REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 1 OF 2015

PATRICK MWORIA KAMWILU.........APPELLANT

VERSUS

REPUBLIC.......................................RESPONDENT

(From the original conviction and sentence in criminal case No.783 of 2012 of the Principal Magistrate's Court at Tigania by Hon. J.W. Gichimu – Ag. Principal Magistrate)

JUDGMENT

The appellant, **PATRICK MWORIA KAMWILU**, was charged with an Offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2016.

The particulars of the offence were that on the 7th day of June 2012 [Particulars withheld] location in [Particulars withheld] District of Meru County intentionally caused his penis to penetrate the vagina of **I.K**, a child aged 5 years.

Alternatively, he was charged with an offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2016. The particulars of the offence were that if he did not defile the complainant, he touched her breasts and vagina by hands.

He was tried and convicted for the offence in the substantive charge.

A life sentence was meted out. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds that can be summarized as follows:

1. That the learned trial magistrate erred in law and fact by failing to note that there were procedural irregularities.

2. That the learned trial magistrate erred in law and fact in convicting the appellant without proper medical evidence.

3. That the learned trial magistrate erred in law and fact in convicting the appellant without sufficient evidence to link him to the offence.

4. That the learned trial magistrate erred in law and fact in rejecting his defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

Briefly the facts of the prosecution case were as follows:

On the 7th June, 2012 the appellant called the complainant from her grandmother's house. He gave her some milk and thereafter defiled her. On that night she spent the night in the home of the appellant.

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 VRS. REPUBLIC 1972 EA 32.**

The substantive charge was wrongly drafted. It is incorrect to cite a nonexistent section. The charge ought to have been contrary to "**section 8(2)..."** and if the drafter wanted to include the definition section then it ought to have read **".. contrary to section 8(1) as read with section 8(2)...".**

There was however no prejudice occasioned to the appellant. The error is curable under section 382 of the Criminal Procedure Code.

I have perused the record and I have noted that the trial followed all the procedure for a criminal case and the trial court cannot be faulted.

The complainant was a child aged 5 years at the time of the alleged offence of defilement. Upon my perusal of the evidence on record some very pertinent issues arise. These are, one, the failure to call the grandmother she was staying with as a witness so as to shed light as how this little girl spent the night away from her home. The failure to call her brother aged 10 years for the same reason spoke volumes against the prosecution case. No explanation was proffered as to why these two material witnesses were not called. Two, if the complainant's evidence is to be believed, she ought to have sustained more injuries than was observed by the clinical officer. There was no evidence of perforated hymen yet she said she spent the night with the appellant.

Was her grandmother so irresponsible? Did she care where such a child spent her night? Did she observe anything out of normal about the complainant the following morning?

All these questions could have been answered had she been called as a witness.

The defence of the appellant that he was framed up in the offence is plausible especially after considering that the prosecution failed to call very material witnesses without an attempt to explain their absence.

I therefore find that it was unsafe to convict him on the evidence on record. The appeal is allowed, conviction quashed and the sentence set aside.

The appellant is set on liberty unless if otherwise lawfully held.

DATED at Meru this 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE