



**Ngorani v Republic (Criminal Appeal E007 of 2021)  
[2021] KEHC 124 (KLR) (6 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E007 OF 2021  
DAS MAJANJA, J  
OCTOBER 6, 2021**

**BETWEEN**

**MARTIN MAINA NGORANI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. B. M. Ekhubi, PM dated 3rd April 2019 in Criminal Case No. 11 of 2016 at the Magistrate's Court at Thika)*

**JUDGMENT**

1. The Appellant, MARTIN MAINA NGORANI, was charged, convicted and sentenced to serve life imprisonment on a single count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 21<sup>st</sup> August 2016 within Kiambu County, he wilfully and unlawfully caused his penis to penetrate the vagina of JWM, a child aged 9 years. He now appeals against the conviction and sentence.
2. As this is a first appeal, 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, Kiilu and Another v Republic* ). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.
3. The complainant, JWM (PW 1) testified on oath after a *voire dire*. She stated that she was 9 years old and in class 1. She narrated what took place on the material day as follows:

I know the person seated in court. He is Martin Ndungu. He is not my relative. I usually see him on the road. I am in court because of him. He removed my clothes and said he will kill me using a knife if I scream. He closed my mouth. He said if I report anything he will kill me. He removed my clothes and did bad manners. I was sleeping with my brother. He removed my brother's clothes then noted he was a boy. He removed my clothes and laid on me. He closed



my mouth, he removed a knife. He said I should not scream. If I do, he will kill me. He removed his clothes and did bad manners to me. He slept on my front part. He had held my hands and he paced my legs. He was in our bed. .... He did remove his trouser, he remained with the shirt. I felt pain in my thighs the accused had raised a knife and hit my thighs.

4. In cross-examination PW 1 told the court that her brother and one Naomi, the Appellant's wife, were present did not assist her. She also stated that she told her mother about the incident but her mother did not take her to hospital but her father did.
5. PW 1's mother, PW 3, testified that the Appellant was the husband of her friend, Naomi. She recalled that she left PW 1 and her other children with a neighbour on 21<sup>st</sup> August 2016 to see her mother who was unwell. When she returned, PW 1 told her about the incident and on further prodding, PW 1 named the Appellant as the person who had assaulted her. PW 3 called her estranged husband who took the child to hospital for examination and treatment. She also stated she examined PW 1's vagina and observed a discharge.
6. PW 4, the Investigating Officer, recalled that she was detailed to investigate the incident of defilement on 27<sup>th</sup> August 2016. When the incident was reported, she issued the P3 form and sent the PW 1 with her father to the hospital. She interrogated Naomi who informed her that it was the Appellant who had been with her on the material night. The Appellant was therefore arrested. PW 4 stated that she arranged for an identification parade to be conducted where PW 1 identified the Appellant
7. PW 5 a medical doctor, produced the P3 medical report on behalf of the doctor who examined PW 1 on 30<sup>th</sup> August 2016. She confirmed that PW 1 was initially seen at the hospital on 21.08.2021. According to the P3 medical report, PW 1's vagina had red trauma, the hymen walls were broken and there was a lot of discharge but no blood. The doctor concluded that there was penetration. In cross-examination, she stated that the injuries could not have been inflicted in any other way other than by penetration.
8. When put on his defence, the Appellant elected to give an unsworn statement. He denied the offence. He stated that he was being framed as a result of a grudge between PW 1's father and himself as a result of affairs he was accused of having with PW 3. He also stated that on 21<sup>st</sup> August 2016, he had travelled to Mwea for work and returned on 3<sup>rd</sup> September 2016. He stated that Naomi called him and asked that he meets her. When he went to meet her, he was arrested and then charged.
9. The Appellant's case is set out in the Amended Grounds of Appeal and written submission filed on 7<sup>th</sup> April 2021. The Appellant's case is that that the Prosecution did not prove all the elements of the offence of defilement. He emphasises that he was not properly identified as the perpetrator and that the prosecution failed to call material and essential witnesses. He also complains that the Prosecution's case was full of contradictions and inconsistencies. The Respondent supports the conviction and sentence and urges that the prosecution proved all the elements of the offence of defilement.
10. The issue in this appeal is whether the prosecution proved all the elements of the offence of defilement. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of 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."
11. There is no doubt that the child was subjected to an act of penetration. She gave a detailed account of what the assailant did to her as I have set out above. The fact of penetration was corroborated by the medical evidence produced by PW 4. She confirmed that the injuries on the child's vagina could only have been the result of an act of penetration. Further, the child's mother, PW 3, was observed that the child's vagina had a discharge soon after the child reported the incident to her. PW 1's evidence alone was capable of supporting a conviction as the proviso to section 124 of the *Evidence Act* (Chapter 80



of the Laws of Kenya) dispenses with corroboration if the trial magistrate, for reasons to be recorded believes the child to be telling the truth. In this case, the magistrate who wrote the judgment was not the one who heard the prosecution evidence hence the need for corroboration in this case.

12. The central issue in this appeal is whether the Appellant was properly identified as the perpetrator. In the judgment, the magistrate concluded stated as follows:

PW 1 evidence was not watertight but considering her tender age and the trauma that sometimes (is) inevitable. She gave different accounts on who was the perpetrator but she was certain on how the incident took place.

13. In this instance, PW 1 testified that she knew the Appellant as she used to see him along the road. When questioned by PW 3 two days after the incident, PW 1 told her that on the material night, Naomi had come with the man who had proceeded to assault her and when she interrogated the child, she disclosed that it was the Appellant. Because of the circumstances, PW 4 decided to arrange for an identification parade after Naomi had been arrested and identified the Appellant who was then arrested.

14. The first point on this issue is that the incident took place at night. The circumstances of identification were not set out in PW 1's testimony. It is in PW 3's testimony that PW 1 told her that Naomi lit a candle when the assailant came into the room. The surrounding circumstances were however not clear in order for the court to assess the condition obtaining and conclude that the identification was free from error. On the other hand, PW 1, in her testimony recalled that she knew the Appellant. The case was therefore one of recognition. In *Peter Musau Mwanzia vs. Republic*, the Court of Appeal expressed itself as follows:

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.

15. The learned magistrate found that there was inconsistency in the evidence on the aspect of identification. This is my view is heightened by the fact that the PW 4 decided to conduct an identification parade in order to assure herself that the Appellant is the person who committed the offence. Unfortunately, the officer who conducted the parade was not called as a witness.
16. Another point that undermines the prosecution evidence is the fact that Naomi, the person who invited the Appellant to where PW 1 was sleeping was not called as a witness despite the fact that she recorded a statement and is the person who led to the Appellant's arrest.
17. Taking into account that the incident was reported almost 6 days after the incident leaving the child exposed to information about the assailant, all the issues I have raised go to the quality of identification which were unfortunately not addressed by the trial court leading to my conclusion that the evidence of identification and or recognition is not watertight and free from error.
18. For the reasons I have set out, I hold that the conviction is unsafe. The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held under a separate warrant.



**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 6<sup>th</sup> day of OCTOBER 2021.**

**M. KASANGO**

**JUDGE**

**Appellant in person.**

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

