

TANZANIA / JUDGMENT

# karim stephen vs the republic

## 2024 tzhc 881 1 march 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (BUKOB A SUB- REGISTRY) AT  
BUKOB A CRIMINAL APPEAL NO. 6 OF 2023 (Arising from Ngara District Court at Ngara in  
Criminal Case No. 152 of2022) KARIM STEPHEN ..... APPELLANT VERSUS THE  
REPUBLIC ..... RESPONDENT

### JUDGMENT

22nd February March 2024 A.Y. Mwenda J, The Appellant Mr. Karimu S/O Stephen was arraigned for rape contrary to Section 130(1), (2) (e) and 131 (1) of the Penal code, [Cap 16 R.E 2022], The prosecutions alleged that the appellant, on the 25th October 2022 at Rwakalemela village within Ngara District in Kagera Region, unlawfully had carnal knowledge with FF (the actual name concealed for her protection), a girl of eight (8) years old. He pleaded not guilty as such, the trial commenced. The prosecution paraded six witnesses and tendered one documentary exhibit whilst the defence had only one (1) witness who is the appellant himself. Having considered the evidence on record and various laws, the trial court was satisfied that the prosecution proved its case beyond reasonable doubt. As such the appellant was convicted and sentenced to serve a term of thirty (30) years jail i imprisonment. Aggrieved he came before this court armed with a petition of appeal containing five (5) grounds which read as follows;

- 1) That, the trial magistrate erred in law and fact by convicting and sentencing the appellant on the offence which was not proved beyond reasonable doubt.
- 2) That the trial magistrate erred in law and facts by convicting and sentencing the appellant basing on improper identification of the accused person.
- 3) That, the trial court erred in law and fact for convicting the appellant basing on the age of the victim which was not proved.
- 4) That the trial court erred in law and facts by convicting and sentencing the appellant in absence of the evidence from school that the said victim was schooling in the said primary school.

- 5) That the trial court erred in law and facts to convict the appellant on the base of hearsay evidence adduced by prosecution side. On appeal hearing date, the appellant appeared in person without legal representation while the respondent republic was represented by Ms. Gloria Rugeye, learned State Attorney. Before hearing could start, the appellant Z prayed to file additional grounds of appeal. The said prayer was granted. It also contains five grounds which read as follows that;
  - 1) That the case seems to be fabricated since the said professional expert failed to prove the issue of sodomy as it was alleged by prosecution witnesses. (PW1 and PW2)
  - 2) That the learned trial magistrate erred in law and fact to reach decision by receiving unsworn evidence of PW4. (sic)
  - 3) That the trial magistrate erred in law and fact by conducting improper voire dire test contrary to section 127(2) of the Evidence Act [Cap 6 R.E 2022].
  - 4) That the trial court magistrate erred in law to convict and sentence the appellant Without considering the defence evidence.
  - 5) That the trial court had grossly erred in law and facts by convicting the appellant with procedural irregularities during and after arrest of the accused person, (sic) When he was invited to submit in support of grounds of appeal the appellant said that the prosecution's evidence is contradictory. He said that before the trial court, PW2 (the victim) testified that she was raped while PW1 testified that the victim was rape and sodomized. On top of that he submitted that PW6 (The Doctor) testified that the victim was raped and said nothing about being sodomized. According to him this contradiction goes to the root Of the case. 3 Submitting in support of the second ground of appeal, the appellant said that PW4 adduced his evidence without taking an oath. In support of the fifth ground of appeal, he submitted that it was not proper for him to be arrested by the victim's father. Regarding the 3rd ground of appeal alleging failure by prosecution to prove the age of the victim, the appellant submitted that there is contradiction regarding the age of the victim. He stressed in that the victim's mother testified that her child (victim) was 7 years old while his father said she was 8 years old. On that basis he prayed this appeal to be allowed, the conviction meted by the trial court be quashed thereby setting aside the sentence passed against him. In her response to the submissions by the Appellant, Ms. Gloria Rugeye, learned State attorney informed the court that the republic is in support of conviction against the appellant. Ms. Rugeye commenced by stating that in rape cases the prosecution is bound to prove the age of the victim, penetration and the responsible person. Regarding penetration, the: learned state attorney submitted that the victim (PW2) testified on how she was raped by the appellant. She said that, the victim's evidence was corroborated by PW6 (the doctor). Regarding the responsible person for rape the learned state attorney submitted that the appellant was well identified by his name. Based on the fact that they were living in the same village supported by the fact that the incident occurred in the morning hours i.e. at 11:00 hours. She stressed that having named the 4 appellant as her assailant to her father shortly

afterwards, the victim led her father to the river bank where the appellant was found and arrested. The learned state attorney added in that in rape cases the best/true evidence is that of the victim. In support to this point she cited the case of SE LEMAN MAKUMBA VS R, [2006] TLR 379. Regarding the: appellant's argument that PW4 did not take oath before testifying, the learned state attorney submitted that failure by the PW4 to take oath does not affect the prosecution's case because in rape case the best evidence is that of the victim as it is in the present matter. Regarding the age of the victim the learned state attorney submitted that it is true that there is contradiction regarding the victim's age, however she was of opinion that the same does not do away with the fact that the victim was under age, no wonder she promised to tell the truth and not lies. To support this, she cited the case of ROBERT SAN GAN YA VS R, CRIMINAL APPEAL NO. 363 OF 2019. Regarding the appellant's argument that voir dire test was improperly conducted the learned state attorney submitted that this is no longer the requirement of the law as currently, what the child is required to do is to promise to tell the truth and not lies. With regard to failure by trial court to consider the appellant's defence, the learned state attorney submitted that it is true that the trial court did not consider the appellant defence. However, she was of the opinion that since this is the 1st appellate court, it can thus step into the shoes of the trial court and reevaluate the appellant's evidence. In conclusion, the learned state attorney prayed this appeal to be dismissed for lack of merits. Having summarized the rival submissions from both sides, the issue for determination is whether the present appeal is meritorious. At the outset, it is important to point out that in criminal cases, the burden of proof lies on the prosecution and the standard deployed is beyond reasonable doubt. See Section 3(2) (a) of the Evidence Act [Cap 6 R.E 2019] and the case of MOHAMED MATULA V, REPUBLIC [1995], TLR 3. In the present matter, the appellant stood before the trial court charged for rape contrary to Section 130(1), (2) (e) and 131 (1) of the Penal code, [Cap 16 R.E 2022]. In rape cases charged under the said provisions, the prosecution is bound to prove penetration and the person responsible for rape (if any). In the present matter, the incident took place on the broad day light and the victim identified the appellant as he was familiar to her. She mentioned his name immediately thereafter when she reported about the incident to her father. During the trial, the victim testified how the appellant raped her. She testified that on the material date, while on her way to school at around 11:00 hrs, the appellant pulled her into the thicket and alleged that she stole his money. According to the victim, the appellant searched her in pretext of looking for alleged stolen money but later, he took off her clothes and he and then inserted his penis into her vagina. According to PW2, she was injured and felt pain in her private parts. This witness testified that after he had fulfilled his desire, the appellant threatened to kill her in case she disclose what befell onto her. According to PW2, she reported to her father who in turn rushed to the scene of crime and arrested the appellant. This court have considered the victim's testimony and convinced that she properly identified her assailant who is the appellant. Her evidence is in purview of the Court of Appeal decision in Tanzania ALEX S/O NDENDYA V THE REPUBLIC, CRIMINAL APPEAL NO. 340, CAT (Unreported) where the Court, while citing the case of SELEMANI MAKUMBA V.R [2006] TLR 379 held as follows: "True evidence of rape has to come from the

victim, if an adult; that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there Was penetration." Apart from PW2's evidence, the prosecution also paraded PW3 who is the victim's father. On his part PW3 testified that on the fateful date at around 11:00hrs, the victim followed him at kapfuha barrier to report that she was raped by Karimu. This witness said that following such information, he took the victim and one Alex to the river bank where the victim left her assailant, where the appellant was found and arrested. From the foregoing reasons this court is of the view that PW2's and PW3's evidence strengthened the prosecution's case and on that basis the 1st and 5th grounds of appeal are dismissed for want of merits. 7 On his part, the appellant alleged that there was weakness on the prosecution's case due to contradiction between the evidence adduced by PW1, PW2 and PW6. Having gone through the record this court is of the view that there is no such contradiction because the charge against the appellant is rape and all the necessary ingredients were proved by the victim. In the 5th additional ground of appeal, the appellant is alleging procedural irregularity during and after his arrest and this court considered this ground only to find it nothing but an afterthought because it was never raised during trial, and even at this stage he failed to describe the said procedural irregularity. Regarding 3rd additional ground of appeal alleging that voire dire test was improperly conducted, this court is of the view that voire dire test is no longer the requirement of law. What the child is required to do is to only promise to tell the truth and not lies. This is by virtue of section 127(2) of the Evidence Act [CAP 6 R.E 2022] which state as follows; "A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies," On that basis this ground is found unmerited. Regarding the appellant argument that, there was contradiction regarding the age of the victim as raised in the 3rd ground of appeal, this court went through the records only to find that the victim and her mother said that she was 7 8 years old while her father testified that she was 8 years old. The appellant tried to impress that the same is material contradiction. However this court does not agree with him. It is so because it is trite law that variance of the age of the victim in evidence is inconsequential. This position was stated in the case of ROBERT SANGANYA VS THE REPUBLIC, CRIMINAL APPEAL NO. 363 OF 2019 (CAT) that; "Notwithstanding the variance of the age in the evidence as claimed by the appellant, such variance was inconsequential." That being the legal position this ground is also unmerited. Regarding the 4th ground of appeal alleging failure to provide a proof on whether the victim was studying in the said primary school or not, this court is of the view that the same is unmerited because in rape cases such as the present one, the prosecution is required to prove the age of the victim, if there was penetration and the person responsible for rape. Regarding the 4th additional ground of appeal alleging failure of the trial magistrate to consider defence evidence, this court went through the copy of a typed judgment and noted that at page 10 the trial magistrate considered the appellant's evidence. On that basis this ground is also unmerited. From the foregoing observations, this court is of the view that the prosecutions proved its case beyond reasonable doubt and as such this appeal is without merits and it is hereby dismissed. The conviction and sentence passed by the trial court is upheld. Right of

appeal fully explained. It is so ordered. Judgment delivered in chamber under the seal of this court in the presence of Mr. Karimu Stephen the Appellant and in the presence of Ms. Gloria Rugeye Learned State Attorney for the Respondent. 10

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