

TANZANIA / JUDGMENT

20000526 TZHC Mwanza

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... IN THE HIGH COURT OF TANZANIA AT Mwanza

- APPELLATE JURISDICTION . HIGH COURT CRIMINAL APPEAL NO. 193 OF 1999 (Original . . Criminal Case No.175 of 1993 of the District Court of Geita. District at Geita.. Before: E.M.Sabuza, J. (Sitting with DM). ABDUL RAMIS, Appellant (Original Accused) Versus THE REPUBLIC Respondent (Original Prosecutor) JUDGE G. M. N. T. On or about the 26th November, 1993, a young girl of about seven years of age was defiled by a male person who the prosecution said was the appellant. The appellant was arrested and prosecuted for defilement, contrary to section 136(1) of the Penal Code. At the trial the young girl, Agnes Maximilian, gave unsworn evidence saying it was the appellant who defiled her. Her mother, Margaret Sembuli, and two other witnesses who included a Nursing Auxiliary, one Mukura Joseph and a medical assistant - one Vedastus Mutagwaba - gave evidence which left the trial court in no doubt at all that the young girl was, indeed, defiled. In his defence the appellant did not dispute that he had been a lover of Agnes's mother, Margaret Sembuli. By implication he agreed that the girl Agnes would know him. Even so, he denied that he defiled the young girl and raised an alibi. He said I was not there on the date but I was, as at Mloro, Kahama. The trial court rejected the alibi because it was raised for the first time during defence evidence, contrary to the provisions of section 194(4) of the Criminal Procedure Act, 1985 which requires that an accused person who relies on a defence of alibi should give to the court and to the prosecution notice of it before the hearing of the case. So, the trial court not only found as a fact that the girl had been defiled, but also found that it was the appellant who did it. He convicted him and sentenced him to 15 years imprisonment. Aggrieved by the conviction and sentence, the appellant has come to this court. His petition of appeal contains six grounds against the trial court judgment. He complains that the trial court did not address itself sufficiently to the provisions of section 127 of the Law of Evidence Act, 1967. Unfortunately he opted not to appear at the hearing of the appeal and, as a result, that ground of appeal was not explained. Section 127 of the Law of Evidence Act, 1967 provides for persons who may testify in court. Among other things it provides that a child of tender years may, in certain circumstances, give unsworn evidence at a criminal trial and that such evidence may be acted upon, even if it is corroborated ... The court may, after

warning itself, of the danger ' of doing so, act on the uncorroborated evidence to convict the accused .. ,_,_,, '!'..'' if it is fully satisfied that t}le-child is'telling nothi~g but the trutht'• The trial court, however, thought that the girl 1 s evidence .that ~the person. who defiled her was. the accused bei::nuse .riin the circumstanc.es of th~- case ii. the girl qt old- nothing but the truth: 1 • The court.did not clearly say'what those ci:r-cumstances were .whi9h >either ~or~roborated I',. .., • gave assurance her• claim that it was the appellant who defiled. her orf-thnt she was telling nothing but the truth. It seems to me that the trial• court . -, . was of the view that once it wns proved that the girl ha:dbeen•defiled :r it would follow that it was the appellant who did it' because he had been a lover of the moth~r o_f the gir.l; that the girl• knew him• well _and that the defilement had taken- place d~uring day time. With due re'spect, those c~ould riot have been co.rroborating circumstances -that it was the appellant who defiled her • .. . • There was ,credible evidence that . although the appellM.t ' . had been ,,• a lover ofthe-mother of the young girl and used to freq\lent her ho!De, he and the mother h~d already fallen ap~rt (for undisclosed.reasons) and such a• circumstance could ~:-: as well ..have . . . provided . . reason for falsely : " .. •; 3 ... falsely,

- -- implicating him/ if it is assumed that the young gi;r:-1 might n<>t it~reelly . known. ,,the person who defiled .her•. : ~ There was a circ1,l!Tistance indeed which could have corroboreted the girl's claim that. it_ was th; ~ppellnnt who• defiled her. The nursing •, auxiliary had claimed in her eviden;e that th~ girl waE f?iiving out puss from her genital organs,whi~h, -5uggested that she had been infected with a vener:ial dise:ise._ If she were to be properly diognised ,J'''' ~ . . . : ' and proved to have contracted .~n identifieable venereal disease and the- . •!.,, appellant medically .checked and found to have a similar venereal disease, thctt could have provided ,~serul and credible eorroborating evidence • - ; ~ \1.. ~\ . ' Unfortunately, the investigation of the case was done clumsily• so -that !_sueh
- I • \ ' useful evidence was lost. I would agree with the appella~t, therefore, ; - . • ... ! 1... ' I • 1,I that none of the evidence of the prosec\,ltic>n witnesses _.... p1,12, PW3 or PW5 - . . . • : ; • •-.. •<i • : provided corroborating evidence that it was the appellant who defiled the girl. Was the evidence of the girl so compelling that the eourt could have properly convicted the appellant of the offence charged notwithstn.nding that there was no corroborF.1.ting evidence because she WDJ3 telling nothing but the truth? The learned Senior State Attorney who appeared for the respondent Republic was unable to show circumstances which would have made the unsworn evidence of the young girl so compelling tho.t the trial court or even this court could, with justification, s~y that she was telling nothing but the truth. For one thing she did not fJpeak of the defilement until three days later when her mother noticed thl\ t she was not walking properly. On being pressed by her mother it was then she claimed that it was the appellant who had defiled her. When she f,ave evidence (unsworn) the appellant was not told of his right to cross-examine her, so her claim that the appellant defiled her remained untested in ~ny way. I think it is risky to base a conviction of the appellant on the bare word of the young girl, more so, considering th~t her mother and the appellant had fallen with each other before the girl WaE filed, , ,--~- ~. ~ 4 Vindictiveness may hnve been the motive ,for falsely implicating the • appellant. The Republic did not

support the conviction, and rightly so. For the reasons given the appeal is allowed. · The conviction is quashed, the sentence set aside and the appellant is set free forthwith unless he is held for some other lawful purpose. I J. AO MROSO JUDGE 26/5/2000. .. , Mr. Rirf;3.buhanga, S.A. for Respondent!!ti ,.

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