**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 68 OF 2012**

**ALOISIO NJERU NJUGUNA ….....APPELLANT**

**VERSUS**

**REPUBLIC .....PROSECUTOR**

***From original conviction and sentence in Criminal Case No. 395 of 2011 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA - PM on 4/5/2012***

**J U D G M E N T**

**ALOISIO NJERU NJUGUNA** the Appellant herein was charged with the offence of Attempted Rape contrary to section 4 of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

> **ALOISIO NJERU NJUGUNA: On the 9th day of July 2011 in Mbeere North District within Embu County unlawfully and intentionally attempted to cause his penis to penetrate into the vagina of A without her consent.**

**ALTERNATIVE COUNT**

Indecent Act with a child contrary to section 11(6) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

> **ALOISIO NJERU NJUGUNA: On the 9th day of July 2011 in Mbeere North District within Embu County committed an act of indecency with an adult namely A by touching her private parts.**

**COUNT TWO**

Assault causing actual bodily harm contrary to section 251 of the Penal Code

The particulars as stated in the charge sheet were as follows;

> **ALOISIO NJERU NJUGUNA: On the 9th day of July in Mbeere North District within Embu County unlawfully assaulted A thereby occasioning her actual bodily harm.**

The Appellant denied the charges and the matters proceeded to full hearing. Eventually the Appellant

was convicted on the 1st and 2nd count. He was sentenced to ten (10) years and one (1) year imprisonment respectively. He was aggrieved by the Judgment and has appealed raising the following grounds;

1. The Appellant pleaded not guilty before the trial Magistrate
2. The learned trial Magistrate erred in law and facts when he convicted the Appellant relying on evidence which was inconsistent and uncorroborated.
3. The learned trial Magistrate erred in law and facts when he convicted the Appellant without considering the fact that no DNA test was conducted between him and the complainant.
4. The learned trial Magistrate erred in law and facts when he failed to consider the fact that the Appellant was initially reported with assault which was later twisted to look like an attempted rape.
5. The learned trial Magistrate erred in law and facts when he failed to consider the fact that there was an outstanding grudge between the Appellant and PW1 which exposed itself the hearing of this case.

The brief facts of this case are that PW1 and Appellant are neighbours. On 9/7/2011 at 3pm PW1 was at her shamba drawing water from her borehole. She had a child strapped on her back. She was hit on the face and she fell down. The person hitting her was the Appellant. He hit her on the head and held her neck. She screamed. He then tore her pant, petticoat and skirt. As they struggled he was pressing his penis on her body in particular the thigh. He had already unzipped his trousers. PW2 came and the Appellant left. She went to the hospital and reported the matter to the Police. The Appellant was arrested and charged.

The Appellant in his unsworn defence denied the charges. He said he was away in Ishiara from 4/7/2011 to 10/7/2011. He then returned home and was arrested. The Appellant presented the Court with written submissions in which he disputes the finding of the learned trial Magistrate on Count 1. He appears to have no problem with Count 2.

M/s Ingahizu for the State submitted that the evidence was overwhelming. That there was proof of assault and attempted rape. And that the Appellant's defence was a mere denial.

As a first appeal Court this Court is enjoined to reevaluate the evidence and come to its own conclusion. An allowance must be given by the Court as it did not see nor hear the witnesses. I am guided by the case of ***KIILU & ANOTHER –V- REPUBLIC [2005]1 KLR 174 where the Court of Appeal held;***

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
ii. ***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; 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.***

I have considered the submissions by the Appellant and the State. I have equally considered the grounds of appeal and the evidence on record. I will consolidate the grounds of appeal which all deal with the weight of the evidence adduced.

There is no dispute that PW1 and the Appellant are neighbours. The incident herein occurred on 9/7/2011 at 3pm on PW1's shamba. She was drawing water when she was attacked. She had strapped a child on her back. She was beaten and she fell down. It follows that she fell with this child. She further says she screamed. PW2 was attracted by the screams and came there. It's noted that though she fell down with the child who was on her back the said child was not screaming or crying. The medical evidence confirms that when she was examined on 14/7/2011 she had pain on the neck and face and nowhere else.

From the evidence of PW2 she heard screams from the direction of the borehole. PW1 and Appellant were fighting. She went and took the child strapped on PW1's back. PW2 did not actually explain to the Court in what position she found PW1, the Appellant and the child. They were fighting yes but were they struggling on the ground? Its PW1's evidence that she fell down and her clothes including the pant were torn. The Court being a Court of record is expected to note all this down. There was a skirt, pant, petticoat and blouse produced as

EXB1–4 by PW4. He said the complainant availed torn clothes. It is nowhere noted by the Court that indeed what was identified by PW1 at page 8 and what was produced at page 16 were torn clothes. I believe that it is the tearing of the pant, skirt and petticoat that would go a long way to establish that indeed the Appellant wanted to penetrate her by all means. PW2 found the child on PW1's back. If indeed the Appellant tore all the clothes PW1 wants the Court to believe he did, and was even pressing his penis (out of his unzipped trouser) on her body especially the thighs it obviously means he was laying on top of her. And if he was laying on her she was lying on her back. The question this Court begs an answer to is where the child was. Was she still strapped on her back? If so were these two adults laying on her? If that was the position this child would have been suffocated or would have been screaming his/her loudest. And had this been the case then there is nothing that would have stopped PW2 from telling the Court the same. These facts as presented to Court by PW1 were on obvious exaggeration. The presence of the child strapped on her back betray her. My analysis of these facts brings me to the conclusion that the Appellant attacked PW1 at the borehole and injured her. She screamed and PW2 came and the Appellant left. PW1 received minor injuries as is shown in the P3 (EXB1). Had there been any attempted rape even PW2 would have seen it as she approached them to take the child.

I therefore find the conviction on count 1 to be unsafe. The Appellant was properly convicted and sentenced on count 2. The appeal on count 1 is allowed. The conviction is quashed and sentence set aside. Appeal on count 2 is dismissed. The conviction and sentence are upheld. If he has completed serving sentence on count 2 then he should be released forthwith unless being held under a separate warrant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of;**

**M/s Ing'ahizu for State**

**Appellant**

**Njue – C/c**