

ALFRED TEDO v. REPUBLIC

**HIGH COURT OF TANZANIA
AT MTWARA**

(Kaji, J.)

CRIMINAL APPEAL No. 41 OF 1997

(From original Criminal Case Number 15 of 1977 before the District Court at Nachingwea, J.K.A. Khaliki, Esq., PDM.)

Evidence-Witness of tender age – No corroborated evidence – Whether conviction may stand on evidence of witness of tender age without corroboration.

Evidence - Witness of tender age – No voire dire whether that is an irregularity – Whether curable irregularity/defect section 381(1) Criminal Procedure.

Criminal law – Offence of defilement – Accused 64 years old – Whether accused may commit the offence.

The appellant, 64 years of age, was charged with and convicted of defilement of two girls aged 4 and 6 years, contrary to section 136(1) of the Penal Code Chapter 16. He was sentenced to 20 years imprisonment and payment of compensation of TZS.10 000 to both girls. On appeal, the appellant challenged conviction on grounds that (i) he would not have, at his age, sexual intercourse with two girls at the same time, (ii) the trial magistrate did not conduct *voire dire* before recording evidence of the witnesses of tender age, (iii) the trial magistrate erred in law in convicting him based on uncorroborated evidence of witnesses of tender age.

Held: (i) The totality of evidence showed that there was penetration into the vagina of the victims which is enough for defilement to stand regardless of ejaculation; Although the record does not show that *voire dire* was conducted before recording the evidence of PW3 and PW4 who were children of tender age the trial magistrate had an opportunity to make proper assessment of the witnesses- that they possessed sufficient intelligence and knew the importance of speaking the truth under section 127 of the Evidence Act 1967.

Appeal dismissed

Cases referred to:

(1) *Furth India Co-operation Ltd v. Stanley and Son Ltd* [1967] HCD 168

(2) *Kisire v. Rule* [1981] T.L.R. 218.

Statutory provisions referred to:

(1) Criminal Procedure Act, section 381(1)

(2) Penal Code Chapter 16, section 136(1)

(3) Evidence Act 1967, section 12

JUDGMENT

(Delivered 22 November 1999)

Kaji, J.: The appellant Alfred Tedo who was at the material time aged 64 years was charged with two counts of defilement of girls under the age of 14 years contrary to section 136(1) of the Penal Code Chapter 16. He denied both counts. However at the end of the trial he was found guilty as charged and was convicted accordingly. He was sentenced to 20 years imprisonment on each count. Both sentences were ordered to run concurrently.

At the trial, it was alleged by the prosecution evidence that the appellant and the two victims namely PW3 Fatuma d/o Seleman and PW4 Christina d/o Christian were neighbours. PW3 and PW4 were residing with their parents. The appellant who had no wife was living alone.

On 12 January 1997, which was a Sunday, PW3's and PW4's parents left for different ventures leaving PW3 and PW4 playing on a heap of sand which was just nearby. There was a house near that heap of sand. PW5 Samson s/o Eliezer was selling sardines (*dagaa*) on the other side of that house while PW3 and PW4 were playing on the sand on the other side.

A At about 1:00pm while PW3 and PW4 were playing on that sand, they were approached by the appellant who invited them to his home where he promised to give them some money for buying sweets. They were interested. They went with him to his home. PW5 Samson
 B who had been hearing their noises when playing on the sand, suddenly stopped hearing that noise. However he felt nothing unusual about it as children keep on changing venue for better playing grounds. He thought they might have moved somewhere for a better playing
 C ground. He continued with his business of selling sardines.

When PW3 and PW4 arrived at the appellant's house, the appellant invited them inside where he said the promised money was. They entered. But just when they entered the appellant locked the door.
 D He grabbed PW3 and placed her on his bed and stripped her of her underwear. He pushed his private part (penis) into her private part (vagina). She felt much pain. He took her down and grabbed PW4 and placed her on the said bed. He stripped her of her underwear
 E and pushed his private part (penis) into her private part (vagina). She felt much pain. Then he cautioned them that they should not tell anybody about it and that if they did they would die as well as their mothers. He opened the door and let them go. He never gave them
 F any money.

Later PW5 Samson saw PW3 Fatuma lying on the ground facing downward (*kifudi fudi*). She looked unhappy. He asked her as to what was wrong with her to what she said there was nothing wrong
 G with her.

Later PW6 Anastasia d/o Eliezer came. PW5 requested her to interrogate her as to what was wrong with her as he had tried to ask her but had not given a convincing answer. PW6 found her still lying
 H on her stomach behind their house. She asked her as to whether she was sick to what she denied. She asked her again. This time she told her as to what the appellant had done to her and as to how it all happened. When PW3's mother PW1 Anna d/o Rashidi arrived she
 I was told about it. She examined her private part (vagina) and saw

some sperms. PW4's grandfather PW2 Oswald Mayaya was informed as to what had happened to her grand-daughter PW4. He asked her to what she narrated the whole story as above. The matter was reported to the village chairman and later to the police. PW3 and PW4 were issued with PF3. They were medically examined. The PF3 for PW3
 B Fatuma showed the following finding:

Patient has got bruises on the vaginal wall. But no sperm was seen. (Exhibit P1).

That of PW4 Christina showed the following finding:

Vulva and vagina stained with blood, and fresh blood oozing from vagina. Vaginal wall is inflamed and there is laceration. But no spermatozoa seen. (Exhibit P2).

At the material time, PW3 Fatuma was aged 4 years and PW4 Christina 6 years. The appellant was arrested and charged with defiling them.

The appellant denied and raised an *alibi*. He narrated as to what he had been doing on that day from morning till 1 pm when he left his home for DW2 Mbobwe s/o Salinu at Namatula "A" after changing his clothes. He said he remained there talking with DW2 and a visitor from Tunduru till around 4 p.m. when he left for home.

DW2 denied to have seen the appellant at his home on that day or anywhere on that day. He said the man from Tunduru who had come to take his child had left long ago before 12 January 1997. After evaluating the evidence, the trial court was satisfied the prosecution had proved the guilt of the appellant beyond all reasonable doubt. The appellant was found guilty and was convicted and sentenced as above. He was also ordered to pay PW3 and PW4 TZS. 10 000 being compensation for the pain they suffered. He was aggrieved. Hence this appeal.

In his grounds of appeal he insisted on his innocence and blamed the trial court for convicting him on the prosecution evidence which he termed as "weak and insufficient". He said, at his age he could not have sexual intercourse with two girls at the same time. He blamed

A the trial court for failing to call the doctor who examined PW3 and PW4 as a witness. He cited the case of *South India Co-operation Ltd v. Stanley and Son Ltd* (1)

B In reply the learned state attorney Mr Masaju who represented the Republic at the hearing of this appeal supported the conviction and sentence on the ground that the prosecution evidence established the guilt of the appellant beyond all reasonable doubt. He said the evidence of PW3 and PW4 who were of tender years was corroborated
C by PW5, PW6 and the PF.3. He said there was no need of calling the doctor and that if the appellant felt there was a need, then he would have told the trial court so and the doctor would have been called. The learned state attorney went on replying that PW3 and
D PW4 knew the appellant very well and the event took place during daytime. The learned state attorney conceded that there was no *voire dire* test conducted by the trial magistrate before recording the testimony of PW3 and PW4. However he was of the view that that failure did
E not cause failure of justice and is curable as per section 381(1) Criminal Procedure Act 1985 and the case of *Kisire v. R.* (2).

F On whether the appellant could have sexual intercourse with two girls at his age, the learned state attorney replied that some old men use local herbs to stimulate their erection, and that there is no wonder for an old man of the appellant's age to have sexual intercourse with two girls simultaneously even if by mere penetration without necessarily ejaculating.

G I have carefully considered the evidence on the record, the appellant's grounds of appeal, the learned state attorney's reply together with the overall circumstances surrounding this case. There is no dispute that the appellant and the prosecution witnesses are neighbours and
H know each other very well. The defilement is alleged to have been committed during daytime at about 1:00pm. Therefore, under those conditions the question of misidentification does not arise. There is nothing indicating or suggesting that any of the prosecution witnesses
I

A had any grudge with the appellant. Therefore there was no danger of a probable concoction or frame up.

B The PF3, Exhibits P1 and P2 showed the injuries PW3 and PW4 sustained in their private parts (vagina). No spermatozoa were seen. PW3 and PW4 said they felt much pain in their private parts (vagina) when the appellant inserted his private part (penis) there. And that he rubbed their private parts with a piece of clothe. Therefore if the appellant had ejaculated to one or both of them, he probably rubbed
C off his sperms with the said piece of cloth. Also since PW3 and PW4 were medically examined on the following morning, their parents had probably washed them the previous night. But as properly stated by the learned trial Principal District Magistrate in his judgment, in cases of this nature, ejaculation is not necessary. What is necessary
D is penetration however small it may be. The totality of the prosecution evidence shows clearly that there was penetration by the appellant's penis. Therefore it is immaterial whether the appellant ejaculated or not, and the absence of spermatozoa in PW3's and PW4's private part (vagina) did not vitiate the merits of this case. E

F The appellant raised a defence of *alibi* that at the material time he was at DW2 Mbobwe's home till 4:00pm. DW2 denied this. His *alibi* did not raise any doubt, leave alone a reasonable one. It was properly rejected by the trial court.

G PW3 and PW4 did not report to anybody until when asked. They gave the reason why it was so. They said the appellant had warned them not to report the matter to anybody, and that if they did so they would have died together with their mothers. They were scared and decided to keep quiet. These were young girls, and that lawful warning scared them stiff. That explanation cannot be said to be unreasonable. It was reasonable. Therefore the fact that they did not report to anybody
H immediately until later when they were asked, does not mean they were not defiled by the appellant. They simply did not report due to fear created by the appellant himself. I

A In ground number 4, the appellant complained of the discrepancy between PW3 and PW4 on whether there was a mattress on his bed. PW3 had first said the bed had no mat or mattress. But later she said she saw a spongy mattress but she could not remember what type it was. PW4 said the bed was covered with a mat (*tapwata la tefu*). However she said she had no time to investigate everything especially that the room had dim light. I am satisfied this discrepancy is minor and did not vitiate the merits of the case. PW3 and PW4 were in a terrified state, and had no time to concentrate on whether the bed was covered with a mattress or a mat.

Lastly, but the most important of all, is whether it was proper to convict the appellant on uncorroborated evidence of PW3 and PW4. PW3 and PW4 were children of tender years. They gave unsworn testimonies.

The procedure of recording testimonies of witnesses who are children of tender years, and the weight of their testimonies, is governed by section 127 of the Evidence Act 1967. Before recording the evidence of such a witness, the trial magistrate must conduct a *voire dire* test to decide whether that child knows the meaning of an oath and is possessed of sufficient intelligence to justify the reception of his or her evidence, and understands the duty of speaking the truth.

According to the record, there is nowhere where it was recorded how the *voire dire* test (if any) was conducted. But the record shows that PW3 and PW4 did not understand the nature of an oath but both of them understood the importance of speaking the truth and were possessed with sufficient intelligence and were able to give rational answers to the questions put to them. They gave unsworn testimonies. I am satisfied under those circumstances the learned trial magistrate had an opportunity to make a proper assessment and was satisfied they were possessed with sufficient intelligence and knew the importance of speaking the truth.

Under section 127(3) of the Evidence Act 1967, a court may convict an accused person on uncorroborated evidence, after warning

itself of the danger of acting on such uncorroborated evidence, and after fully being satisfied that the child or children are telling nothing but the truth. In the present case the learned trial magistrate did not record in his judgment about that warning. But although he did not record so in black and white, yet going through his judgment very carefully, it is apparent that he took all the necessary precautions and was satisfied PW3 and PW4 were telling nothing but the truth. In view of this it is my view that the omission of recording the warning did not cause failure of justice nor did it prejudice the appellant. The appellant's complaint that he is too old to defile two girls at the same time has no merit, because defilement requires only penetration and not necessarily ejaculation. The appellant did not say he is impotent.

Failure to call the doctor who examined PW3 and PW4 also did not vitiate the merits of this case, because the appellant did not tell the trial court that he wanted that doctor to be called as a witness so that he could cross examine him on any important fact.

The sentences imposed on the appellant were minimum at that time. The compensation of TZS. 10 000- to PW3 and PW4 is not excessive in view of the pains PW3 and PW4 sustained as shown in the PF3, Exhibits P1 and P2. This appeal was lodged without sufficient grounds. It is hereby dismissed in its entirety.