REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 179 of 2017.

VICTOR JUMA WAFULA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara delivered by Hon. H. M. Nyaga, CM on 9th November, 2017).

JUDGMENT.

Background.

1. Victor Juma Wafula, hereafter the Appellant, was accused of committing the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act, No 3 of 2006. The particulars of the offence were that on 15th June, 2015 at [particulars withheld] Estate in Starehe Sub-County within Nairobi County, intentionally attempted to cause his penis to penetrate the vagina of Y. M. N, a child aged three years. He was charged in the alternative with an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006 in that he intentionally and unlawfully caused his penis to touch the vagina of Y. M. N, a child aged 3 years. He pleaded not guilty but at the conclusion of the trial was found guilty in the main count and sentenced to 30 years imprisonment.

2. The Appellant preferred the instant appeal both against the conviction and sentence. His amended grounds of appeal were that Section 122 A, B and D of the Penal Code was not complied with, that his conviction was based on mere suspicion, that the charge sheet was defective and that his defence was not considered.

Evidence.

3. The prosecution's case was that the Appellant lured the complainant into his house where he attempted to defile her. PW1, E. N. was the complainant's mother. She recalled that the Appellant was her neighbor and that on 15th June, 2015 she saw the Appellant by the gate and as he headed to his house he was followed by three children including the complainant. That while she was in her house the complainant informed her that "uncle ametoa dudu" before she started undressing. She examined the child and found no injuries in her genital areas but noticed what resembled semen on her pants and bikers. She went to his house but it was locked so she reported the matter to the police and took the child to the hospital. She also produced a Clinic Card which indicated that the complainant was born on 28th February, 2012

4. The complainant was subsequently examined by a police doctor on 17th June, 2015 namely **PW2, Dr. Kizzie Shako** who produced her P3 Form. The Appellant was also examined by a police doctor on 22nd June, 2015, **PW3, Dr. Joseph Maundu** who produced his P3 Form. Both were found with no injuries. **PW4, Irene Nyagwachi** was a Clinical Officer at MSF Clinic in Mathare. She produced a medical examination report that was prepared by one Barbara Salano Kerre, also a Clinical Officer at the clinic upon her initial examination of the child victim15th June, 2015. It was concluded that the child had not been defiled and had no obvious injuries.

5. **PW5, Ann Wangechi Nderitu**, a Government Forensic Analyst carried out tests to determine the presence and source of semen, spermatozoa and blood on exhibits received on 17th and 21st March, 2016 from **CPL Domitilla Matheka (PW6)** who investigated the case. After carrying out the tests she concluded that the DNA profile of the blood sample received form the Appellant matched the profile of the DNA in the blood, semen and spermatozoa. PW6 summed up the prosecution case. It was her evidence that she charged the Appellant after the DNA results linked him to the offence. She added that the Appellant was arrested by members of the public.

6. The Appellant gave a sworn statement of defence in which he denied committing the offence. He stated that on 15th June, 2017 he heard people mentioning his name and went to a police station where he was arrested pending investigations. That he was also taken to a hospital where blood samples were taken although he did not know why. He was of the opinion that the child's mother was lying as no one saw him

in the act and no parade was conducted. In cross examination he acknowledged knowing the complainant and her mother as they were neighbors. Further, that although they had no grudge the complainant's mother had coached her to fix him.

Determination.

7. After reevaluating the evidence on record and the respective rival submissions, i have isolated the following issues for determination.

i. Whether the DNA sampling complied with the legal requirements.

ii. Whether the charge sheet was defective.

iii. Whether the Appellant's defence was considered.

iv. Whether the offence was proved beyond reasonable doubt.

Compliance with Section 122 of the Penal Code.

8. There is no doubt that the Appellant's conviction was purely based on the DNA examination. The evidence was adduced by PW5. The Appellant contended that the evidence was admitted in accordance with the law, specifically Section 122 A, B and D of the Penal Code. Section 122C relates to a consenting suspect who allows the police to carry out the DNA sampling procedure. However, the consent must be recorded in writing.

9. Section 122A involves the ordering of the suspect to submit to the DNA sampling. He should submit himself pursuant to an order made by an officer of the rank of Inspector or higher. The order must also be in writing. In the present case, the Appellant, as evidenced by exhibit 10 which is a "Request To Obtain a Blood Sample" dated 16th June, 2015 consented to submitting himself for sampling. Hence, the requirement under Section122A was dispensed with. In the circumstances, I find that the DNA evidence was admissible under Section 122D of the Penal Code.

Defective charge sheet.

10. On the issue of defective charge sheet, the Appellant submitted that the evidence of PW1 did not tally with the particulars of the charge sheet rendering it defective. His submission was based on the particulars indicating that the offence occurred at [particulars withheld] Estate while PW1 testified that she resided in [particulars withheld] Estate. In the court's view, this is a minor error that does not prejudice the Appellant or affect particulars of the offence. It did not negate the fact that the Appellant lived next or near PW1's residence. The error can be cured under Section 382 of the Criminal Procedure Code.

Whether Appellant's defence was considered

11. It was also the Appellant's submission that his defence was not considered. Ms. Atina urged this court to look at the trial court's judgment and find that the defence in question was adequately considered. In the judgment, the learned trial magistrate found, inter alia, that the Appellant's defence was a mere denial as the Appellant confirmed that he was mentioned in the allegations causing him to turn himself in at the police station. Further, that the Appellant failed to state how the semen ended up on the complainant's inner clothes.

12. On the latter finding, it is clear that that the court shifted the burden of proof upon the Appellant to proof that he was not guilty which is against basic principles in a criminal trial that the burden of proof always lies with prosecution to prove their caser beyond a reasonable doubt. It is noteworthy that the Appellant admitted to being acquainted to the complainant and her mother, PW1, who were his neighbors. He however denied committing the offence and so the trial court was enjoined to evaluate the evidence and determine whether the prosecution had proved their case to the required standard. Any contradiction in the Appellant's defence ought only to have aided the court in arriving at a finding that it did not dislodge the prosecution case. This issue leads the court to turn on to the next issue for determination, which is whether the case was proved beyond a reasonable doubt.

Proof of the case.

13. The Appellant was convicted of committing the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act. The offence requires prove of the complainant's age and in this case the complainant's age was proved by the production of her Clinic Card which proved that she was aged three years.

14. With regards to the identity of the Appellant it is clear that he was known to PW1 and the complainant as he acknowledged in his defence. He was also allegedly tied to the matter by the DNA evidence which matched him to the semen on the complainant's pants. PW1 did not testify to viewing a blood stain on the pants, but the DNA analysis was carried out on a pant stained with blood, semen and spermatozoa matching the stains to the Appellant. While PW5 testified that the exhibits she was to analyze; the pants, biker and blood samples, were received on 17th June, 2015 and 21st March, 2016 there was no indication which of the items were received on which date. Further, the investigating officer, PW6, who conveyed the exhibits testified to only delivering one batch of exhibits on 17th June, 2015 and soon thereafter receiving a report back at what time she charged the Appellant.

15. The court notes that the report is dated 4th April, 2017 and could not inform the preferring of charges against the Appellant. This is confirmed by the court record which indicates that on 22nd March, 2017 the court ordered the investigating officer to follow up on the exhibit from the Government Analyst, further indicating that it would serve no useful purpose to fix a hearing date when results were not yet

received.

16. Flowing from the above observation, the court noted with concern the hand written amendments to the Analyst Report so as to correct the physical description and colour of the exhibits received. To be specific as at the date of receipt, Item 1 was a white pant with blue and yellow spots in a khirk envelop. It was amended to read white pant with **green blue** and yellow **heart** prints. Item 2 was initially a brown biker in a khirk envelop. It was amended to read a **cream** biker in a khirk envelop. Suffice it to state, the amendments were made on hearing date, 30th May, 2017. The amendment materially affected the description of the exhibits. This is an unusual occurrence bearing in mind that PW1 did not testify as to the colour of the exhibits. It is an issue that ought to have arisen at the stage of identification of exhibits. I am inclined to conclude that the changes were made so as to match the Report and to avoid embarrassing the prosecution case. More so, it must be borne in mind that neither the Government Analyst nor the investigating officer stated what exhibits and in what colour were received on the respective dates indicated in the Report.

17. In no uncertain terms, there is a likelihood that the analysis that was done pursuant to the exhibits and samples received on 17th June, 2015 and 21st March, 2016 was not against the exhibits that were produced in court on 30th May, 2017. This casts doubt to the credibility of not only the chain of custody of the exhibits that were analysed but also of the link of the Appellant to the offence. I will therefore accord him the benefit of doubt that he was the culprit.

18. Moreover, PW6 testified to having forwarded all the exhibits on 17th June, 2015 as evidenced by the exhibit Memo Form adduced as exhibit 9. Clearly then, it calls into question where the second set of exhibits forwarded on 21st March, 2016 came from. It can only be safely concluded that the DNA examination process was muddled with irregularities which were material to the outcome of the results. The same goes into the core of the case, thereby casting doubt on the culpability of the Appellant.

19. In the upshot, I find that the evidence adduced was not sufficient to link the Appellant to the offence. The prosecution did not prove their case beyond all doubts. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

DATED AND DELIVERED ON THIS 27TH DAY OF SEPTEMBER, 2018

G. W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*

2. *Miss Atina for the Respondent.*