



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 378 OF 2003**

**(From Original Conviction and Sentence in Criminal Case No.2060 of 2003 of the Senior Resident Magistrate's Court at Kwale – L.N. Mbatia, Ms – S.R.M.)**

**NDEGWA MRABU TSUTSU.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

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

The Appellant pleaded guilty to the offence of RAPE contrary to Section 140 of the Penal Code in that on 29/9/2003 he had carnal knowledge of Fatuma Safari Yaa without her consent.

The particulars of offence were read to him in details (covering half a page of type) and he agreed with the same saying: "Facts are correct". He was convicted and sentenced to 12 years imprisonment with hard labour. He was a first offender. He asked for leniency and promised not to repeat such a thing again.

He now appeals against the sentence saying that the Trial Magistrate did not consider that he was a first offender and by pleading guilty saved court's time. And that the harsh punishment does not mean to rehabilitate but rather to ruin and spoil ones life. That he was repentant and sorrowful to what had happened. All this covers grounds 1, 3, 7, & 8.

On these grounds the court observes that the Trial Magistrate considered mitigation in favour of the Appellant. The offence of rape now carries life imprisonment. The sentence of 12 years therefore is fair and reasonable in the circumstances and I see no reason to interfere.

The other grounds that the Trial Magistrate turned down the request of the complainant when she attempted to withdraw the case I have perused the record and there is no evidence to support this allegation.

Also it is alleged that the Trial Magistrate did not give Appellant time to explain. This is not correct. The prosecutor took time to explain the particulars of the offence, that is, what happened between the Appellant and the complainant and all the Appellant said is that the facts were correct.

Again, there is no evidence that the Trial Magistrate was informed that the complainant was his friend or that on the material day the Appellant was intoxicated

The Appellant asks for re-trial but upon a careful perusal of the record the Trial Magistrate conducted the trial in a regular and correct manner and in accordance with procedure and I find no grounds to enable the re-trial to be ordered.

In the circumstances, I find no merit in this appeal and I dismiss the same. It cannot be over-emphasized that sexual offences nowadays expose the victims and even the perpetrator to death dealing HIV/AIDS.

Dated at Mombasa this 9th day of June, 2004.

JOYCE KHAMINWA

J U D G E