



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 169 OF 2009**

**MARTIN MASABAGA NAVADE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.5472 of 2006 of the Chief Magistrate's Court*

*at Thika by B.A. Owino (Mrs) – Resident Magistrate)*

**JUDGMENT**

The appellant, **MARTIN MASABAGA NAVADE**, was convicted for the offence of Defilement **contrary to section 8 (1) as read with Section 8 (2) of the Sexual Offences Act**. He was then imprisoned for 10 years.

The victim was 9 years old at the time of her ordeal. She is said to have been defiled within her parent's house, in the sitting-room, where she was doing her homework.

The date was 18<sup>th</sup> November 2006, and the time was 10.00a.m. Clearly therefore, there should have been no hindrance to the positive identification of the offender.

**PW 1**, the complainant, said that when her mother came back home, she told her what had happened. The mother then examined her and verified that she had been defiled.

**PW 1** could not recall what the assailant was wearing. However, she remembered that he was a brown boy.

The said brown boy had never before been to the complainant's house. Consequently, **PW 1** did not know his name. In fact, it is the complainant's mother who told her that the assailant's name was Martin.

**PW 2, DR. MBILIA BAHATI** saw **PW 1** on 29<sup>th</sup> November 2006, at the Thika District Hospital. However, the said doctor did not examine her. The explanation for the failure to examine the complainant was that she was traumatized.

The doctor relied on previous treatment notes "from a government hospital", whose name she could not recall.

The said notes formed the foundation of the conclusion that the complainant had been defiled.

However, the doctor also conceded that a hymen can be broken by means other than sexual contact.

The record shows that the complainant, reportedly, had pus cells together with yeast cells. The existence of those cells was indicative of sexual activity.

**PW 3, L.M.N.**, is the complainant's mother. On 26<sup>th</sup> November 2006 she noted that the complainant was very resistant to being bathed.

As **PW 3** was applying oil to **PW 1's** body, she noted that **PW 1** had pimple-like things in her vagina, and also that she had a big hole. When **PW 3** inquired from **PW 1** what had happened, the daughter told her.

**PW 3** and the complainant's father (**PW 4**) reported the incident to the police, and then took the complainant to hospital.

It was the testimony of **PW 3** that she did not know the name of the appellant although she knew him physically.

**PW 3** knew the appellant because both she and he used to work at J[...] **PW 3** said that she did not know whether or not the appellant was at work on the material day. However, she was aware that employees of J[...] did work even on Saturdays.

18<sup>th</sup> November 2006, when the incident took place, was a Saturday.

During cross-examination, **PW 3** said that she identified the appellant as her daughter's molester through the description given by the children. The said description was that the person was brown and that he and the children used to call one another:

*“friend yangu”.*

**PW 4, P.M.N**, is the complainant’s father. He works as a pastor with the C[...] church.

He left home, at R on 18<sup>th</sup> November 2006, and travelled to K. He returned the next Sunday, and noticed that **PW 1** had trouble walking. It is then that he alerted **PW 3**.

Thereafter, **PW 3** examined **PW 1** and ascertained that she had been defiled.

According to **PW 4**, his daughter described her assailant, and also described his clothing on the material day.

When **PW 4** met the OCS, he was asked about the person who had assaulted his daughter. It was the evidence of **PW 4** that he told the OCS that he did not know the said person, save that the person was their neighbour.

However, it is **PW 4** who directed the police to arrest the appellant.

**PW 5, PC JACKSON RINGERA**, was based at the Juja Police Station at the material time.

On 25<sup>th</sup> November 2006, he received a report from **PW 4**, that **PW 1** had been defiled. **PW 5** recorded the complaint in the O.B.

2 days later, **PW 4** led the police, including **PW 5**, to JKUAT, where the appellant was arrested. It was **PW 4** who identified the appellant to the police.

**PW 5** did not investigate the case. He only recorded the complaint in the O.B., and later arrested the appellant.

**PW 6, PC PATRICK MATHENGE**, was also based at the Police Station at the material time. He was present when **PW 3** escorted her daughter (**PW 1**) to the station.

By that time, the incident had already been reported at the Report Office, and the complainant had already been taken to hospital.

**PW 6** was the Investigating Officer. However, he did not visit the scene of crime. His reason for not doing so was that there would have been nothing for him to check for at the scene, one week after the incident.

**PW 6** did not interrogate the complainant personally. He relied on her written statement.

When the appellant was put to his defence, he testified that on 18<sup>th</sup> November 2006, he was at his place of work. He was therefore surprised to be arrested 10 days later, being accused of defilement.

**DW 1, JNK**, testified that on 18<sup>th</sup> November 2006 he worked alongside the appellant, all day. He added that the appellant was the Supervisor on that day.

**DW 2, N.A**, also testified that he worked with the appellant on the material day. He stated, categorically, that the appellant never went far from the groups of workers whom he was supervising.

**DW 3, J.O.O**, used to be the regular supervisor at G[...] (K) Limited. On the material day, he left the appellant to supervise workers at J[...], when he went to Nairobi, to meet their employer.

It was the evidence of **DW 3** that if the appellant had left his place of work, **DW 3** would have known.

He emphasized that the scene of crime, at O Estate, was about 45 minutes to one hour away from where the appellant was working on the material day. Therefore, if the appellant had left, and gone to that Estate, it would have been easily noticed.

**DW 3** even produced the Roll-call for November 2006, in which the appellant is shown to have been on duty on 18<sup>th</sup> November 2006.

Having re-evaluated the evidence on record, I have noted that whereas the mother of the complainant said that she did not know the appellant by name, it was the evidence of the complainant that it is her mother who told her what the appellant's name was.

Considering that the complainant and both her parents all said that the appellant had never been to their house previously, it is not clear how **PW 3** and **PW 4** were able to pick on the appellant as the brown boy.

Furthermore, whereas **PW 4** said that **PW 1** described the clothing worn by her assailant, **PW 3** (who was present), said that **PW 1** could not recall the clothing worn by her assailant.

Since the complainant's mother only knew the physical appearance of the assailant, but not his name, it is incomprehensible how **PW 3** later told **PW 1**, the appellant's name, which **PW 3** had not previously known.

And **PW 4** told the OCS that he did not know the appellant. However, it is he who thereafter led the police to arrest the very same appellant.

The inconsistencies in the evidence on identification of the appellant lead me to conclude that there was no certainty about identification.

My said conclusion is fortified by the fact that the complainant's father (**PW 4**) beat up a boy called S, after the incident. According to the complainant's mother, the appellant was, at the time, not a suspect.

The fact that **PW 4** beat up S suggests that he suspected the said S, to have been the person who defiled **PW 1**.

Secondly, as **PW 3** did not suspect the appellant, that implies that the description, if any, which was provided by the complainant, did not match that of the appellant. One does not need to look far to appreciate why the description was so inconclusive.

“A brown boy” could easily describe numerous persons, unless there are other specific descriptions added thereto, to eliminate all other persons who fit that description.

In this case, the appellant gave an alibi. His said alibi was that he was at his place of work at the material time. He produced 3 other witnesses to back-up his alibi.

None of those witnesses was shaken, in cross-examination.

More significantly, the line of defence was disclosed from the outset, when the appellant as cross-examining **PW 1**. The said **PW 1** appeared to lend credence to the alibi.

Thereafter, the prosecution never led any evidence to cast any doubt on the alibi. Therefore, the defence should have been accepted by the learned trial magistrate, as it was not displaced by the prosecution.

Finally, the learned Mrs B.A. Owino RM (as she then was) took over as the presiding judicial officer in the trial, on 21<sup>st</sup> July 2008.

Regrettably, the said succeeding magistrate did not put on record anything to show that she complied with the mandatory provisions of **section 200 (3) of the Criminal Procedure Code**. That omission is fatal.

For all those reasons, the conviction cannot be sustained. Accordingly I do allow the appeal; quash the conviction; and set aside the sentence.

I order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of November, 2011.**

.....  
**FRED A. OCHIENG**  
**JUDGE**