Opiyo v Republic (Criminal Appeal E019 of 2021) [2023] KEHC 3771 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3771 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E019 OF 2021

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

LEVI OPIYO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from judgment by Hon. Eric Malesi, Principal Magistrate, PM, in Kakamega CMC Sexual Offence Case No. 26 of 2018, of 7th April 2021)

JUDGMENT

1. The appellant, Levi Opiyo, had been charged before the trial court of the offence of defilement, contrary to section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The particulars were that on 26th March 2018, at Navakholo Sub-County of Kakamega County, he intentionally caused his penis to penetrate the vagina of SF , a child of 7 years. There was an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. He also faced a charge of escape from lawful custody, contrary to section 123, as read with section 36, of the Penal Code. He pleaded not guilty, a trial was conducted, and 9 witnesses testified.

2. PW1, JA, was the grandmother and guardian of the complainant, PW2. She testified that 1st April 2018, as she prepared to go to the shops, PW2 insisted on going with her, saying she did not want to be left at home as she was afraid. She narrated to PW1 about how she was assaulted sexually by the appellant, on a previous occasion after she was left at home alone. She explained that that incident happened on 26th March 2018. PW1 informed her husband, who checked the child, and took her to hospital. She stated that on the first day the child was not attended to in hospital, and was attended the following day, after which they reported to the police.

3. PW2, SF , was the complainant. She narrated how the appellant had sexually molested her. He came to their compound, and took her by hand to his house. He put her on a bed, removed her clothes, he

lay on top of her, and inserted his penis inside her vagina. She felt pain. She did not scream, saying that she could not scream. After he was done, he locked her inside the house. Later the door was opened and she walked away, and went home. She informed PW1 of the incident after sometime, and she was taken to hospital.

4. PW3, Shaban Wafula, was the chairman of the local community policing. He testified that on 3rd April 2018, the father of the appellant called him, to inform him that the appellant had escaped from custody, and had fled with handcuffs. He wanted PW3 to collect the handcuffs from him, and to surrender them to the police. He went, collected the handcuffs, and handed them over to the police.

5. PW4, MUW, was the spouse of PW1 and the grandfather of PW2. He testified that PW1 informed her on 1st April 2018, that PW2 had a problem, and she invited PW2 to inform him herself. PW2 narrated to him about how on 26th March 2018, the appellant defiled her. He called the father of the appellant to his home, and asked PW2 to narrate to him what had transpired, which she did. The father of the appellant, DW2, told him to do as he pleased. He reported the matter at the local Administration Police Camp, and was referred to Navakholo Police Station. At the police station, he was asked to take PW2 to hospital, which he did. The appellant was subsequently arrested, escaped from police custody, and was re-arrested.

6. PW5, Raphael Otoyi Wandera, was the clinician who attended to PW2, and filled her P3 form. The incident had happened 5 days to treating her. The hymen was absent, and there were abrasions/bruises around the vaginal wall. He did age assessment.

7. PW6, Police Constable Omondi Basil, No. 255765, was the arresting officer. They arrested him at his home, and locked him in a room at the AP camp. He later escaped, but was re-arrested. He broke a grill, to gain egress from the locked room. PW7, No. 220135 Corporal Zacchaeus Sawe, he was with PW6, when the appellant was arrested. They locked him in a room at the AP Camp, from which he escaped, after removing a grill from the widow to that room. He was handcuffed. He was being held there temporarily, pending transportation to the Navakholo Police Station. PW8, No. 90090540 Administration Police Constable Fanuel Andalo, was together with PW6 and PW7, when the appellant was arrested. PW9, No. 110955 Police Constable Simeon Etot Tiogo, investigated the matter. He detailed the steps that he took in the investigations.

8. The appellant was placed on his defence. He gave a sworn statement, as DW1. He testified on how he spent the whole day on 26th March 2018, working at a sugarcane plantation way away from home. He also testified on how he was arrested on 2nd April 2018, and how he escaped from custody, and how he was re-arrested. He said that there was enmity within the family. DW2, Benson Barasa Opiro, was the father of the appellant. He said that he did not see him at all on 26th March 2018. He also testified on the family dispute, which he believed was fuelling the dispute. DW3, Anthony Koba Mukwana, said he spent the day with the appellant at the sugarcane farm on 26th March 2018. He did not know the name of the owner.

9. After taking evidence from both sides, the trial court found that the offence of defilement had been established against the appellant, convicted him and sentenced him to serve life in jail. The appellant was aggrieved, hence the instant appeal. The grounds are that at sentencing he was not accorded an opportunity to mitigate; the court did not consider section 333(1) of the Criminal Procedure Code; the trial court imposed the sentence of life imprisonment without exercising discretion; the medical evidence did not connect him to the crime; the evidence was inconsistent, uncorroborated, malicious and farfetched; and his alibi defence was not evaluated.

10. The appeal was canvassed by way of written submissions. Both sides filed written submissions. The appellant submitted that the charge was defective, and pointed at a number of errors on it; some of the witnesses were hostile or lacking credibility; the case against him was not proved; the language that PW2 used in court was not recorded; he was cruelly and inhumanly treated during arrest; proof of his escape from custody; non-compliance with section 211 of the criminal Procedure Code; poor and shoddy investigations; and the inconsistences of mandatory life sentence with section 329 of the Criminal Procedure Code and Article 50(2)(p) of *the Constitution*. The respondent submitted on inconsistencies and contradictions; and the alibi defence.

11. On the defective charge, the appellant is raising issues about the names used of the places and persons involved. Say Namukhome instead of Namukhokhome, Mbeta instead of Mbete, Opiro instead of Opiyo. The parties to the matter were all neighbours, and came from the same place. It could be the proceedings reflect errors in the names of some of them or the places. The appellant has not demonstrated that these errors in any way inconvenienced him or prejudiced his case. There was no confusion of the persons and places being referred to. There was the issue of section 8(1)(2) of the *Sexual Offences Act* being non-existent. That provision exists, it refers to subsections (1) and (2) of section 8. There can possibly be no confusion at all that the charges herein were founded on these 2 subsections, the first defines the offence, the second prescribes the penalty. He takes issue with the dates of arrest and arraignment according to the typed proceedings. I think that that issue is neither here nor there. When the appellant was arrested and was presented in court, are not matters that go to the core of the matter of his guilt or otherwise. It would only be relevant with respect to pre-trial detention, which was not an issue before the trial court.

12. On the issue of what the appellant calls hostile and "incredible" witnesses, the appellant's concern appears to have something to do with the errors that I have mentioned above, about spellings of certain places and persons. I have dealt with that above. It did not prejudice the appellant, and it is of no moment.

13. On the prosecution case not being proved against him, the prosecution presented a good number of witnesses. The key witness was PW2, the victim of the crime. Her testimony was fairly straightforward, and unshaken during cross-examination. I found it extremely exceptional for a minor of 7 years. That testimony was corroborated by witnesses to whom she narrated her ordeal, and the medical evidence. The child was defiled, and the medical evidence was clear on that, and she pointed at the appellant as the perpetrator. The prosecution presented a strong case against the appellant, and proved that he did defile PW2.

14. On the language that PW2 used when she testified not being indicated, I have perused the record and noted that it is indeed true, the trial court omitted to record the language used. PW2 was a local girl, a neighbour of the appellant, and whatever language she used in court could not have been alien to him. The record indicates that the appellant cross-examined PW2 extensively. It cannot then be the case that he was prejudiced if he got to confront her with many questions.

15. On his being cruelly treated during arrest, and before arraignment, I will start by saying that does not go to the core of the matter, in terms of his culpability for the offence. It is a constitutional right alright, but it has nothing to do with a fair trial. It did not happen after arraignment. Ideally, that is an issue that the appellant ought to raise in separate proceedings. It had no impact on his trial, and nothing should turn on it.

16. He has raised questions about proof of his escape from custody. I believe the appellant is flagging a dead horse with regard to this ground. He, himself, in his sworn defence statement, said that he escaped from custody, on grounds that he was facing beatings. His escape version may differ from that offered

by the police, but what matters is that he was in police custody, and he escaped from that custody. Since he admits that he escaped, the issues that he is now raising are neither here nor there. Three police officers, under whose custody he was in, testified that he escaped. Whether he broke out of a room, or simply sneaked away from clueless officers, is of no moment. The fact is that he left the custody of the police without being formally released.

17. On non-compliance with section 211 of the Criminal Procedure Code, I have read the record, and I am satisfied that there was compliance. The ruling on no case to answer was delivered on 22nd January 2021, after which the trial court complied with section 211. That happened in the presence of the appellant and his Advocate.

18. For avoidance of doubt the record reads:

> " Court: I have considered the evidence on record and having established a prima facie case as against the accused in both counts, the accused is thus placed on his defence.
>
> E. MALESI – PM
>
> 22/1/2021
>
> Court: The Provisions of Section 211 CPC explained to the accused, the rights and options available thereunder to the accused explained. The accused also reminded of the charges and when asked to respond he answers.
>
> Accused: I shall give sworn evidence without witnesses.
>
> Court: Defence hearing on 22/2/2021
>
> E. MALESI - PM"

19. It is not true, therefore, that the court did not comply with section 211 of the Criminal Procedure Code. There was full compliance which, I think, was not even altogether necessary, as the appellant was represented by an Advocate, who was in court at that point. But then again, it is good to be extra cautious, to avoid questions being raised, like the ones the appellant is raising here, despite the full compliance. Even if there was no compliance, which there was, the appellant was not prejudiced in his defence at all, for he went on to give a sworn statement, and to call 2 witnesses, which is the essence of section 211.

20. On poor and shoddy investigations, I am not persuaded that the investigations could be described as such. Statements were recorded from the most critical witnesses, and the witnesses were presented in court, and testified. I have not been pointed to any loose ends in the case, that might have required a more robust investigation.

21. On the matter of the life sentence, I will say that the trial court cannot be faulted. The offence for which the appellant faced provides for a mandatory life sentence, under section 8(2) of the *Sexual Offences Act*. The trial court was implementing that law, and its hands were tied. The Supreme Court, in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), appeared to lay down a general principle that mandatory sentences were unconstitutional, and appeared to give trial courts some discretion when it comes to sentencing where such mandatory sentences are involved. However, the Supreme Court threw trial courts into confusion, in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), when it said that its decision in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

applied only to murder cases. That then meant that the mandatory sentences in the *Sexual Offences Act* were unaffected by the principle in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), hence the trial court, in the instant case, properly exercised its jurisdiction in sentencing under that law. Of course, there is now some movement in the jurisprudence with respect to mandatory sentences for offences under the *Sexual offences Act*. This is by dint of Philip Mueke Maingi & others vs. Director of Public Prosecutions & another Machakos HCPet. No. E017 of 2021 (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J). The trial court may now exercise discretion. There may be need to revisit the sentence in the circumstances.

22. Although the appellant had raised his alibi defence in his grounds of appeal, he did not address the matter in his written submissions. The respondent has raised it in hers, and, therefore, I shall have to deal with it. It is true that the trial court did not deal directly with it, but it considered it, for it said that it was not persuaded by the defence proffered by the accused created doubt in the evidence tendered by the respondent. I agree. DW3, the man who was allegedly working with the appellant at the sugarcane farm, did not even know the owner of the farm where they were working. That ought to raise credibility issued around that evidence. More crucially, for alibi defence to be taken seriously, the law requires that it be raised at the earliest possible opportunity. It should not suddenly appear at defence hearing. This is so as the prosecution has a duty to disprove it by marshalling evidence intended to do just that, otherwise, the alibi would hold. The prosecution cannot possibly lead evidence to disprove an alibi unless there is prior disclosure of that alibi defence. That prior disclosure should arise from service of witness statements in advance, before closure of the prosecution case, or a notice to effect the defence would be raising an alibi at defence hearing, and give particulars, again before the closure of the prosecution case. Trial by ambush is not allowed, when it comes to such a defence. So, if the appellant expected the court to take his alibi defence seriously, then it should have given prior notice of it to the prosecution, before the prosecution case closed.

23. From the material on record, I find and hold that there was sufficient evidence, upon which the trial court could convict.

24. I will tinker with the sentence for reasons that I have given above. I note that the trial court had called for a pre-sentence report by a probation officer, which was not eventually availed, as that was when the Covid-19 pandemic was raging, and the appellant was in isolation. It would also appear that the appellant never got an opportunity to mitigate, for similar reasons, and partly also as the sentence was mandatory, and the mitigation would, perhaps, have made no difference. In view of Philip Mueke Maingi & others vs. Director of Public Prosecutions & another Machakos HCPet. No. E017 of 2021 (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J), there may be need to re-sentence the appellant.

25. In the end, I am persuaded that the appeal is only partially merited. I, accordingly, shall dismiss it on conviction, but I shall interfere with the sentence. The conviction is affirmed. The sentence is hereby set aside, but the appellant shall remain in custody, to await re-sentencing by the trial court. The original trial records shall be remitted to the trial court, for re-sentencing, where the appellant shall be given a chance to mitigate. To facilitate the re-sentencing, let the Kakamega County Director of Probation and Aftercare Services look into the antecedents of the appellant, interview the family of the victim and the community, and prepare a report, which shall be placed before the trial court for the purpose of the re-sentencing. The time spent in remand shall be reckoned, as required by section 333(2) of the Criminal Procedure Code, should the trial court decide to send the appellant to a fixed term sentence. The file in Kakamega CMCSO No. 26 of 2018 shall be mentioned before the Chief Magistrate, on a date that I shall allocate shortly. Orders accordingly.

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

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant

Appearances

Levi Opiyo, the appellant in person.

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