



**Onchoke v Republic (Criminal Appeal 23 of 2020)
[2021] KEHC 332 (KLR) (11 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 23 OF 2020
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

RICHARD MAKORI ONCHOKE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of Hon.V. Kachnodho, SRM dated 6th March 2020 at the Magistrate's Court at Thika in Sexual Criminal Case No. 1 of 2017)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to serve 20 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. It was stated in the charge that the Appellant, on the 2nd day of January 2017 in Juja within Kiambu County intentionally and unlawfully caused his penis to penetrate in the vagina of JMM, a child aged 13 years.
2. The Appellant is dissatisfied with this decision and now appeals against both the conviction and sentence and seeks that the same be set aside. His appeal is set out in the Petition of Appeal dated 1st August 2021 and is supported by the written and oral submissions of his counsel. The Respondent has opposed the appeal through the written and oral submissions of its counsel.
3. In determining this appeal, I am mindful that I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic [1972] EA 32* and *Kiilu and Another v Republic [2005] 1 KLR 174*). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.
4. The Prosecution marshaled six witnesses in a bid to prove its case against the Appellant. The child, JNM (PW 1) was sworn after a voir dire. She testified stated that she was 13 years old and at Class 8



at the time. She recalled that on the material date at around 10 pm, she was outside waiting for her friend when she met the Appellant, who was her neighbor and who told her to go to a “Room No. 7” of the plot as there was something he wanted to give her. On entering the room, PW 1 narrated what took place as follows:

The accused came and locked the door and started struggling me and funga my mdomo....he then removed my pants....then he removed his clothes trouser and started raping me. He inserted his penis in my buttocks. I couldn't scream he had covered my mouth with his one hand. The accused put me on the bed. I was lying on the bed facing upwards. The accused did scratch my thighs. After he finished raping me, I asked him why he said he needed me and locked me inside room no. 7 and left.

5. PW 1 stated that after she was allowed to leave the room by the Appellant, she did not go home immediately for fear of being punished by her parents and that some men got hold of her and took her home. Together with her parents, they went to the police at Juja and that she refused to be examined by the doctor because she felt pain at her private parts. In cross-examination, she denied that she had an agreement with the Appellant to meet at the said Room No. 7 or that the men who took her home after she left the said room were the ones who defiled her. She further stated that the Appellant's room number was Room number 6 and that she took the police to the said room. She further denied that her mother had any grudge against the Appellant.
6. PW1's mother, PW 2, recalled that on the material date, she left her children in the sitting room and went to sleep. The following morning, she noticed that the house's main door was open and PW 1 was not in the house. When she went out to look for her, a neighbor, informed her they had seen PW 1 coming from the next flat. She stated that when PW 1 saw her, she took off into the nearby bushes and after another search, found her at around 7 pm. She asked PW 1 where she had slept the previous night and PW 1 informed her that the Appellant had locked her in Room 7 and that she had been sexually assaulted. PW 2 reported the matter to the police and that PW 1 took them to the said Room No. 7.
7. PW 2 stated that she examined PW1 and saw scratch marks on her face, neck, shoulders and thighs and stated that PW1 informed her that's she got the injuries struggling with the Appellant. PW 2 stated that she took PW 1 to the hospital where she was examined and the doctor informed her that she was defiled. PW 2 further stated that she also examined PW 1's private parts. PW 2 added that she knew the Appellant as a neighbor and that she neither had any relationship with him nor a grudge against him prior to the case.
8. PW 1's father, PW 3, reiterated much of PW 2's testimony that he also noticed PW 1 was missing that morning and they went out in search for her. In cross-examination, PW 3 stated that he saw injuries on PW 1. PW 3 also stated that PW 1 informed him the Appellant told her he was going to give her something at Room no. 7.
9. PW 4, a clinical officer working at Thika Level Five Hospital, testified that as he filed the P3 medical form, PW 1 told him that she had been defiled by a person known to her. He stated that PW 1 had injuries on her face, neck, back, upper limbs and right thigh and that he examined her after one month of the injuries. PW 4 stated that PW 1's hymen was torn; urinalysis and pregnancy test was negative and that as per the treatment notes, there was evidence of penetration and physical injury. In cross-examination, he stated that he was not the one who treated PW 1 and that there was proof of defilement because the hymen was torn. He further stated that the PRC form indicated that PW 1 had no sexual intercourse prior to the encounter.



10. The arresting officer, PW 5, testified that PW 2 reported at the Police Camp that PW 1 had been defiled. PW 1 took them to the house no. 7 where the Appellant was arrested after being identified by PW 1. The investigating officer, PW 6, stated that she interrogated the Appellant who told her that PW 1 had requested accommodation since she had been chased from home by her parents and that he agreed to accommodate her in his friend's house no. 6. PW 6 also interrogated PW 1 who told her that the Appellant took her to Room no. 6 where he locked, defiled and strangled her the whole night. PW 6 also recorded other witness statements.
11. The Appellant (DW 1) called four witnesses. In his sworn testimony the Appellant stated that on the material day he had gone to help a bereaved cousin plan a funeral fund raising event in Donholm together with his girlfriend and a friend. He stated PW 1 and PW 2 were neighbours and that he had a dispute with PW 2 the previous day over a clothing line and that PW 2 threatened him.
12. The Appellant's girlfriend, DW 2, stated that on the material date he escorted the Appellant for a burial in Donholm and that since it was late, they slept there and returned to Juja the following day. She stated that at around 7.30pm she opened the door after a knock whereupon the police arrested the Appellant. In cross-examination, she stated that she would do anything for the Appellant apart from lying. DW 3 stated that he was with the Appellant for the funeral in Donholm and that they spent the whole day and night with the Appellant there. He stated that they left the place the following day. DW 4 and stated that on the material day, he escorted the Appellant to Donholm for the burial and that they stayed there until the following day where they went back to Juja at 10 am.
13. In order to prove the offence of defilement the prosecution must prove that the accused did an act which amounted to penetration to a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
14. The evidence that PW 1 was a child is not much in dispute. PW 1 was about 13 years of age at the material time. PW 1, PW 2 and PW 4 gave evidence to that effect and I find that PW 1's age was sufficiently proved.
15. The Appellant complains that the prosecution did not prove penetration as the treatment notes and PW 1's own evidence was inconclusive on this fact. PW 1's testimony was that the Appellant inserted his penis in her buttocks and that she declined to have an examination on her private parts as she was in pain. One treatment note, filled one day after the alleged incident, indicates that PW 1 claimed 'not to have had coitus'. Another treatment note, written one day after the incident, confirmed that PW 1 declined to have a vaginal exam. The P3 medical form, filled one month after the incident, stated that there was evidence of vaginal penetration and physical injuries. The PRC form, filled 6 days after the incident, indicated that there was a genital examination where; the anus was normal, outer genitalia was normal, hymen was normal but with torn withold flaps and the vagina was also normal. Contrary to the learned trial magistrate's finding, I do not find these medical reports clear and conclusive on the fact of penetration but in my view this is not decisive to prove penetration.
16. The fact of defilement is proved by evidence, direct or circumstantial and may include oral testimony of the victim/complainant or any other person, medical evidence or DNA (see *Kassim Ali V Republic MSA CA CRA No. 84 of 2005 [2006] eKLR*). Thus, the evidence of PW 1 is crucial in determining whether indeed there was penetration. PW 1 was firm and consistent even in the face of what appeared to have been a rigorous cross-examination by the Appellant. PW 1 stated that the Appellant "inserted his penis in my buttocks". One cannot blame PW 1 for refusing to be medically examined soon after the incident because of the pain she felt in her private parts. If anything, this refusal supports PW 1's evidence that there was contact with her private parts, which contact caused her pain. PW 1's narration of her ordeal to PW 2, PW 3, PW 4, PW 5 and PW 6 was consistent. In as much as I find the medical



evidence was inconclusive, it also supported and corroborated by PW 1's testimony which proved that she was subjected to penetration.

17. The last issue that ought to have been proved is that of identification. It is common ground that the Appellant was a neighbor of PW 1, PW 2 and PW 3, thus he was a person well known to them. PW 1's testimony was that he lured her into his house where he sexually assaulted her. On the next day, PW 1 was able to direct the police to the house and identify the Appellant. The Appellant, when cross-examining PW 1 insinuated that they had an agreement with PW 1 to meet at the said Room no. 7. He never brought up any issue with PW 1 that maybe PW 1 mistook him for someone else as he was away on that day attending a funeral in Donholm. Further, when his statement was being recorded, the Appellant never informed PW 6 that he was attending a funeral or burial on the material date. PW 1's credible testimony and positive identification disproves the Appellant's alibi. I am satisfied that the Appellant was properly and positively identified.
18. The Appellant also faulted the learned trial magistrate for failing to ensure that the Appellant had legal representation at the time of the hearing contrary to Article 50(2)(g) and (h) of the *Constitution* which provides that:
 50. Fair hearing
 - (1)
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
19. The Supreme Court of Kenya, in the case of *Republic v Karisa Chengo & 2 Others [2017] eKLR*, dealt with this issue of legal representation of accused persons. The court held stated that:

[T]hat the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".
20. The Supreme Court then proceeded to hold that in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, 2016 the seriousness or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehended by the accused.
21. In the instant case, the record shows that at the start of the trial court proceedings, the court only read out the charges to the Appellant during plea taking and the matter proceeded for hearing. There is nowhere in the record that indicates that the trial court informed the Appellant of his rights as



mandated under section 43(1) of the Legal Aid Act and Article 50(2)(g) and (h) of the Constitution. The trial court ought to have complied with these provisions and since this was not done, the question then is whether this omission by the trial court was so fatal that it prejudiced and occasioned substantial injustice to the Appellant. It should not be lost that Section 43(6) of the Legal Aid Act, 2016 above provides that “lack of legal representation shall not be a bar to the continuation of proceedings against a person.”

22. From the record, I do not find any prejudice or substantial injustice that was occasioned on the Appellant by the omission of the trial court to inform him of his right to choose and be represented by an advocate as per Article 50 (2)(g) of the Constitution of Kenya and section 43(1) of the Legal Aid Act, 2016. The record shows that the trial was conducted fairly with the Appellant understanding and participating in all the processes. He was able to mount a defence and indeed called three witnesses on his side. For this reason and for the reasons I have given, I affirm the conviction.
23. The sentence of 20 years’ imprisonment is provided as the mandatory minimum sentence under section 8(3) of the Sexual Offences Act. It is neither harsh nor excessive. It is affirmed.
24. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER 2021.

M. KASANGO

JUDGE

Appellant in Person

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the Respondent.

