further testified that when she met the appellant she begged him to give her even half of the money he had stolen from her so that she could get treatment. The appellant directed PW2 to the scene of the incident where he said the money would be found but there was no money on that spot. PW2 proceeded to appellant's mother's house and waited till 2.00 p.m. At 2.00 p.m. the appellant's mother told her that once her son had money he would not come home. She advised PW2 that she should report him to the Police which PW2 did. PW2 got treated only on the 3<sup>rd</sup> January 2005 and had P3 Form filled and appellant was subsequently arrested.

On cross-examination by the appellant PW2 was unshaken in her evidence. She testified that the liquor she took was in celebration for the new year and she was merely passing by the appellant's house and reiterated her evidence in-chief that despite wrestling with the appellant the appellant overpowered her and raped her. PW2 stated that PW2 did not return any of the money he had stolen.

PW3 was one H.C a teacher at M Primary School who witnessed the incident on the 31<sup>st</sup> day of December 2004 at about 7.30 p.m. She testified that she was passing by the appellant's mother's gate when he found the appellant holding the complainant and ordering to "**remove it**". clothes. She testified that since she did not know what was going on she left the appellant struggling with her. On the next day PW2 visited PW3 when PW3 observed that PW2 looked sickly and informed her that the appellant had raped her and stolen her money the time. She explained that the More importantly PW3 testified that the appellant is also his neighbor. This evidence was confirmed in cross-examination by the appellant.

PW4 Julius Tiyan was the investigating officer. He testified that PW2 had complained that she had been raped by the appellant. He gave the appellant a P3 form and advised the complainant to go for medical examination. PW4 corroborated the information that the appellant had raped PW2.

At the end of the prosecution's evidence the appellant when found he had a case to answer chose to give an unsworn statement where he corroborated the evidence of PW2 that he escorted PW2 to his mother's gate and bid her farewell. He denied any of the allegations of rape and theft of money

The evidence is quite clear that the appellant committed the heinous offence against a neighbor. Mr. Gumo learned Assistant Deputy Public Prosecutor supported the conviction and sentence. The appellant was well known to the complainant. The attack took place about 7 p.m. The complainant recognized the appellant. PW3 witnessed the struggle but learnt later the struggle was actually rape. PW1 examined the complainant. The injuries were consistent with sexual assault and prayed that the appeal should be disallowed.

In his submissions to the court the appellant stated

***“I have learnt a lot in prison. I know some carpentry. It will help me if my appeal is allowed.”***

Having reviewed the evidence before court and the grounds of appeal I am persuaded beyond per adventure that the lower court came to a correct decision on the evidence and sentenced the appellant accordingly. I find that there is no merit in this appeal whatsoever and the same is dismissed forthwith. The lower court’s findings, conviction and sentence are affirmed.

**Dated, delivered and signed at Nakuru this 26<sup>th</sup> day of February 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**