Onyimbo v Republic (Criminal Appeal E023 of 2021)
[2023] KEHC 3775 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3775 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E023 OF 2021

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

HABIL ONYIMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. F Makoyo, Senior Resident Magistrate, SRM, in Butere SRMCCRC No. 39 of 2015, of 7th July 2021)

JUDGMENT

1. The appellant, Habil Onyimbo, had been charged before the primary court, of the offence of defilement, contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 30th January 2015, in Khwisero District, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of TI, a child aged 14 years. The appellant denied the charges, on 5th March 2020, and a trial ensued, where 5 witnesses testified.

2. PW1, TI, was the complainant. She described how the appellant lured her to his house, removed her underclothes, and had sex with her. She screamed in pain, attracting a crowd of responders. PW2, Moses Ameyo Okelo, was among the persons who responded. He found that PW1 had escaped. She was found at home, and was escorted to the police station. PW3, NOO, was the father of PW1. He described how he went searching for PW1 at the home of the appellant, who informed him that she had been there, looking for a husband. He found her school uniform there. He later met PW1 on the road, crying, looking confused and dirty, and he took her to the police. PW4, Ondelia Mucheka, presented the P3 Form and the treatment notes in respect of PW1. PW1 had been attended to at the health facility a day after the incident. She had a white discharge from her vaginal orifice. There was evidence of epithelial and pus cells. The appellant was also attended to at the same facility. His tests were

positive for pus cells. She concluded that there had been defilement. PW5, No. 66059 Police Constable Richard Kibet, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 2nd June 2021. He made a sworn statement. He denied the charges. His evidence centred on what happened when PW2 and PW3 came to his house looking for PW1.

4. In its judgment, the trial court found the appellant guilty on the main charge. It found the main charge had been proved beyond reasonable doubt. He was sentenced to 20 years in prison, which is the maximum penalty for the offence, under section 8(3) of the *Sexual Offences Act*.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the trial did not meet the threshold of a fair trial under Article 50(2) of the *Constitution* ; he should have been tried on a fresh charge sheet; the investigations were shoddy; the case was not proved beyond reasonable doubt; there was no forensic evidence; the evidence was flimsy; and the defence was not considered.

6. The appellant filed detailed written submissions. I have gone through the same, and noted the arguments made. The submissions are on the case not being proved to the required standard, the investigations being shoddy, inconsistencies in the evidence, crucial witnesses not being called, the mandatory sentence, and not being provided with an Advocate paid for by the State. He asks for the conviction to be quashed, and, in the alternative, re-sentencing based on *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No. E017 of 2021 (Odunga, J).

7. Let me consider the fair trial principles first, for if there was breach of the same, then the proceedings would be in jeopardy. This was a case of a retrial, based on failure to comply with fair trial principles. When the appellant was presented for retrial, the trial court made an effort to scrupulously comply with the constitutional fair trial principles. The trial court made an effort to ensure that the charges were read in Kiswahili, a language that the appellant which appeared to understand. He was duly informed of his right to be represented by an Advocate, under Article 50(2)(g) of the *Constitution* . The trial court should have also gone beyond that and informed him of his right to an Advocate provided by the State, if he was not capable of defending himself. That would mean that the trial court should have made an assessment, and recorded the same, as to whether the appellant was capable of defending himself, and if he was not, then take the steps set out in section 43 of the *Legal Aid Act*, No. 6 of 2016. These provisions are mandatory. However, I shall presume that the communication of information on his rights to representation by an Advocate, included the bit on entitlement to an Advocate provided by the State. The trial court, however, could have done better, and recorded that the 2 aspects of the right to legal representation were communicated to the appellant. He was granted bond. He was furnished with the State evidence before the trial commenced in earnest.

8. Did the prosecution have to draw up fresh charges? No. The High Court had ordered a re-trial. A re-trial is a repeat of the trial. It is founded on the same charges, although there is liberty to the prosecution to add or subtract from the same.

9. Was the case proved to the required standard? I believe it was. The charge was in respect of defilement. What needed to be proved was that PW1 was penetrated by the appellant. That was done. She testified about how the appellant lured her to his house, removed her panties, and had sex with her. She felt pain and screamed. Witnesses placed her at that house. She and the appellant were medically examined. The clinician found evidence of defilement, the epithelial and pus cells. The appellant was found to have similar pus cells. I am persuaded that the offence was proved to the required standard. If there were inconsistencies in the evidence, the same did not go to the core of the matter. Conviction is not dependent on the sufficiency of the investigations, but of the evidence presented, and the evidence

adduced was adequate to prove the offence, to the required standard. Whether all the crucial witnesses were called, I find that they were. PW1 was the most crucial. She was the victim of the offence. She testified. The clinician was the next most important witness. She testified. It is not the number of witnesses that matters, but the quality of their evidence. Was burden of proof shifted to the appellant? I have not encountered incidences of that.

10. On the sentence, the hands of the trial court were tied. The *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) case appeared to give some respite, but only momentarily, for *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ) came along, and clarified that the principle in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) was limited to murder cases. Subsequent decisions by the High Court have extended the principle to sexual offences, in *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No. E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J). I shall revise the sentence based on those 2 decisions. The appellant preyed on a minor, a school-going student in school uniform. That calls for a stiff penalty to protect school-going minors, and to deter persons who have a mind like that of the appellant.

11. I find no merit in the appeal, on conviction, and I, accordingly, dismiss it on that aspect. I hereby affirm the conviction. There is merit on the aspect of sentence. I set aside the sentence imposed by the trial court, and I substitute it with a sentence of 15 years in prison, counted from the date of conviction. If the appellant was not released on bond during trial, the period spent in remand custody to be reckoned. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Habil Onyimbo, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.