



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal No. 137 Of 2012

KELVIN MUSYOKA APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 347 of 2012 of the Principal Magistrate's Court at Taita - Taveta – **Hon. Ndegwa- PM**)

JUDGMENT

KELVIN MUSYOKA hereinafter referred to as the Appellant herein was convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement of a girl contrary to section 8(1) as read with section 8(3) of the Sexual Act No. 3 of 2006.

This appeal arises after a retrial had been ordered by the High Court.

Its basically grounded on the issue of identification. The defence contention being that the incident took place at night, that it was sudden and brief.

On the issue of identification this is what the trial magistrate noted at page 33 line 1.

“ The question to consider is whether there was indeed necessary in the circumstances of this case. According to the complainant, the Accused defiled her for about one hour and she used to see him before that date. The Accused was also brought to the Hospital after he had been arrested and she was able to confirm he was the one who had defiled her the previous day even though she did not know him by name. This is a case of recognition which is more reliable than identification. Moreover, it is my finding that since the complainant was not present to identify the Accused at the time of he was arrested by villagers the description she had given to PW 2,

PW 3 and PW 4 of her attacker was so detailed and accurate that the villagers were able to narrow down their search to the Accused”.

I am satisfied that the trial magistrate did carefully analyse the evidence presented before him by the prosecution.

The complainants evidence was not shaken during cross examination. After the incident and after she explained and gave a description of the attacker the villagers proceeded to the house of the appellant

at night but they did not find him. When he later surfaced the following day he was arrested. His alibi was that he slept in his farm. The trial magistrate did consider that evidence and was of the view that the appellant did not sleep in his house that night because he was hiding. This is what the trial magistrate observed at page 4 line 20,

“As I have said earlier the complainant was able to recognize the Accused at the time she was defiled since she used to see him before. It is also my finding that the Accused ran away from the scene after the incident and did not spend the night in his house because he had a guilty conscience and he definitely knew that the villagers would be searching for him. The Doctor was also categorical that he saw a minor bite mark on the Accused His alibi has no merit because he only ran away from the scene after committing the offence and also made sure that he did not spend the night in his house to evade arrest”.

I am in agreement with the analysis given by the trial magistrate. The prosecution had proved its case beyond reasonable doubt and the conviction was safe. The Sentence of twenty years imprisonment is the one prescribed by law and hence legal. I find no good reason to interfere with both Conviction and Sentence.

The appeal has no merit and its dismissed.

Judgment delivered dated and signed this **23rd** day of **October, 2013**.

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M. MUYA

JUDGE

23RD OCTOBER, 2013

In the presence of:-

Learned State Counsel Miss Ogweno

Thee Appellant present

Court clerk Musundi