REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO.78 OF 2015

AUGUSTINE WANYOIKE KAMAU

alias

JAMES KARIUKI KAMAU ..... APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(From the original conviction and sentence in Criminal Case No.241 of 2014 of the Senior Principal Magistrate's Court at Kandara by Hon. C. Kithinji - Resident Magistrate)

JUDGMENT

The appellant, **AUGUSTINE WANYOIKE KAMAU alias JAMES KARIUKI KAMAU** , was charged with an offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006. He was alternatively charged with an offence committing an indecent act with a child contrary to section 11(a) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 17th February 2014 in Kandara District of Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of **J.N.W**, a child aged 5 years. Alternatively if he did not defile her he unlawfully touched her vagina.

He was sentenced to life imprisonment for the offence in the substantive charge.

He now appeals against both conviction and sentence.

The appellant was in person. He raised seven grounds of appeal which can be summarized into one as follows:

1.That the learned magistrate erred in law and in fact by failing to appreciate that there existed family conflict.

2. That the learned magistrate erred in law and in fact by failing to observe that PW1 was coerced to give evidence.

3.That the learned magistrate erred in law and in fact by failing to observe contravention of section 163 (c) of the Evidence Act.

4.That the learned magistrate erred in law and in fact by failing to observe that section 169 of the CPC was contravened.

5. That the learned magistrate erred in law and in fact by relying upon flawed medical evidence.

6.That the learned magistrate erred in law and in fact in convicting the appellant when there was no sufficient evidence.

The state opposed the appeal through M/s. Lydia Wang'ombe, the learned counsel.

Briefly the facts of the prosecution case are as follows:

The complainant, a girl aged about 5 years was going home from school. She found the appellant who took some sweet potatoes garden where he defiled her He threatened her with death should she inform anybody of the incident.

In his defence the appellant denied any involvement in the offence and pleaded an alibi.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The first duty of the trial court is to ensure that the charge is correctly drafted in all aspects. In the instant case, the charge ought to have read:

"**contrary to section 8(1) as read with section 8(2) ..."**

Since the appellant understood the charge and fully participated in the trial, I find that he was not prejudiced in any way by this flaw. The same is curable under section 382 of the Criminal Procedure Code.

Though the appellant raised an issue of a family misunderstanding (probably with the complainant's family for it did not come out clearly) while cross examining the complainant's mother (PW2) and grandmother (PW3) he never asked them any question towards that direction. This again did not feature during his defence. I therefore dismiss this ground as an afterthought.

What the evidence on record discloses is not coercion on the complainant to testify but to disclose what had befallen her. The evidence that emerge indicate that she had been threatened with death if she disclosed she had been defiled. The other part where the appellant took issue with the complainant's evidence is where she was promised gumboots if she conducted the case well. Does this amount to coercion? In my view the context within which the promise was made would matter. In the instant case was a child who had been threatened with death. Her guardians had to do what was possible to make her testify. I do not agree with the appellant that this amounted to coercion to testify.

Section 163 (1) (c) of the Evidence Act provides as follows:

(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—

....

(c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;

When the appellant contends that this section was contravened one is left wondering by whom. My

understanding of this section is that such impeaching may be by the adverse party (in this case the appellant) or by the party that calls the witness (in this case the prosecution) if their witness turns hostile. For the party who seeks to impeach own witness the consent of the court must be obtained. However, for the adverse party no such consent is required. This is misunderstanding of the law by the appellant.

The appellant complained that section 169 CPC was contravened. The section is on the content of judgments. After perusing the learned magistrate's judgment, I do not find any reason to claim that it does not comply with the requirements of section 169 CPC.

The medical evidence did not point an accusing finger at the appellant. all it indicated was that there was evidence of defilement of the complainant. This does not make the evidence flawed.

The proviso to section 124 of the evidence Act states:

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

The learned trial magistrate gave her reasons as to why she believed the complainant. My evaluation of the complainant's evidence does not raise any doubt. She knew her assailant before the incident and she struck me as a witness who was telling the truth. The medical evidence corroborated her allegation that she was defiled.

Though the appellant had argued in his submissions that his defence was not considered, I find this contention not to be true. The learned trial magistrate considered it before dismissing it.

I noted that the learned trial magistrate convicted the appellant on both the substantive and the alternative charge. The correct procedure after convicting on the substantive charge is to make no findings on the alternative charge. This defect is curable under section 382 of the CPC.

The upshot of the foregoing analysis of the evidence on record is that the appeal must fail. The same is dismissed for lack of merits.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE