

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 50 OF 2016

BETWEEN

EVANS SAWE NYANGAYA ...APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.N Mwaniki – PM dated 6th January 2014 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 25 of 2014)

JUDGMENT

1. The appellant, **EVANS SAWE NYANGAYA**, was charged with the offence of rape contrary to **section 3(1) (a) and (b)** of the **Sexual Offences Act** and sentenced to ten (10) years imprisonment. The particulars of the charge were that on 5th January 2014 [Particulars Withheld] Sublocation of Borabu District within Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of PCM without her consent.

2. The trial court only heard the complainant’s evidence which was taken by Hon. Sindani PM on 21st July 2014 and in due course the matter was adjourned several times until 6th October 2018. When it came up before Hon. J. Mwaniki, PM, the prosecution unsuccessfully tried to withdraw the case under **section 87(a)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The court then put the appellant on his defence. The trial magistrate did not comply with **section 200** of the **Criminal Procedure Code** having taken over the conduct of the matter from the magistrate who took the testimony of PW 1. I therefore agree with counsel for the respondent that this appeal must be allowed.

3. I have considered whether I should order a re-trial. The trial could not proceed due to lack of witnesses hence I do not think a re-trial would be feasible in the circumstances.

4. The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KISII this 9th day of November 2018.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.