



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO.43 OF 2009**

**BRAMWEL OMONDI MAGERO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence of E.O.Obaga P.M. in Busia PMC Cr. Case No.712 of 2008)**

**J U D G E M E N T**

The appellant, Bramwell Omondi Magero, was originally charged with the offence of Defilement contrary to Section 8 (1) of the Sexual Offences Act, Act No 3 of 2006. In the alternative he was charged with Indecent Act, contrary to Section 11(b) of the Sexual Offences Act aforesaid. In count 2, the appellant was charged with Wounding with Intent to Maim contrary to Section 231 of the Penal Code. He was convicted of the Count 1 of Defilement and acquitted of the second count of wounding. He appealed against the conviction and sentence of 15 years meted out to him.

The main prosecution evidence came from the complainant, B.M, PWI. She said that she knew the appellant before the material day because he had been her boy friend and had a child by him after he gave her a pregnancy. She said she was about 16 years old.

On 22.7.2088 at 5.00p.m., she was on her way home on a bicycle when the appellant met her and took away her bicycle at a place called Kijabe. As she demanded for it one Charles Musungu passed by and she appealed to Musungu to intervene for her. He did so and she got the bicycle back and Musungu went his way. As she started to ride her bicycle, she said, the appellant held her from the back of the neck and pulled her into a sugarcane farm where he threatened to kill her. There, the appellant tore the complainant's skirt, pulled down her pants and had sexual intercourse with her.

It was her further evidence that during the period of defilement, the appellant tried to strangle the complainant and also beat off the lip of her tongue. He also bit the lower part of stomach before he

escaped, leaving her to walk home. At her home she met her mother and father who took her to Nambale Health Centre before being referred and then taken to Busia District Hospital where she was admitted. She was later given a P3 which was filled.

A.M, PW2 and the mother of the complainant saw her daughter coming home at 6.00p.m. on 22.7.2008. She was bleeding from the mouth and she mumbled that Omondi had bitten her tongue. She took the complainant to Nambale Health Centre and later to Busia District Hospital for medical treatment. It was her further testimony that at Busia Hospital the complainant was taken to theatre before being admitted in the ward. On 29.7.2008 A.M reported the case to Nambale Police Patrol Base she had earlier on the 24.7.2008 sent Rev. Ooko to report at Nambale Police Post. The appellant was later arrested and charged with these offences.

Charles Musungu gave evidence as PW3. He confirmed that on 22.7.2008 he met the complainant and appellant on the road and she sought his help to recover her bicycle from the appellant. He successfully intervened for her and went his way. He later found the complainant being taken to Nambale Hospital and he learnt that she had been defiled by the appellant.

Reverend Fredrick Ooko Ikasi met A the mother of the complainant at Busia on 24.7.2008. She told him that she brought her daughter B to Busia Hospital for treatment because she had been injured and defiled. Reverend Ooko went to the hospital ward and saw B who had injury on the mouth. Angeline requested him to help report the matter at Nambale Police Patrol Base.

On 24.7.2008, the same day Pc Evans Barasa attached to Nambale Police Patrol Base received a crime report from Reverend Fredrick Ooko who stated that B.A had been assaulted and defiled and was admitted at Busia District Hospital. Pc Barasa visited B at Busia Hospital and provided her with a P3 form. B was discharged from the hospital on 28.7.2008 and recorded her and her witnesses evidence statements on 29.7.2008. Appellant was arrested on 1.8.2008. Pc Barasa produced the complainant's birth certificate No.10015 dated 28.11.2008 showing B was born on 29.12.1991.

The final evidence came from PW6, George Wanga, a Clinical Officer then attached to Busia District Hospital. On 24.7.2008 he signed two P3 forms for B.M. B presented to George Wanga, a story of assault by a known person. He established that B had injuries to her tongue which was partially amputated. She also had injuries on the neck and lower lips. The tongue was tender on palpation. The right and left hands were bruised. There were multiple bruises on the lower part of the abdomen. The injuries were about 3 hours old and that it amounted to maim. There was a 2<sup>nd</sup> P3 concerning the same complainant. The Clinical Officer in a 2<sup>nd</sup> P3 found that the complainant was 12 years old. Her labia majora was swollen and tender. There was a thick whitish discharge from the complainant's vagina. There were epithelial cells and spermatozoa visible. He concluded that there had been defilement. He also signed the 2<sup>nd</sup> P3 on 24.7.2008.

The appellant was put on his defence. He said that on 22.7.2008 he went to Nambale and met the complainant. She told him their child was sick, for which she accompanied her to her home. When the mother of the complainant saw the appellant, he testified, she became furious and chased him away. He immediately left but gave the complainant ksh.300/- to buy medicine for the child. He denied the complainant's story and denied defiling or assaulting her.

The honourable trial Magistrate considered the totality of the prosecution evidence. In respect to count 2 of wounding with intent to maim, he said, he had serious doubts as to whether the complainant was really

wounded in the manner she claimed. He found no original medical evidence to support her claim that appellant bit her tongue and the groin. He came to that conclusion because there were no treatment cards or books showing that she was indeed ever treated either at Nambale Health Centre or at Busia District Hospital. He found that there was no evidence of admission into hospital or a discharge from it. The trial Magistrate accordingly made a finding that there was no evidence to support a conviction on the count of wounding the complainant.

I have considered the evidence independently. I totally concur with the honourable Trial Magistrates finding on the second count of wounding. In doing so, I am stating, as the magistrate ought to have done, that the complainant was not a reliable and credible witness.

She stated that the appellant attacked, injured and defiled her on 22.7.2008. Throughout her evidence she never claimed that she was taken to hospital the same or even the next day. Even the prosecution who ought to have led her to come out with that relevant piece of evidence, clearly skirted the issue. Indeed even Angeline the mother of the complainant avoided stating the date when she took her to hospital. She only stated that she took her to Busia District hospital where she was sent to theatre. She however claimed that when she was at the hospital she sent someone to go and report the incident to Nambale Police Base.

Following on this issue however, Reverend Fredrick Ooko, PW4, clearly confirmed that A.M took her to see the complainant in the Busia Hospital ward on 24.7.2008 and thereafter asked him to go and report to Nambale Police Base on her behalf. PW5, PC Barasa confirmed that Reverend Ooko reported to him at the Police Station on 24.7.2008. And finally and most importantly, the Clinical Officer, George Wanga, PW6, stated that he attended to the complainant on 24.7.2008 when the wounds were only 3 hours old and signed the P3 on the same date. That is also the day when he signed a second P3 showing that she had been defiled very recently. These pieces of evidence all confirm or tend to confirm that the complainant was injured on 24.7.2008, not 22.7.2008.

The story about defilement came only from the complainant. There was no eye witness. The date could only come from the complainant and be supported by her mother who clearly had close interest in the matter. The mother had reason to hate the appellant and be ready to fix him, most likely for pregnant her daughter and then appearing to follow her after she got a child but was now back at school.

The evidence on record on the other hand establishes that if the complainant was defiled, she was defiled not on 22.7.2008 but on 24.7.2008. All the evidence tending to suggest that the appellant defiled the complainant on the 22.7.2008 is not credible and should not have been made the basis of the conviction since it is in conflict with the rest of the relevant evidence.

In addition, the testimony from George Wanga, the Clinical Officer is highly doubtful. First, the officer could not come out clearly why he had signed two P3 in respect of the complainant on the same day. One P3 form has space enough to have accommodated the wounding injuries and the defilement injuries. The only possible explanation for filling two P3's was that they were not filled the same day or that the Clinical Officer was persuaded later to fill another P3 form to cover allegation of defilement. Whatever happened however, it raises serious doubt as to whether the complainant was defiled on 22.7.2008 by the appellant.

On the other hand, the appellant's story looked more likely and more acceptable and credible. It confirms that on 22.7.2008 he only escorted the complainant home for him to see his child, but the complainant's mother could not let it happen. It was also more likely that the appellant gave the complainant some money to buy the child medicine as he claimed in his defence.

In conclusion, once the trial court found that it could not trust and accept the complainants story relating to wounding, it would make little sense to trust and accept the second story on defilement which looked more cooked than the wounding story. It is unfortunate that the Clinical Officer allowed himself to be swallowed in it.

I on my part find the evidence of the complainant and her mother totally unreliable and unworthy of any credit. It cannot be the basis of a conviction of a serious criminal offence. On that basis, I find the appellants appeal meritorious and hereby allow it. I quash the conviction and set aside the sentence of 15 years. The appellant is to be set free forthwith unless otherwise lawfully held in prison.

Orders accordingly.

Dated and delivered at Busia this 21<sup>st</sup> day of September, 2011.

**D.A. ONYANCHA**

**J U D G E**