Oduor v Republic (Criminal Appeal E024 of 2021)
[2023] KEHC 20602 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E024 OF 2021

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

EDWIN MAKOKHA ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. Mercella Onyango, Resident Magistrate, RM, in Mumias SPMCRC No. 35 of 2020, of 14th July 2021))

JUDGMENT

1. The appellant, Edwin Makokha Oduor, 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 10th August 2020, in Mumias West Sub-County, within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of FAA, a child aged 14 years. The appellant denied the charges, on 20th November 2018, and a trial ensued, where 6 witnesses testified.

2. PW1, FA, was the complainant. She described how she was watching television with other children, when the appellant came, chased the other children away, pulled her to his bed and defiled her. PW2, RMK, was the guardian of PW1. He received the report of the defilement, and in the same evening took PW1 to the police, and onwards to the health centre. PW3, Steve Biko Onzeze, was the clinician who attended to PW1, a day after the incident. He noted a broken hymen, lacerations on the vaginal area and pus discharge. PW4, IR, was watching television with PW1, when the appellant came and sent him to the shops, leaving PW1 behind. When he came back he did not find her, and when he called out her name, she answered from within the house of the appellant, she came out crying, and he heard her disclose to her mother that she had been defiled. PW5, No. 10092 Police Constable Vincent

Mwita, was the arresting officer; while PW6, No. 238165 Police Constable Joseph Musyoki, was the investigating officer.

3. The appellant was put on his defence, vide a ruling that was delivered on 21st April 2021. He made a sworn statement. He denied the charges. He said the charges were trumped up by PW2, over some disagreement.

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.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that Article 50(2)(4) of the *Constitution* were violated; the evidence was contradictory; crucial witnesses were not called to testify; penetration was not proved; the appellant was not medically examined; the defence was not considered; the judgment does not indicate the provisions of the law on which the appellant was convicted; section 333(2) of the *Criminal Procedure Code,* Cap 75, Laws of Kenya, was not taken into account during sentencing; and the finding by the court was against the evidence.

6. The appeal was canvassed by way of submissions. The appellant submitted in writing, while the respondent submitted orally. In his written submissions, the appellant argued that the trial was unfair, the evidence was uncorroborated, and the investigations were unfair. Ms. Kagai submitted around consistency and corroboration of the evidence, penetration, the appellant not being subjected to medical examination, and sentence.

7. On the trial being unfair, the appellant is raising the issue of not being supplied with the prosecution evidence in advance. He took plea on 28th August 2020, and on the same date he was supplied with the charge sheet, the P3 Form, treatment notes, 5 witness statements and the certificate of birth for PW1, after which he asked to be also supplied with the first report and investigation diary. The hearing commenced on 16th September 2020, when PW1 testified. The appellant indicated that he was ready to proceed, but informed the court that he was yet to be supplied with the first report and investigation diary. When the matter was mentioned on 18th September 2020, the appellant once more informed the court that he had not been supplied with the first report and the investigation diary. He repeated that plea on 16th October 2020, when it was indicated that the appellant had already been provided with the investigation diary, to which he responded that he wanted an extract from the police occurrence book, and an order was made that he should send someone to get a copy. The record is, therefore, clear that the appellant had been supplied with the relevant prosecution evidence by the time the trial commenced, save for the investigation diary , which was supplied later, but at least by the time PW6, the investigating officer, who would have been examined on its contents, testified. Although he required an extract from the police occurrence book, which carried the exact details of the report first made to the police, it would appear that that report was never supplied, and the trial court imposed on him the duty to go for a copy of it from the police, instead of directing the State to make it available to him.

8. Was the failure to supply the extract of the occurrence book fatal? I do not think so. The appellant was supplied with the most critical evidence, being the statements of his accusers and the medical evidence. The failure to furnish him with the extract from the occurrence book could not have hampered his preparations to present a defence, for the nature of the report recorded in the occurrence book would have been captured in the investigation diary that was availed to him. The obligation on the State is to provide the evidence that it would be proposing to place on record before the trial court. The police occurrence book is usually not part of such evidence, but where it is, the prosecution would be obliged to avail it.

9. On corroboration of the evidence, the starting point is with stating that corroboration is only required with respect to proof of the act of defilement. Corroboration is no longer a mandatory requirement with respect to sexual offences. The court may convict, in the absence of corroboration, so long as it finds the testimony by the complainant credible and reliable. See section 124 of the *Evidence Act*, Cap 80, Laws of Kenya; *Kassim Ali v Republic* [2006] eKLR (Omolo, Bosire & Githinji, JJA) and *AML v Republic* [2012] eKLR (Odero, J). Was there corroboration in this case? Yes, there was. PW1 and PW4 went to the home of the appellant happy children, to watch television. They left minutes later unhappy, with PW1 distressed, walking with difficulty, without her leso and her slippers, according to PW4. A report of what transpired was made to the parents by PW1, shortly after they got home, and that report was relayed to the police minutes later by PW2. PW1 was examined by PW3, the next morning, and there was evidence of sexual assault.

10. On section 36 of the *Sexual Offences Act* not being complied with, the starting point should be with stating that the same is a very useful provision, for it helps in getting evidence that would connect the alleged perpetrator of the defilement to the crime, by having him also subjected to medical examination, to confirm whether or not he had engaged in recent sexual activity, and more crucially to harvest forensics from him or her, which would connect him to the offence charged. Section 36 is, however, not mandatory. See *Robert Mutungi Muumbi v Republic* [2015] eKLR (Makhandia, Ouko & M'Inoti, JJA). Its application is subject to a number of factors, such as how soon the alleged perpetrator is apprehended after the commission of the alleged offence. It would work best where the alleged perpetrator is caught in the act, for then it would be possible to get as much evidence as possible out of him. Where there is lapse of time, not much evidence could be available from him, and it would serve no purpose to subject him to any form of medical examination. Whether section 36 is to be applied will also depend on the nature of evidential material gotten from the complainant, that could be forensically tested so as to link the alleged perpetrator with the crime.

11. On the investigations being shoddy, the function of a trial court in criminal cases is not to audit the investigations carried out in the matter by police detectives, but to determine the matter based on the evidence placed on record by the prosecution. Whether the investigations were shoddy or sufficient is besides the point. The question should be whether the evidence placed on record reached the threshold for a conviction, and not whether the investigations were shoddy or sufficient.

12. The respondent submitted on the consistency and corroboration of the evidence. I have discussed corroboration above, and I shall not revert to it. On consistency, I have noted that there are inconsistencies in the evidence recorded. This is to be expected, for no witness is expected to narrate the events in exactly the same way or manner as the other witness. People perceive and process happenings, and recollect and reconstruct them, differently. It is human nature. The mere presence of inconsistencies in the evidence should not be fatal to a prosecution. What would matter is whether the inconsistencies go to the core of the matter. See *John Cancio De SA v VN Amin* [1934] 1 EACA 13 (Abrahams CJ&Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ), *Joseph Maina Mwangi v Republic* [2000] eKLR (Tunoi, Lakha & Bosire JJA), *Twehangane Alfred v Uganda* [2003] UGCA 6 (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha, JJA), *Dickson Elia Nsamba Shapwata & Another v The Republic,* Cr. App. No. 92 of 2007 (unreported), *Erick Onyango Ondeng v Republic* [2014] eKLR (Githinji, Musinga & M'Inoti, JJA), *Philip Nzaka Watu v Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA) and *Richard Munene v Republic* [2018] eKLR (Ouko, P, Sichale & Kantai, JJA). It has not been demonstrated that the inconsistencies herein go to the heart of the case, for despite them , the witnesses painted a coherent picture of what transpired.

13. On penetration, the testimony by PW1, who was the victim, was that the appellant used force to have sex with her, and that he threatened her with a knife. She was the victim, it happened to her, she was the

one penetrated. He had sent away the other children prior to that. PW4 saw PW1 walk with difficulty, which is consistent with the claim that there was forced penetration. PW3 noted lacerations or wounds in the vagina of PW1, again consistent with forcible penetration.

14. On sentence, the trial court noted that section 8(3) provided for a minimum sentence of 20 years, and nevertheless awarded a lesser sentence of 15 years. No reasons were given, but I suppose that the trial court was alive to the principles of sentencing set out in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), with regard to mandatory sentences. Should I interfere? I will not. The principles in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) were reiterated in the High Court, with regard to mandatory sentences under the *Sexual Offences Act*, in *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), and the trial court is not bound to impose the mandatory sentences prescribed under the statute. I note that the appellant was armed with a knife, when he had his way with PW1. That aggravated the offence of defilement, and I believe he got what he deserved, by way of the sentence of 15 years imprisonment.

15. Overall, I find no merit in the appeal. I accordingly dismiss it. I hereby affirm the conviction, and confirm the sentence. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21 ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Edward Makokha Oduor, the appellant, in person.

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