REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 98 OF 2016

PETER KIPKEMBOI CHIRCHIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Molo Chief Magistrate's***

Criminal Case No. 1322 of 2011** by **Hon. M. W. Kagendo C. M.** on **15th day of February, 2016

J U D G M E N T

1. The Appellant **Peter Kipkemboi**, was charged with the following offences:

a) **Count I: Grievous Harm** contrary to **Section 234 (1)** of the **Penal Code.** Particulars of the charge are that on 1st July, 2011, in Nakuru District with Rift Valley Province unlawfully did grievous harm to one **RK**.

b) **Count II: Rape** in violation of Section 3 (1) (a) of the Sexual Offences Act No.3 of 2006. Particulars of the charge are that on 1st day of July, 2011 in Nakuru District within Rift Valley Province did intentionally and unlawfully cause his penis to penetrate the vagina of **RK** without her consent in violation of **Section 3 (1)** (a) of the **Sexual Offences Act No.3 of 2006.**

2. The prosecution availed 8 witnesses. The accused chose to give unsworn statement and did not avail any witness. The accused was convicted of the offence of grievous harm and acquitted of the second charge of rape. The trial court called for probation officers report after giving the accused an opportunity to mitigate. The accused was sentenced to 5 years imprisonment.

3. Being aggrieved by the trial magistrate's judgment, the appellant appealed against both conviction and sentence on the following grounds:-

i. That the honorable trial magistrate erred in law and fact in convicting the Appellant against the weight evidence.

ii. That the honorable trial magistrate erred in law and fact in convicting the Appellant though the prosecution did not prove its case beyond reasonable doubt.

iii. That the trial magistrate erred in law and fact by failing to evaluate the evidence of the prosecution and of the defence objectively.

iv. That the trial magistrate erred in law and facts by noting that the Appellant was non repentant and by rectifying the probation officer's report yet the Appellant in mitigation had asked for leniency of the court.

v. That the trial magistrate erred in law and in to a large extent disregarding issues arising from cross-examination of prosecution witness.

4. On hearing, **Mr.Bosire** for the appellant relied on submissions filed on 14th November 2018. The said submissions restated grounds of appeal. Appellant submitted that the trial turned a blind eye on glaring inconsistency on parts of the body injured as described by PW1 to PW7. He added that PW5 the medical officer failed to describe the depth of the injuries and what may have inflicted; that he did not observe any stab wound on complainants left breast as indicated by PW7,chest,hands as described by PW6 or head as described by PW4.

5. Appellant further submitted that complainants clothes were not produced to prove that she bled profusely neither was the weapon used

produced or described. Appellant added that both *actus reus* and *mense rea* should have proved but in this case *mense rea* was not proved.

6. In response **Ms kiburi** for the state submitted that the offence of grievous harm 4 ingredients that need to be proved are as follows:

i. whether injury was done

ii. whether it was serious to cause interference with the health of the victim

iii. whether the act was intended

iv. Whether it was lawful

7. She submitted that the victim suffered stab wound, which was confirmed by P3 Form, discharge summary and PRC form produced in court. That from evidence adduced by PW4 and PW7 the victim was bleeding from breast and the leg.

8. Counsel further submitted that the intention of the appellant is proved by circumstantial evidence and the mere act of stabbing a person several times is clear evidence of intention.

9. On prove of harm, the state counsel submitted that the victim was on heavy medication and unable to reach court prompting the court to move to L her home. She added that the P3 Form classify the injury as harm and it is unlawful.

10. On identification of assailant, the state counsel submitted that the appellant was known to the victim before the incident; was able to tell PW4 and PW7 immediately and the following day. She submitted that the appellant raised defence of *alibi* but failed to corroborate it.

11. Counsel further submitted that the trial magistrate considered the appellant's mitigation. She urged court to uphold conviction and sentence.

ANALYSIS AND DETERMINATION

12. This being the first appellate court, I am required by law to reevaluate evidence adduced before the lower court and arrive at an independent determination. This I do bearing in mind the fact that contrary to the trial magistrate I have not had the opportunity to take evidence first hand and make observation on demeanor of witnesses. **See Okeno Vs Republic *[1972] EA 32*** where it was stated as follows:-

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"***

13. Record show that in her testimony the complainant testified that the appellant is her neighbor and was therefore known to him prior to the incident herein. She testified that the incident occurred at 7 pm, that it was not dark but darkness was setting in. It is evident that the complainant struggled with him for some time before she run away. She added that she was given first aid by a neighbor and returned to her house. She testified that the appellant went back to her house the same night and stabbed her on the head and leg. She said after stabbing her, the appellant removed her pant and raped her. She said in the process, the appellant threatened to kill her once he was through with her.

14. From the evidence above, there is no doubt that the appellant spent considerable time with the appellant during the incident and was able to identify him. The incident having occurred at 7 pm there was still light to enable her see and identify the appellant. That aside the appellant talked during the incident and being a neighbor there is no doubt that the appellant was able to identify his voice. This was confirmed by her mention of the appellant to Pw4 and pw7 after the attack. There is no doubt that the appellant was positively identified.

15. On prove of injuries the trial court observed scars on the appellant, which corroborate the doctor's evidence.

16. On prove of on *mense rea* the act of hiding in complainant's house and utterances made by the appellant clearly confirm that the act was premeditated.

17. From the foregoing I find evidence adduced prove beyond reasonable doubt that the appellant inflicted injuries on the complainant, which were aggravated in nature. The appellant was properly charged and convicted.

18. In respect sentence, I note from record that the appellant was given an opportunity to mitigate; the court directed probation report to be availed before sentencing. The court noted that there was a land dispute. The court asked for updated report, which portrayed the appellant as a violent person feared by the society.

19. I am aware that the offence attracts a life sentence but having noted that there is a land dispute, which may have ignited the commission of the offence herein, I am inclined to call for social inquiry report by probation officer before I make a determination on sentence.

Judgment Dated, signed and delivered at Nakuru this 21st day of February 2019.

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RACHEL NGETICH

JUDGE

In the presence of:-

Schola Wangui - Court Assistant

Chigiti Counsel for Appellants

Bosire Counsel for Respondent

12/3/19

Before: Hon. R. Ngetich, J

C/P Chigiti

C/A Schola

Ms. Waweru for state

Appellant – present

Bosire for Appellant

WAWERU: A social inquiry report has been filed.

R. NGETICH

JUDGE

12/3/19

ORDERS ON SENTENCE

1. I have perused and considered the social inquiry report. The probation officer visited victim and appellant's relatives, area administration and community members. Report indicate that while on bond pending appeal, the appellant has been involved in 2 other criminal activities thus failing to comply with conditions for bond pending appeal. It is evident that his incarceration for one year before being granted bond never helped to rehabilitate him. My view is that it is unlikely that a non-custodial sentence will help in reforming the appellant. He was sentenced to 5 years imprisonment. The offence herein attracts life imprisonment. The appellant was not however warned of a possibility to enhance sentence in the event the court uphold conviction.

2. I am therefore inclined to uphold the sentence imposed by the trial court. The appellant to serve the remainder of sentence imposed.

Judgment Dated, signed and delivered at Nakuru this 12th day of March, 2019.

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RACHEL NGETICH

JUDGE

In the presence of:-

Schola Wangui - Court Assistant

Bosire Counsel for Appellant

Ms. Waweru for state