REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 91 OF 2014

EVRA KIPTURMET...……………..……………………………APPELLANT

VERSUS

REPUBLIC………...……………………………………………RESPONDENT

(*Being an appeal from the original conviction and sentence in Criminal Case No. 304 of 2013 Republic v Evra Kiptumet in the Principal Magistrates Court at Kabarnet by S. O. Temu, Principal Magistrate dated 13th February 2014)*

JUDGMENT

1. The appellant was convicted for rape contrary to section 3 (1) (a) of the Sexual Offences Act. He was sentenced to fifteen years imprisonment. The particulars were that on 2nd June 2013 in Marigat District within Baringo County he intentionally and unlawfully caused his penis to penetrate the vagina of J S without her consent.
2. The appellant has appealed against his conviction and sentence. The petition was filed on 9th June 2014. The primary grounds in his petition are two-pronged: first, that the investigations into the crime were poor or shambolic; secondly, that there was no conclusive medical evidence linking him to the offence. In particular, the appellant contended that the examination on the complainant revealed no bruises. He stated that when he was examined by the same doctor, the tests were negative. In a synopsis, the appellant's case is that the charge was not proved beyond reasonable doubt. At the hearing of the appeal, the appellant relied wholly on his hand-written submissions.
3. The State contests the appeal. In a nutshell, the case for the State is that the appellant was positively identified; that his *alibi* was a red herring; and that there was consistent and corroborated evidence that established the culpability of the appellant. I was accordingly urged to dismiss the appeal.
4. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. PW1 was the complainant. She knew the appellant. They were neighbours. She testified that on Sunday, 2nd June 2013 at about 6:00pm, she met the accused on the road. It was near his house. The accused grabbed and dragged her into his house. She screamed but no one responded immediately. The appellant raped her. She stated further as follows-

> *"There was nobody to hear me. The accused had taken me to his house and he started assaulting me all over the body. The accused….then tore my clothes which were then full of blood. The accused had then placed me in his bed and he raped me severally as I*

screamed for help. One lady who was the accused's neighbour had come into the house and she had found the accused on me and she pullled him off me and the accused had left me and got hold of the said lady and he tore her blouse and took a panga with which he had cut the said lady on the finger and the lady ran out and went away. I had remained in the house and the accused had taken a stick and he had hit me on the knees and I had fallen down."

6. PW3 responded to the screams. She found the appellant on top of the complainant. She told the trial court as follows-

> *"I heard screams from the accused's house. I [went] to his house. I met the accused in the house with J. The two were on the bed and they were making love. The accused was on the complainant. I tried to rescue the complainant but the accused had turned against me and wanted to assault me. I then screamed for help but nobody came……..I left after the accused hit me with a panga on the left thumb finger. I [went] to my house. The following day I [went] to the complainant's house and when I looked at her, she had injuries to the ears which were bleeding. The eyes were red and the knees had injuries."*

7. PW2 was the examining doctor. He carried out the examination on 4th June 2013, two days after the incident. He festified as follows-

> *"[She] was in fair general conditions. The right eye was red and both ears had blood stains. The patient had birth marks on the neck and abdomen. Her clothes had blood stains. She was in the said clothes and the yellow t-shirt had blood stains. Her inner wear was torn. The injuries were caused by blunt object. The patient had pain on the chest. She had tenderness on both knee joints. The injuries were two days when I examined the patient blunt object was used. But she had been treated before examination. The patient was given an injection for STDS and tetanus. The injuries were categorized as harm. On part C on the patient's private parts, the labia majora and vagina were normal externally. She had no injuries but she had whitish discharge from her vagina."*

8. The doctor produced the P3 form (exhibit 4). The P3 stated: "*normal external genitalia. No obvious injury on labia majora or minora…possible rape-while discharge could be semen"*. The blood stained yellow t-shirt, pink panties and black skirt were identified in court by the complainant. The doctor also identified the complainant's torn inner wear. They were produced in evidence as exhibits by PW6, the investigating officer. PW5, a clinical officer, examined the appellant on 11th June 2013. The tests were all negative.
9. When the appellant was placed on his defence, he denied committing the offence. In his brief statement, he said-

> *"I am a resident of Marigat. I am a farmer, the charges are not true. On the alleged date of incident I was at home with my children and after three days I was arrested and charged"*

10. The appellant called two witnesses to support his *alibi*. DW2 was his wife Esther Turumet. She said the alleged incident took place on Sunday. She claimed she was with the appellant at DW3's farm. They went for lunch and returned to the farm until the evening. They then retired to bed and slept. DW3, Joshua Maina, was a neighbor to the appellant. He confirmed the narrative given by the appellant and his wife. He testified that he had requested the appellant and DW2 to assist him on his farm. He said the appellant and his wife left his farm in the evening. DW3 then went to his house. He learnt of the complaint when the appellant was arrested.
11. From that evidence, it is obvious that the complainant and the appellant were not complete strangers. She knew him. They were neighbours. She met him on the road near his house. The appellant dragged her into his house, assaulted her and had sexual intercourse with her. Her screams attracted PW3 who caught the appellant *red-handed* on top of the complainant. Her efforts to rescue the complainant failed because the appellant assaulted her with a *panga* and

injured her on the thumb.

12. When PW3 saw the complainant the next day, she noticed *her ears were bleeding; her eyes were red and there were injuries on her knees.* That evidence was corroborated by PW2, the doctor. If any sexual intercourse took place between the appellant and the complainant, it was obviously not consensual. I am fortified in that finding by the blood-stained yellow skirt and torn inner wear produced at the trial.
13. From that evidence, the appellant was positively identified by the complainant and PW3. It was evidence of recognition; much stronger than mere identification. See *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Kiarie v Republic* [1984] KLR 739,*Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. *Obwana & Others v Uganda* [2009] 2 EA 333. I have reached the inescapable conclusion that the appellant was the person who attacked the complainant and who was caught in the act by PW3.
14. I agree with the appellant that there were inconsistencies in the dates of the medical examination. The complainant stated she received the P3 results on 3rd June 2013. The doctor examined her on 4th June 2013. I do not think it was a material discrepancy. I do not also know why PW3 did not call other neighbours to rescue the complainant. It does not affect the charge. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993**,** the Court of Appeal held-

> "*In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."*

15. I am alive to the defence by the appellant. He was setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501.
16. The appellant, his wife (DW2) and the neighbor (DW3) all stated that the appellant was at DW3's farm until the evening before he retired to his house for the night. The *alibi* in this case was a red herring. The evidence of PW1 and PW2 was consistent and believable. The attack occurred on Sunday evening at about 6.00pm. The appellant had a clear opportunity to commit the offence. He was positively identified as the person who dragged the complainant into his house and assaulted her.
17. The next key question is whether he had *unlawful carnal knowledge* of the complainant. Subject to section 111 of the Evidence Act, the legal burden of proof rested throughout with the prosecution. There is no room for presumptions in a criminal trial. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
18. PW1 was emphatic that the appellant penetrated her without her consent. The injuries on her eyes, ears and knees confirm that the sex was *non-consensual*. She screamed. PW3 found the appellant on top of the complainant. True, the medical examination on her genitalia was *not* consistent with rape. The examination was done *two days* after the incident. The doctor testified that *the labia majora and vagina were normal externally. She had no injuries but she had whitish discharge from her vagina.* He opined that the discharge could have been semen. The doctor said she had been treated before. The examination on the complainant was also negative. I agree with the appellant that there was *no* credible medical evidence establishing rape. But medical evidence is just but one form of proving a fact. What is however disturbing is that the medical evidence did not corroborate a forced entry or the nature of the whitish discharge.
19. In the instant case, I have reached the conclusion that the appellant assaulted the complainant. The evidence on the assault is overwhelming. But the evidence of *penetration* is not borne out by the medical examination on either the complainant or appellant. I am unable to reach a conclusive finding that the appellant penetrated the complainant. In the circumstances, the conviction for

rape was unsafe.

20. The appellant had faced the alternative charge of indecent acts contrary to section 6 (b) of the Sexual Offences Act. The complainant's pink panties were torn. PW3 found the appellant on *top* of the complainant. The complainant testified that the appellant *penetrated* her. I am thus satisfied that the appellant indecently touched or intentionally caused his body or penis to come into contact with the complainant's vagina. I thus find that the lesser but cognate offence was proved beyond reasonable doubt. I *convict* the appellant for the offence of compelling or inducing an indecent act.
21. In the end I am not satisfied that the prosecution *proved* beyond reasonable doubt that the appellant *on the 2nd June 2013 unlawfully penetrated the complainant with his genital organ*. It must follow as a corollary, that the conviction was unsafe. I set aside the conviction and sentence. I however find on the totality of the evidence that the appellant was guilty of the lesser but cognate offence of compelling or inducing an indecent act. I *convict* him accordingly.
22. Under section 6 of the Act, the offence of compelling or inducing an indecent act carries a *minimum* sentence of *five years*. I have noted the mitigation tendered in the lower court: that the appellant has young children who look up to him for support. But the brutality meted out on the complainant was grave. I accordingly sentence the appellant to serve *five years* imprisonment. The sentence shall run from 13th February 2014, the date of the original conviction.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 13th day of October 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court Clerk.