

A We wish to observe that such misconduct by counsel as appears to have taken place in this case, was most unfortunate, to say the least. This is so not only because the misconduct was calculated to deceive and mislead the court and hence to pervert the course of justice, but also because it was designed to induce others including the court registry staff into committing misconduct. We feel duty bound to strongly discourage such conduct by counsel in the future, especially in this time when there is a growing number of allegations of corruption and other malpractices being made against the legal profession.

D With that said, we now conclude this matter by holding that the learned High Court Judge wrongly found that the Written Statement of Defence was filed within the time fixed by the court. On the evidence he should have found that the respondents had failed to file a Written Statement of Defence. Accordingly that Ruling is set aside.

E The appellant in his chamber application to the High Court had asked for judgement in default of filing a Written Statement of Defence or for an order that the case proceeds *ex parte* against the respondents. Although the appellant did not say so expressly, it is clear that he was relying on the provisions of Order 8, rule 14 of the Civil Procedure Code. Had the trial judge not been misled, he would have found, that the respondents had failed to present a Written Statement of Defence, in which case he would have proceeded to make the necessary order or direction under the above cited rule following such default. Accordingly the matter is remitted to the High Court with a direction that that court now proceeds to make the necessary order/direction under Order 8, rule 14 of the Civil Procedure Code. The appellant is to have his costs of this appeal.

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MAKAME JUNEDI MWINYI v. SERIKALI YA MAPINDUZI ZANZIBAR (SMZ)

HIGH COURT OF ZANZIBAR
AT VUGA

(Garba Tumaka, D/C.J.)

CRIMINAL APPEAL No. 1 OF 1999

(From the Regional Magistrate's Court at Vuga, in Original Case No.178 of 1999)

Criminal Law – Defilement – Ingredients of the offence – Section 119 of the Penal Decree Chapter 13.

Evidence – Circumstantial evidence – Definition of circumstantial evidence – When circumstantial evidence may support a conviction.

Evidence – Corroborative evidence – When to be applied – Meaning and function of corroborative evidence.

Evidence – Expert evidence – when and how expert evidence is applicable.

The appellant was charged before the Regional Court at Vuga, with defilement of a girl under 14 years contrary to section 125(1) of the Penal Decree Chapter 13. He was convicted and sentenced to serve 30 years in the educational centre. Being dissatisfied with the conviction and sentence the appellant lodged an appeal with this court. The grounds of appeal were, among others, that the Lower Court erred by convicting the appellant based on uncorroborated evidence, that the conviction relied solely on circumstantial evidence and that the expert evidence which the trial court relied on was not conclusive or definite.

Held: (i) There were circumstances that reasonably enabled the trial magistrate to infer the appellant's guilt;

(ii) Corroboration is simply independent evidence which supports or confirms as true the principal evidence; the rule testimonies of PW2 and PW3 served to corroborate the evidence of PW1 the prosecutive;

- A (iii) The position of the law is that expert evidence is admissible in cases where specialized knowledge is required; and the competence of an expert witness should in all cases be shown before his evidence is properly admissible in this case PW5 is a qualified medical doctor, gynaecologist, sufficiently qualified and experienced to preffer expert opinion.

Appeal dismissed.

Cases referred to:

- C (1) *Kibazor v. Uganga* (1965) EA 507
 (2) *Republic v. Opert, Son of Erui* (1936) 3 E.A.C.A 122
 (3) *R v. Konstant Kirimunyo* (1943) 10 E.A.C.A 64
 D (4) *Sunmonu v. R* (1957) WRNLR. 23
 (5) *Gatheru s/o Njagwara v. R* (1954) 21 EACA 384

Statutory provisions referred to:

- E (i) Penal Decree Chapter 13, section 119, section 125(1)

Mr Haji, for the Appellant

Mr Saleh, for the Respondent

JUDGMENT

(Dated 14 September 1999)

- G **GARBA TUMAKA D/C.J.:** The appellant Makame Junedi Mwinyi was charged, before the Regional Court at Vuga, with defilement of girl under 14 years of age contrary to section 125(1) of the Penal Decree Chapter 13.

- H It was alleged by the prosecution that on the 27 July 1998 at about 4:00am at Kwabaniani Fuoni in Urban West Region Unguja, the accused person defiled Amina Mgeni Mohammed, who was under 14 years of age.

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The trial magistrate gave judgement on the second February, 1999 in which he convicted and sentenced the accused to serve 30 years in the educational centre.

Having been dissatisfied with this judgement the appellant lodged an appeal with this court. The appellant was represented before me by Mr K. Haji while State Attorney Said Saleh represented the respondent.

The prosecution's evidence was to the effect that on the 27 July 1998 the appellant at about 4:00am went into the room of PW1 (the complainant) in her parents home PW2 (the mother) and PW3 (the father) and defiled her. Her mother (PW2) had observed that the lamp in the daughter's room was on and peeped in and saw "this accused person who is my brother-in-law trying to hide himself". She then informed her husband and later in the morning enquired from her daughter what went on, who told her it was not the accused first time of coming to her room and that he defiled her every time he came. "I then examined her and observed that she was in a state of a person who had been defiled" she concluded.

The prosecution witnesses went on to testify that subsequent to the appellant being found in PW1 room, he was questioned. PW3, the complainants father and the accused brother, said in his testimony "... I got in that room and at first, I did not see him, I searched the whole room and discovered the accused in the sack (bag). He was hiding under the bed and he was in the bag".

The accused failed to explain to him why he was in the room and why he was hiding under the bed. PW3 then brought in their father in the morning and when questioned, the accused denied having defiled the PW1. "I thereafter took the daughter PW1 to Fuoni police station, then to the hospital" he concluded.

PW 4 detective Cpl. Kondo from Fuoni police station handled the investigation. He took down statements and visited the room in question where he found a mat on a bed and the sack in which the accused hid himself. He interrogated PW.1 who confirmed that the accused defiled her several times before the material date. He took

A the girl (PW1) to the hospital and the doctor confirmed that she was in a very bad condition. He then produced her birth certificate to show that PW1 as only 11 years old at the material time.

B PW5 Mr Hassan Mohammed Hassan, a gynaecologist from Mnazimmoja hospital, testified that PW1 was brought to him on 27 July 1998 to examine and attend to. It was said that the girl had been defiled and when he examined her, he found that her outer vagina and to some extent the inner part had bruises. She also had blood
C and some fluids oozing from her vagina. "To my opinion especially from the lost virginity and the bruises Amina had, there was a possibility that she had really been defiled" he concluded.

D Under cross-examination by the Accused, PW5 stated that he did not know who might have defiled PW1 and to the courts enquiry he said that the bruises and even the loss of virginity can be caused by any other blunt object and not necessarily by defilement. He then produced his report which was admitted in evidence.

E Before this, the prosecutrix, Amina Mgeni Mohammed who is PW2 had given her unsworn testimony wherein she stated that she resides with her parents and usually slept alone in her room she said she knew the accused person who stayed with them, though he
F had his own hut close to their house. One night, she said, the accused went into her room, put out the lamp, put his finger in her vagina before defiling her. He then gave her TZS. 20 and asked her not to tell anyone about the affair. He prevented her from screaming out
G in pain by gagging her with a cloth, which she, under cross-examination identified as an old black shirt that used to belong to her father. She said, after the accused defiled her but before leaving the room, her mother came out of their room and proceeded to the toilet. When
H the mother returned, her father now came into her room and found the accused hiding under the bed and when asked what he was doing there, he offered no explanation. Her father then went out with the accused. She said the accused had defiled her several times and even
I though she experienced great pains, she couldn't tell her parents or scream because she was afraid she would be punished. She said he

used to give TZS. 20 every time he defiled her. She also said the accused had his hut close to their house whilst their door was always unlocked during the night. PW1 gave her unsworn testimony after the Magistrate got the impression, upon a *voir dire*, that she was sufficiently intelligent to have her evidence received, though she
B could not take oath.

The accused person gave evidence in his defence denying the allegation and saying he was in his house at the material time. He said he woke up very early and went out for his business, only to be
C accosted by his brother and father with defiling PW.1 when he got back to the house at 7.00am., which allegation he denied. He was arrested at 3.00pm. and arraigned before the court the next day. He pleaded not guilty, denied having been found in PW1's room and
D wondered how PW2 and PW3 could have found him in her room without raising an alarm. Under cross-examination, he said he used to live with PW3 family and never had a quarrel with PW3. His brother, according to him was only framing him up for reasons best known
E to him.

That in essence, was the substance of the evidence before the Magistrate Court in this case. The Magistrate identified the issues for determination, as (1) whether PW.1 was defiled and (2) if she
F was defiled by none other than the accused. The issue of her age was not contended.

The Magistrate on the basis of the evidence of PW1 and PW2 her mother, found that PW.1 had been defiled, as further supported,
G in his view, by this testimony of PW5, the medical doctor. On whether she was defiled by non other than the accused, he also found in the affirmative. He came to the conclusion on the basis of the evidence of PW1, the prosecutrix and her parents PW2 and PW3. He didn't
H disbelieve PW1 because they knew each other well, used to live together and were close relatives with the accused, nor did he disbelieve PW2 "who discovered the accused person in PW1's room" and PW3 who is the accused person's brother who narrated how he "found the
I accused person hiding under PW1's bed in the sack".

A He found further that there was nothing in PW1, PW2 and PW3 evidence for the court to believe that these witnesses lied so as to "fix the accused person" and was thus satisfied that PW1 was defiled on the material, date and time, and that she was defiled by none other than the accused person. He disbelieved the accused person's denial because he said he saw no element of ill-will in the testimony of the prosecution witnesses.

C The appellant filed 5 grounds of Appeal before this court as contained in the annexed Memorandum of Appeal.

The gravamen of these grounds, taken together with the learned counsel's address before this court, appears to me to be:

- D (1) that the Lower Court erred by convicting on the uncorroborated evidence of prosecution.
- E (2) Convicting solely on circumstantial evidence.
- E (3) Reliance on the expert evidence of the medical doctor that was not conclusive or definite.
- (4) As a consequence of 1, 2 and 3 aforesaid, the standard of proof required for conviction had not been met.
- F Counsel for the appellant, Mr Ussi, found it expedient to argue it generally and not ground by ground and appropriately so in my view, as some of the grounds are manifestly intertwined.

G Learned Counsel began by highlighting the essential ingredient of the offence, which is unlawful carnal knowledge, which as defined by section 119 of the Penal Decree, are epitomized by penetration, which once proved inculcates the accused.

H He contended that it was imperative for this to be proved in order to secure conviction and in this case, the prosecution had totally failed in this regard. He further contended that due to the tender age of the prosecutrix, her testimony needed to be corroborated. In view of the gravity of the offence, this flaw was fatal to the prosecution's case.

A Mr Ussi also found the testimonies of PW2 (the prosecutrix's mother) and PW3 (the father), incredible and unbelievable. How could a mother have found the appellant in the stated circumstance and simply decide to go and ease herself before returning to report to her husband and why did the father not get the appellant arrested on the spot and taken to the police station, he queried. Conspiracy it must be to do the appellant in, he declared.

C On the final point, he dwelt on the expert evidence of PW5, Mr Hassan, who examined the prosecutrix (PW1). He said PW5 based his report on what he was told by the person who brought her. He quoted from PW5's testimony wherein he stated, "... It was said that the said girl had been defiled ..." PW5, he said, also based his opinion and report on the "lost virginity and bruises" PW1 had. Mr Ussi queried if lost virginity could only come from defilement. He said sportswomen like long jumpers have been known to lose their virginity. He however took succor in the fact that PW5 was not categorical about the cause of defilement and had confined himself to "the possibility" of her defilement. The doctors report, he said, was not categorical that there had been defilement and even said there could have been other causes for the loss of virginity, it did not say there had been penetration nor that the fluid found in PW1 vagina was from the appellant. Additionally, the appellant was not examined to see if he had bruises on his organ to show his having penetrated the girl. All these, Mr Ussi argued, were not sufficient to secure a conviction. He cited the case of *Kibazor v Uganda* (1) reported in the East African Law Reports, 1965 at page 507, which was also a sexual offence case, where it was held that "the trial judge placed higher reliance on the evidence of the complainant in view of the contradiction of her evidence".

H He finally submitted that in view of the fact that the prosecutrix evidence was not corroborated and the doctors report was not categorical, and in view also of the fact that, the appellant and prosecutrix knowing each other could not be a criterion for guilt, the case should have been dismissed at the Lower Court and that the conviction should be quashed.

A Mr Said Saleh for the respondent, sought to differentiate between rape and defilement in his opening remark. He however did not dwell much on this. He said going through the memorandum of appearance and the record of proceedings at the Magistrate's Court, PW1, PW2 and PW3 were succinct and clear in their testimonies. From the evidence he said the issue for determination by the Magistrates Court was whether the prosecution had proved its case beyond reasonable doubt or not, and this could be answered by the questions (1) was the girl defiled (2) was it the accused who defiled her? Quoting extensively from the evidence of PW1, he submitted that her testimony was without contradictions. This was supported amply by the evidence of PW2 and PW3. PW5's evidence only served to buttress their positions further. There was no doubt therefore to the fact that PW1 had been defiled. As to who had defiled her, he said PW1's testimony was clear that it was the accused person who went into her room on the material night and defiled her. They (the accused and PW1) are not unknown to each other, as apart from being close relatives, they used to stay together. He cited the case of *Republic v. Opert, Son of Erui* (2) reported in the Digest of East African Criminal Case law, where it was decided "that the complainant a child of tender years made a recent complaint of a sexual offence against her, is merely indicative of consistency of her evidence and does not supply corroboration". The accused, he submitted, had no justification being in PW1's room under the bed at the material time and offered no good explanation when accosted.

G He submitted that the unsworn evidence of PW1 as corroborated by the evidence of PW2, PW3 and PW5 left no doubt and satisfied the Magistrate Court that PW1 was defiled by none other than the accused and registered a conviction against the appellant.

H In view of these, he urged the court to uphold the conviction as there was no justification to disturb the conviction which was rightly made, and confirm the 30 years sentence.

I I will begin by stating that it is trite law that carnal knowledge must be proved. As aforesaid, in accordance with the definition

given in section 119 of the Penal Decree. It is not necessary to prove that the hymen was ruptured ("disvirgined") or that there has been an emission of semen. The slightest penetration of the vagina is sufficient, but there must be penetration. It is the contention of the appellant's counsel that this essential ingredient was not proved as all the evidence adduced by the prosecution amounted to mere circumstantial evidence purporting to support the uncorroborated testimony of the prosecutrix.

C What is circumstantial evidence? Simply put, these are circumstances in the form of evidence which enable a court to reasonably infer or conclude the existence or non-existence of a fact in issue or the guilt of an accused person. It is generally in the form of oral evidence. In the instant case, were there circumstances that reasonably enabled the trial magistrate to infer or conclude the appellants guilt? I shall come back to this in due course. Suffice it to say that in order to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused.

F Mr Ussi, learned counsel for the appellant contended also that the trial court convicted on the uncorroborated testimony of the complainant. Corroboration is simply independent evidence which supports or confirms as true, the principal evidence.

G It is my view that the testimonies of PW2 and PW3 support the principal evidence, which is the evidence of PW1. PW2 in her evidence said *inter alia* that she saw "this accused person who is my brother in law trying to hide himself ... I then examined her (PW1) and observed that she was in a state of a person who had been defiled" She concluded.

H PW3 in his evidence, *inter alia* said, "... He was hiding under the bed and he was in the bag ..." and in conclusion said "... I thereafter took the daughter PW1 to Fuoni police station, then to the hospital ..." The rule is that corroborative evidence must implicate the accused person in some material particular in respect of the offence charged. Did the evidence of PW2 and PW3 implicate the accused person in

A respect of this charge? I would answer in the affirmative. That PW1 was defiled I believe, was proved beyond reasonable doubt and this is a material particular in respect of this offence.

B The disposition of the courts as regards testimonies of complainants in sexual offences is clear. In the case *R. v. Konstant Kirimunyo* (3).

C It was said, "whilst there is nothing in the evidence ordinance to require corroboration of the statement of a girl of tender years as to a sexual offence against her, it is the practice to require corroboration of the evidence of a child complaint in the case of sexual offences". This position is amplified by the decision in the case, *Sunmonu v. R.* (4) at page 24. Where it was *inter alia* stated that, courts regard it as unsafe to convict upon the uncorroborated testimony of the complainant only. However "it is not a rule of law that in sexual offences, an accused person should not be convicted on the uncorroborated evidence of a prosecutrix, but the proper direction is that it is not safe to convict on the uncorroborated evidence of a prosecutrix, but the court (jury) may after paying attention to the warning, nevertheless convict if they are satisfied of the truth of her evidence". The testimonies of PW2 and PW3 served to corroborate the evidence of PW1, the prosecutrix, whose testimony as already stated, was unsworn.

F It is my view that the fact that the trial magistrate conducted a "voir dire" to test the intelligence and understanding of PW1, showed that he had appropriately adverted his mind to the possible "evidential deficiency" of her testimony. Her evidence was very clear and categorical in my view.

G ...That was not the first time for Makame, the accused, to come to my room at night, he oftenly used to come and put out the lamp and defile me....

H Under cross-examination by the accused, her response was very unambitious "you covered my mouth by the old shirt which used to be my father's. You used to give me TZS. 20 everyday you defiled me. The shirt is black in colour". Taken in conjunction with the evidence of PW3, I am of the view that the trial court was correct to reasonably

A infer or conclude the existence of a fact in issue, i.e. that PW1 was defiled by the accused; in other words, the guilt of the accused. For purposes of clarity, I would quote the relevant portion of PW3's testimony; at page 5 of the record of proceedings "this accused person is my younger brother and I know him very well. The accused hid himself in the sack (bag) under the bed. The bag was dirty and torn ... this is the very bag in which the accused person was hiding under my daughter's bed (the accused was also shown same)".

C It was also canvassed by the counsel for the appellant that the trial court relied on the expert evidence of the medical doctor which failed to prove that the prosecution was defiled by no one else but the accused. The position of the law is that expert evidence is an admissible in cases where specialized knowledge is required. The governing rule is that "the competence of an expert witness should in all cases, be shown before his evidence is properly admissible." *Gatheru s/o Njagwara v. R.* (5).

E PW.5 here, Mr Hassan, stated that he has over 12 years experience, and is ... "a qualified doctor especially in women problems (gynaecology)." His testimony has been severally referred to and analysed by both counsel and the trial magistrate which can be gleaned from the record of proceedings and hence I am not inclined to dwell on it. Suffice it to say however that, I am in agreement with the trial magistrate that taken together with all other evidence, it points inexorably to a conclusion of guilt of the accused.

G Learned counsel also stated in his grounds of appeal that the court failed to consider other circumstantial evidence which could have led the trial court to find that PW.1 could have been defiled between the time she went to school and the time she was sent to the hospital to be examined. I must confess that I did not see, both from the record of proceedings and the learned counsel address, any such circumstance. From the testimony of PW3, after accosting the appellant in PW1's room, he released him, and at about 5.00am, he took his bicycle to go and bring their father. The accused denied defiling PW1 and thereafter PW3 took her to the police station and

A then to the hospital. Under cross examination, on page 6 of the record of proceedings, PW3 said "We took PW1 to the hospital in the same morning."

B I feel inclined to comment on what I will call the "gang-up" or
C frame-up theory of the Appellant's Counsel. Nothing was tendered
D or proved to show that there was any ill will harboured against the
E appellant. Interestingly, the appellants cross-examination of PW3
F conspicuously dwelt on the question of who actually examined PW1
G on the allegation of her defilement and absolutely nothing to contradict
H his alleged presence in PW1 room in a bag under the bed at that
I hour of the day. The appellant himself under cross-examination confirmed
having lived peacefully with PW3 and his family. There was nothing
to allude to a subsisting enmity between them.

On a final note, I feel it is worth while going into the case *Kibazo v. Uganda* cited by the appellants counsel, as it seems to form pivot of his argument. In this case, the appellant was convicted of rape, mainly on the evidence of the complainant. There were contradictions in her evidence; the evidence she gave the police and the evidence of the medical assistant who had examined her. In other regards, her evidence was false. She had stated she was a virgin, which turned out to be false from the evidence of the medical assistant who examined her. Similarly, her dress which she wore at the time of her assault which she said was blood stained contained no blood. The appellant whom she claimed to be merely acquainted with turned out not only to be well known to him but had even written him five letters, some of which turned out to be love letters, which she at first denied. The counsel in this case argued and submitted that in view of the discrepancies in the evidence of the complainant as aforestated, the learned Chief Justice erred in ignoring these contradictions and accepting the evidence as he did. Consequently, the court held, *inter alia*, that "the trial judge placed a far greater reliance on the evidence of the complainant than was desirable in view of the contradictions and false hoods in her evidence" and that it was unsafe to allow the conviction to stand and it be quashed.

A I would at this point like to observe that in the present case, there was no allegation of the complainant having given evidence which was proved to be false.

B In the *Kibazo* case, as in this case, it was a ground of appeal that
C the trial judge misdirected himself in holding that the medical assistants
D opinion with regard to the injuries sustained by the complainant could
E only have been sustained through sex without consent. The medical
F assistant stated that he found fresh bruises in the complainant's vagina
G and that in his opinion, a male organ had penetrated into the vagina.
H The issue before the court was not only that the complainant had
I been raped, but that she had been raped by non other than the appellant. The medical assistant had stated on further examination that it was quite possible that the bruises could have been caused by "a fall or by a violent bathing in the river with swift current." In the present case, PW5, Mr Hassan stated that he found some bruises in her vagina and that the vagina had blood and some foul smelling fluids oozing out. In his opinion, the bruises and the lost "virginity" showed a possibility that she had been defiled. Like in the *Kibazo* case, PW5, agreed that "the bruises and even the loss of virginity can be caused by any other blunt object it is not always that it may be caused by defilement."

On this issue of expert evidence, I will like here to make a contradistinction between the two cases, which is fundamental. Whereas in the former case, the medical assistant, who is not a qualified doctor, should not have been allowed to express an opinion without laying a proper foundation of sufficient experience enabling him to speak with authority on the subject. In this case, PW5 is a qualified medical doctor, gynaecologist, sufficiently qualified and experienced to proffer expert opinion. This, I am of the view, weigh eminently on the evidential value of his testimony.

Coming back to the question earlier posed, i.e. were there circumstances that reasonably enabled the trial magistrate to infer the appellants guilt? I would in the light of all the foregoing be compelled to answer in the affirmative.

A A I find that there has been no injustice occasioned by the judgment of the trial court consequently I have no reason to tamper with it and therefore uphold the conviction.

B B Whilst entirely agreeing with the Magistrate that since this type of offence is becoming prevalent and needs to be curbed in order to protect young and the weak in society, I would want to give a reconsideration to the fact that the appellant is a young person and more importantly a first offender, I am hoping on his reformability.

C C Accordingly, I hereby set aside the sentence of 30 years and substitute therefore a sentence of 15 years (imprisonment) in the educational centre. Save for the variation of the sentence, this appeal is dismissed.

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