



**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**CRIMINAL APPEAL NO. 33 OF 2010**

*(From original conviction and sentence in Criminal Case No.558 of 2009 of the Senior Principal Magistrate's court at Narok – A.G. KIBIRU, PM)*

**KESEI OLE MAGEL.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Kesei Alnakali Kiteo alias Kadogo was charged with four offences before the trial court, namely attempted rape contrary to **Section 4** of the **Sexual Offences Act 9SOA) 2006**, indecent assault contrary to **Section 5(1)(b)** as read with **Section 5(2)** of the **SOA**, assault contrary to **Section 251** of the **Penal Code**, and lastly being unlawfully present in Kenya contrary to **Section 13(20)** of the **Immigrations Act Cap 172 Laws of Kenya**. He pleaded guilty to the third charge and was convicted and sentenced. After the hearing, the court found the accused guilty of the 1<sup>st</sup> charge and convicted him. The court however, found that count two was erroneously indicated as a main charge yet it was an alternative to the main charge and that the 3<sup>rd</sup> count was an offence committed during the commission of count 1 and was not an independent offence. The accused was discharged of the offence of assault under **Section 89(5)** of the **Criminal Procedure Code**. He was sentenced to 10 years imprisonment to the main charge (CT 1). He appeals against both conviction and sentence. He had pleaded guilty to count 4 and sentenced to serve 6 months imprisonment.

A brief summary of the prosecution case is that R.N was asleep in her house at Suswa at about 1.00 a.m. when she heard movement outside. Her house was locked from outside and she thought it was her husband coming back home. The person opened the door from outside, got hold of her, removed her clothes as they struggled. She overpowered him and it is then he removed a sword cut her twice on the head. She screamed and her children who were very young the oldest being 9 years, woke up and she asked for their help. They took burning firewood to burn him but he took it and burnt her on her breast and thigh, cut her with a sword on the hand. The suspect ran off as she screamed. Neighbours came to her rescue and her husband arrived and they took her to hospital. She said she was able to see the intruder's face as they struggled as there was a blazing fire.

PW2, S. Ole M and PW3, J Ole K are PW1's neighbours who heard her screams and went to her aid. PW2 said they found PW1 injured on the head, back and was bleeding profusively. They called for a vehicle to take her to hospital. PW2 and PW3 followed the assailant's footprints along the road and at 5.30 a.m., saw the person enter a certain house. They said that the person had unique shoes which left imprints. They found him with blood stains on the hands, clothes, sword and he had a small cut on the face and head. They took the suspect to the police post and back to the scene and found the shoe mark to be his. Both PW2 and PW3 identified the shoes accused wore as those which made the unique foot prints. PW11 who arrested the accused from members of public recalled visiting the complainant who had been admitted with serious injuries. He also noted that the accused had fresh wounds on the face and hands and a Masai sword with blood stains.

In his unsworn defence, the accused said that he had been brought to Kenya by the complainant's husband one L.T. They disagreed and L refused to pay the accused and chased him. When L tried to persuade the accused to return to work, accused declined and that is when police arrested him and charged him and that the two witnesses PW2 and PW3 are L's brothers who knew about the shoes which he had been given by the employer.

In his petition of appeal, the accused contended that there was not sufficient evidence to found a conviction upon as there was no supportive medical evidence, and that his defence was disregarded.

There is overwhelming evidence that PW1 was attacked and injured. Her testimony was corroborated by PW2 and PW3 who went to the scene on hearing screams. She recalled the ordeal in detail and that is not questioned in anyway.

The P3 form that was filled after PW1 was treated was produced by the police officer PW4. He is not a medical practitioner. I do note from the record that no application was made by the prosecution to have the P3 form produced under **Section 33** of the **Evidence Act**. It is the accused's contention that was contrary to **Section 33** of the **Evidence Act** and **Section 77** of the **Constitution (now repealed)**. **Section 77** provided for fair hearing before both a criminal and civil courts. The accused contends that he was not told the implication of producing the P3 form without the doctor. It is true that the manner in which the P3 form was produced was irregular. There are situations when the police can be allowed to produce such document if the person who filled it can not be traced without necessary delay and with the consent of the accused person. The prosecution should have demonstrated that the doctor who filled the P3 form cannot be traced. The question then is whether the failure to call the doctor who filled the P3 form was prejudicial to the accused's case or occasioned a miscarriage of justice. I find no miscarriage of justice occasioned. This is because the offence that the accused was convicted of is attempted rape. Medical evidence is not a prerequisite. The medical evidence produced only goes to strengthen PW1's testimony that she was injured during the attack.

From the analysis of the evidence on record, I find that the police left some gaps in the case. Though there was evidence from PW2, PW3 and PW4 that the accused was injured, no attempt was made to take him to the doctor so that he too could have been examined. PW2 and PW3 also said accused's clothes were blood stained. It would have been prudent for the police to take these clothes for further investigations to ascertain whose blood was on accused's clothes and sword. This would have gone along way in ascertaining whether or not the accused was PW1's assailant.

PW2 and PW3 alleged that they followed accused's foot prints to some home where the accused had just entered. It was important that the owner of the home where the accused was arrested be called as a witness. For unknown reason the prosecution did not deem it necessary to call that person as a witness.

Another gap in the prosecution evidence is that even though PW2-3 relied on the unique footmarks made by accused person's shoes and they said that they found accused still wearing the shoes upon arrest and matched it with the foot prints, the police never saw it necessary to take the shoes away to produce them in evidence.

The accused person blames the prosecution for not calling PW1's husband as a witness because he is the one who brought him from Tanzania as an employee but that he failed to pay him and he framed him with this offence when the accused refused to go back to work for him. I read the testimonies of PW1-3 and at no time did the accused refer to his relationship with PW1's husband. It is only when PW4, the police officer testified that the accused raised the issue of having been employed by PW1's husband and then in his unsworn evidence. In my view, that line of defence came as an afterthought. If indeed PW1's husband had employed the accused, the accused could not fail to raise it when PW1 testified.

The incident herein took place about 1.00 a.m. PW1 said he saw the accused person from a blazing fire she had lit. She was under attack and the attacker had a sword. Apart from undressing her, she had the sword to contend with. These were not conducive circumstances for PW1 to identify the assailant. In the judgment, the trial magistrate duly warned himself of the danger of relying on a single identifying witness

under such circumstances. He found that her evidence was corroborated by that of PW2 and PW3 who arrested the accused person after following his foot prints from PW1's house till the place of arrest.

The accused's defence was that he was framed with this offence because he had refused to go back to work for PW1's husband and explained how he received his injuries, when he was beaten up by the said person. In his judgment the trial magistrate did consider the accused's defence and noted that the alleged relationship between the accused and PW1's husband was never put to the prosecution witnesses. I do agree that the accused's line of defence came late as an afterthought. If he had been working for PW1's husband then PW1 must have known him and those questions of his relationship with L should have been put to PW1. The accused could also have put these questions to PW2 and PW3 whom the accused claimed were his former employer's brothers. I doubt that PW1 would have injuries inflicted on herself in order to frame the accused. The trial court rejected that line of defence and I find that it is indeed an afterthought and does not reasonably explain the circumstances and the state in which the accused was arrested in and the injuries on his body and blood stained clothing. Even though the police did not have the blood on the clothes analysed this court is satisfied that the trial court ably analysed the evidence before it and I do come to the same conclusion that the defence did not offer a reasonable explanation of the injuries accused had suffered or the circumstances leading to his arrest. The prosecution witnesses were more believable.

Despite some gaps noted in the prosecution case, I do find and hold that there was overwhelming evidence connecting the accused with the offence and I dismiss his defence as an afterthought and not being a plausible explanation. I find the conviction to be safe and it is upheld. The accused was handed the minimum sentence provided under **Section 4** of the **SOA** and I find no reason to interfere with it. This appeal is dismissed.

**DATED and DELIVERED this 3<sup>rd</sup> day of December, 2010.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

The appellant present in person.

Mr. Nyakundi for the state.

Kennedy – Court Clerk.