IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 78 OF 2019

(Originating from RM's Court of Arusha at Arusha, Criminal case No. 60 of 2017)

LEONARD MKUMBO..... APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29/4/2021 & 28/6/2021

ROBERT, J:-

This is an appeal against the decision of the Resident Magistrates' Court of Arusha in Criminal Case No. 60 of 2017. The Appellant, Leonard Mkumbo, was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002. After a full trial, he was convicted and sentenced to life imprisonment. Aggrieved, he filed this appeal challenging the decision of the trial Court.

The prosecution alleged that the accused person (Appellant) did have unlawful carnal knowledge of a girl aged three years old on 3rd

February, 2017 at the village of Kikuletwa within the District of Arumeru in Arusha region. After a full trial in which five prosecution witnesses testified against the Appellant and the Appellant giving evidence on his own behalf, the trial court found the accused person guilty of the offence of rape Contrary to section 130 (1) (2) (e) and 131 (1) of Cap. 16 R.E 2002 and sentenced him to life imprisonment. Aggrieved, the Appellant filed this appeal armed with four grounds reproduced as follows:

1. *That, the Learned trial Magistrate erred in law and fact in not finding that the charge sheet which preferred against the appellant was defective.*
2. *That, the learned trial Magistrate erred in law and in fact for failing to notice the variance between the charge sheet and the evidence as regards the place where the place offence was committed.*
3. *That, the Learned trial Magistrate erred in law and in fact when he held that Pw1, Pw2, Pw3, Pw4 and Pw5 proved the prosecution case beyond reasonable doubt. The victim was not brought to court.*
4. *That, the Learned trial Magistrate erred in law and in fact by neglecting the Appellant's defence.*

At the hearing of this appeal, the Appellant was present in person without representation whereas Respondent was represented by Mr. Ahmed Hatibu, Learned State Attorney.

Having been invited to address the Court on his grounds of appeal the Appellant moved the Court to adopt his grounds of appeal as stated in the determination of the appeal.

Responding to the grounds of appeal, Mr. Hatibu stated at the outset that that the Republic is supporting both conviction and the sentence imposed by the trial Court. According to him, the Appellant was properly charged and convicted.

Responding on the first ground, he submitted that, there was no defect on the charge sheet filed against the Appellant. He maintained that section 130 (1) (2) (e) and 131 (1) of Cap 16 cited in the charge sheet were the right sections applicable for the offence committed by the Appellant. The cited sections establish the offence of statutory rape. Further to that, all particulars of the offence were properly indicated in the charge.

Having perused the trial court proceedings especially the charge sheet alleged to be defective, I am satisfied that the Appellant was properly charged. Since the victim of the alleged rape was 3 years old at the time of the alleged crime, sections 130 (1) (2) (e) and 131 (1) of the Penal Code were the proper sections applicable for the charged offence. Since the Appellant didn't specify what he considers to be defective in

the charge sheet or why he thinks the charge sheet was defective, it is difficult to guess the parameters of his argument on this ground. Accordingly, I find no merit on this ground.

On the 2nd ground, Mr. Hatibu, admitted that, there was no clear clarification as to where the alleged crime took place. While PW1 said the offence occurred at Mbuguni, Pw2 said it occurred at Kikuletwa. He maintained that, since the Appellant did not question the issue of place of crime at the trial court it should be taken that he understood well the place of the alleged crime. However, he argued that the said contradiction is curable under section 388 of the CPA. He cited the case of **Ally Ramadhan Shekindo and Another vs Republic**, criminal Appeal No. 532 of 2017, CAT, Arusha where appellants did not cross examine the witnesses on the place where the offence was committed during trial, the Court of Appeal held that it should be taken that they acquiesced to what was testified by the prosecution witnesses.

This Court is aware of the numerous decisions where the Court has been firm that minor contradictions, inconsistencies or discrepancies in the prosecution evidence cannot dismantle a case unless the alleged contradictions go to the root of the case.

In the cited case of **Ally Ramadhan Shekindo and Another vs The Republic** (supra) at page 15 it was held that;

> "We are aware that the appellants in the 3rd ground of appeal complained that the place where the offence was committed shown in the charge sheet (Majengo Mapya) is at variance with the place mentioned in evidence by Pw1 (Kwa Roja). Nevertheless, we think, as was rightly submitted by Ms. Silayo that except Pw1 who testified that the offence was committed at Kwa Roja, all other witnesses testified that it was at Majengo Mapya area as indicated in the charge sheet. But again, as the appellants did not cross examine the witnesses on that aspect, we think, they acquiesced to what was testified by the prosecution witnesses as was held in **Nyerere Nyangue** (supra) that a party who fails to cross examine the witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness has said. Therefore, as to the place where the offence was committed, it is certain that it was at Majengo Mapya area."

In the present case, PW1 and PW5 said they lived at Mbuguni while PW2 said he lived at Kikuletwa village. As submitted in the mentioned case above, the Appellant did not question Pw2 and Pw5 with regard to the issue of a place where the alleged crime was committed

which should be taken that he agreed to what was testified by the prosecution witnesses. He is therefore estopped from moving the court to disbelieve what the witness said.

The same was held in the case of **John Shini vs The Republic**, Criminal Appeal No. 573 of 2016 (Unreported) CAT at Shinyanga that,

> "It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."

On the basis of the reasons stated in this ground I find no merit in this ground of appeal.

Coming to the 3rd ground, the Appellant alleged that the victim was not brought before the court. Objecting this ground, the respondent's counsel stated that, the victim was a child of 3 years old, therefore it was difficult for the child to be brought before the court to testify. However, the prosecution proved their case since PW1 who was the eye witness testified what she saw on that day and her evidence was corroborated with that of PW2, Pw4, Pw5 and exhibit P1 which proved that the victim was raped. I therefore find no merit on this ground of appeal.

Lastly, the appellant alleged that his defence was not considered by the trial court.

Opposing this ground Mr. Hatibu said that, the trial court analysed the evidence and made a finding that the defence evidence did not raise any reasonable doubt.

Having gone through the trial court judgment, I am in agreement with Mr. Hatibu that the Appellant's evidence was considered at the trial court. At page 5, 4th paragraph of the trial court judgement, Hon. Magistrate stated that;

> *"The accused person in his defence told this court, this case to have been made out of malice from the parent (mom) of the victim, this court is very much aware that the duty of the accused is not to prove the case, but to raise a reasonable doubt as regard to his guiltiness, I will not consider the accused defence because it is an afterthought, Pw5 whom he claimed to indebted Tshs. 80,000/= came before this court to testify the accused never-cross examine her about the debt."*

The quoted paragraph proves how the trial Magistrate took the defence evidence into consideration but it failed to raise any reasonable doubt that would be interpreted in favour of the Appellant herein. For that reason I find no merit in this ground as well.

In the circumstances, this Court finds that the case against the Appellant was proved beyond reasonable doubt. As a consequence, I

find no grounds to warrant this Court's interference with the decision of the trial Court. In the end, I dismiss this appeal in its entirety.

It is so ordered.

K.N.ROBERT
JUDGE
28/6/2021