**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., NDIKA, J.A., And SEHEL, J.A.)**

**CRIMINAL APPEAL NO. 4 OF 2015**

**DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT**

**VERSUS**

**PETER KIBATALA.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Bongole, J.)**

**dated the 10th day of October, 2014**
**in**
**HC Criminal Appeal No. 101 of 2012**

.....

## JUDGMENT OF THE COURT

21st June & 9thJuly, 2019

**LILA, J.A.:**

In the Resident Magistrate's Court of Kisutu the respondent was charged with two counts of corrupt transactions contrary to section 15(1) of the Prevention and Combating of Corruption Act, No. 11 of 2007. At the conclusion of the prosecution case, the trial court was satisfied that no prima facie case was established and the respondent was accordingly discharged under section 230 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (The CPA). Aggrieved, the appellant unsuccessfully appealed to the High Court. Undaunted, the appellant preferred the present appeal.

The charge laid at the door of the respondent was free from any ambiguity. In the 1st count it was alleged that he being an advocate of the High Court and employed by one Rajesh Vohola, hence his agent, to defend him in Civil Case No. 33 of 2009 corruptly solicited payment of TZS. 7 Million from one Joseph Talaka Gambi as an inducement to forebear from raising objections and taking any legal action to delay the execution of a decree arising from the said case, a matter which is in relation to the principal's affairs. In the 2nd count, it was alleged that the respondent obtained TZS. 3.5 Million from Joseph Talaka Gambi (PW2 who is wrongly labeled as PW1 in the record of appeal) as part payment of the said TZS. 7 Million.

Before us, the appellant was represented by Mr. Apimaki Patrick Mabrouk who was assisted by Mr. Theophil Mutakyawa, both learned Senior State Attorneys, and the respondent had the services of Mr. Jeremia Mtobesya, learned advocate.

The evidence on record as was presented by five witnesses briefly indicated that the respondent was an advocate and was engaged by Mr. Rajesh Vohola (PW3) to defend him in Civil Case No. 33 of 2009 in which his rival was Mr. Joseph Talaka Gambi (PW2). The latter had initiated

execution process of the decree against PW3 and was issued by the court a summons to serve on PW3. According to PW2, the respondent demanded payment of TZS.7 Million from him. PW2 reported the matter to the Prevention and Combating of Corruption Bureau (PCCB) where he was issued with TZS.3.5 Million to be used as a trap. PW2 went to the respondent's office in the company of PCCB officers who remained outside. PW2 entered in the respondent's office and he gave the respondent TZS. 3.5 Million. No sooner had he done so, PCCB officers stormed into the office. The money was found in the respondent's brief case and at the PCCB's office it was counterchecked and found to be the trap given to PW2 by PCCB so as to catch the respondent. In both the evidence by PW2 and the cautioned statement (Exhibit P4) the respondent said out of TZS. 7 Million, TZS. 3 Million was for refunding PW3.

In her ruling on whether the respondent had a case to answer, the learned trial magistrate was satisfied that the respondent received the money. However, alive of the cardinal principle in criminal justice that the onus of proving the charge against the accused beyond reasonable doubts lies on the prosecution and after citing the case of **Wanyama vs R** [1975] 1 EA 120, she was satisfied that at the time the money was received there existed no principal – agent relationship between PW3 and the respondent

which was a crucial ingredient of the offences charged as enunciated in the case of **Issa Athumani Mduyah vs. R** [1983] TLR 336. She reasoned that PW3 had told the court that he was yet to engage the respondent to handle the summons that was served on the respondent by PW2 and that the TZS. 3 Million he paid to the respondent was in respect of the appeal and an application which was already dismissed. She also stated that even PW2 had said that the respondent told him that he was no longer representing PW3. She was of the view that there was no evidence from PW2 that TZS. 3.5 Million paid to the respondent was intended to induce the respondent to forebear from raising objections so as to delay execution of the decree. In the end she "discharged" the respondent in the following words:-

> *"It is from the above discussion I am of the opinion that there is no prima facie case established against the accused person and so the accused person has no case to answer and so he is hereby discharged under section 230 of the Criminal Procedure Act (Cap. 20 R. E. 2002)."*

In his appeal before the High Court, the appellant sought to fault the trial court's finding on no case to answer upon a five point memorandum of appeal. The grounds raised were:-

> *"1. That the learned trial magistrate erred in law and facts on holding that the prosecution failed to prove the existence of principal – agent relationship as an ingredient of the offence of corruption.*
>
> *2. That the learned trial magistrate erred in law and facts in holding that the respondent was not instructed to file an application or appeal by PW3 RAJESH BOHOLA.*
>
> *3. That the learned trial magistrate erred in law and facts on failing to consider the evidence in the respondent's confessional statement in which he confessed to solicit bribery from PW2 JOSEPH TALAKA GAMBI.*
>
> *4. That the learned trial magistrate erred in law and facts on failing to find that the money Tshs 3.5 million obtained by respondent from PW2 JOSEPH TALAKA GAMBI was bribery.*
>
> *5. That the learned trial magistrate erred in law on holding that prosecution failed to establish a prima facie case against the respondent."*

The High Court (Bongole, J.), at first, considered the propriety of the trial magistrate's order discharging the respondent under section 230 of the CPA after a finding of no case to answer and after reciting wholesome the testimony of PW3 whose evidence it found to be crucial in proving the prosecution case, had this to say:-

> *"The revelation from this piece of evidence is that the respondent had no any instruction from "P.3" to handle the new summons. Wherefore the allegation that there was principal – agent relationship is and was defeated. The trial court under the circumstances was justified to hold that the prosecution failed to prove the existence of principal – agent relationship as an ingredient of the offence of corruption. The finding of facts that no prima facie case had been established was therefore obvious as no court worth of the name could hold otherwise.*
>
> *As the prosecution failed to establish principal agent relationship between the respondent and "PW3" the rest of the allegations leveled against the respondent were mere sweeping statements."*

The learned first appellate judge, save for the alteration in the order made by the trial court that it should read that ***"the charge is dismissed and the accused is acquitted under S.230 of the Criminal***

***Procedure Act Cap. 20 R.E 2002",*** unreservedly concurred with the trial court's finding. He, too, was of the firm view that principal – agent relationship was not established between the respondent and PW3. He then proceeded to dismiss the appeal.

Being dissatisfied by the decision of the High Court, the appellant filed a memorandum comprised of four grounds as herein under;

1. *That, the Honourable High Court Judge erred in law in holding that the Prosecution failed to establish the Principle-Agent relationship between the Respondent and the third prosecution witness; one RAJESHI BOHORA as an ingredient of the offence of corruption.*
2. *That the Honourable High Court Judge erred in law for failure to take into consideration and properly address the contents of grounds number 2, 3, 4 and 5 by calling them a "mere sweeping statements".*
3. *That the Honourable High Court Judge erred in law for failure consider and properly evaluate the evidence in the respondent's confessional statement, which is the best evidence in law where he confessed to solicit bribery from the second*

*prosecution witness namely; one Joseph Talak Gambi.*

4. *That, the Honourable High Court Judge misdirected himself and totally failed to evaluate the prosecution evidence on record which clearly established a prima facie case against the respondent.*

At the hearing, Mr. Mabrouk opted to abandon ground 2 of appeal and argued the remaining grounds jointly. Arguing briefly in elaboration of the three grounds of appeal, he pressed that a case was made out for the respondent to enter a defence. He was emphatic that the evidence by PW3 and PW4 complimented with the respondent's cautioned statement in which he admitted receiving the money sufficiently established that there was principal - agent relationship between PW3 and the respondent hence a need for an explanation from him. He added that since the respondent admitted receiving the TZS 3.5 Million from PW2 before the respondent terminated his services with PW3 and in his statement claimed that he was paid the same as advocate's fee, the respondent ought to have resolved that contradiction by availing his defence. He insisted that the money was paid as an inducement so as not to delay execution.

Mr. Mabrouk also faulted both courts below for not making an order as to how exhibit P4 was to be disposed of. He urged the Court to order that the said exhibit be returned to the PCCB as it is clear that it was given to PW2 by PCCB. To buttress his assertions that the respondent had a case to answer, he cited the cases of **Rex vs. Jagjiwan M. Patel and Four Others** [1948] 1 TLR 85 and **Director of Public Prosecutions vs. Morgan Maliki**, Criminal Appeal No. 133 of 2013 (Unreported).

In his focused submission in opposition to the appeal, Mr. Mtobesya confined himself to the two issues on which Mr. Mabrouk centered his arguments. In respect of the principal – agent relationship between PW3 and the respondent, he said according to PW3 and the cautioned statement no such relationship was established. He insisted that at the time the respondent was given the TZS 3.5 Million he was no longer engaged by PW3 and therefore the two courts below were justified to make that finding. He said the respondent never admitted receiving such money as bribe. On the need for the Court to make an order that the money (Exhibit P.3) be returned to the PCCB, he fully supported that move, for, the respondent did not claim the money as being his but he said

he received it from PW2 as advocate's fee and as PW2 said he got it from PCCB then there is no harm if the same is returned to PCCB.

We must confess, after we have carefully gone through the evidence and the judgments of both courts below that we have found out that both the trial magistrate and the first appellate judge properly addressed themselves to the ingredients of the offences with which the respondent was charged.

In the instant matter the respondent was charged with the offence of corruptly soliciting and corruptly receiving TZS 3.5 million as an inducement to forebear raising objection in a case which act was in relation to his principal's affairs. The relevant section creating the offence provides that:-

> *"15.-(1) Any person who corruptly by himself or in conjunction with any other person-*
>
> *(a) Solicits, accepts or obtains, or attempts to obtain, from any person for himself or any other person, any advantage as an inducement to, or reward for, or otherwise on account of, any agent, whether or not such agent is the same person as such first mentioned person and whether the agent has or has no authority to do, or forbearing to do, or*

*having done or forborne to do, anything in relation to his principal's affairs or business."*

We have applied our minds to the above provisions of the law under which the respondent was charged. We fully agree with both courts below that, in order to sufficiently establish the offence of corruptly soliciting and receiving any advantage under the aforesaid section, one of the crucial ingredients of the offence which the prosecution must prove is the existence of principal - agent relationship.

Before we discuss the points raised in the memorandum of appeal and the counsel arguments, we think it will be instructive if we expound whether a principal – agent relationship exists between an advocate and his client. In this we are guided by the persuasive decision of the High Court of South Africa (Orange Free State Provincial Division) in the case of **Elizabeth Adriana Croucamp and Schoeman Maree Inc**, Case No. 4056/2006 in which the case of **Goodrich & Son vs. Auto Protection Insurance (Pty) Ltd** 1967 (2) SA 501 (W) at 503G-H was cited in which it was stated that:-

" *The services an attorney renders to his client are mainly ...those which an agent renders to his principal. Although the relationship between an attorney and his*

*client is of a very special character with certain aspects peculiar to itself, the legal principles which apply to that relationship are those of law of agency..."*

On the basis of the above principles, there is no doubt that engagement of an advocate to represent a person in court on a certain matter creates a principal – agent relationship between them and therefore their relationship is contractual. It therefore goes without saying that, the relationship being contractual, parties are bound by the terms and conditions stipulated in the agency agreement. Needless to say, unless an advocate is retained to represent the client in all matters present and subsequent, the advocate's mandate is restricted to a matter of engagement only.

We have shown in sufficient details that the prosecution relied heavily on the testimonies of PW2 and PW3 and the respondent's cautioned statement in an attempt to establish that principal – agent relationship existed between PW3 and the respondent. However read closely, nowhere in the cautioned statement the respondent admitted still being PW3's advocate at the time he was served with the summons, given the money and arrested in connection with the offences he was charged. In the circumstances that statement is not worth a confession. More so,

the testimony of PW2 falls far short of proving that relationship. It is clear in his evidence that he was not certain as to whether at the time he took the summons and the money to the respondent, the latter was still representing PW3. It is on record that when he met the respondent, this is what transpired:-

> *"He told me that the case was over with Rajesh and that if I give him money he will not do an application. He said that he was no longer Rajesh (sic) as the case with Rajesh was over. I am not a lawyer and so I could not understand well what he was saying. My desire was to see the end of my case. I did not ask him why he receive (sic) the summons if he was no longer for Rajesh. He said the case was with Rajesh was over and that is why we had gone to court two times without seing (sic) him."*

Worse still, PW3 told the trial court that he was yet to communicate with the respondent on served summons and agree on the fees to handle that summons. This is what he said, when he was cross–examined by the respondent:-

> *"I did not have a fixed abode here in Dar es Salaam and that is why I told Gambi to bring the summons to you. There was another lawyer before I engaged you. You*

*were supposed to talk to me and discuss and agree on fees to handle the new summons. I did not call you to instruct you to handle this summons.."*

In view of the above evidence, it is clear that the respondent was no longer acting for PW3. The summons served on the respondent required new engagement terms. That was yet to be done. Definitely, principal-agent relationship between PW3 was not in existence. In that regard we have found ourselves constrained to agree with the findings of both courts below that such crucial ingredient was not established.

We now turn to consider whether, in the circumstances, there was need for the respondent to enter his defence, that is to say, whether a *prima facie* case was made out to require the respondent defend himself. Mr. Mabrouk was emphatic that the case was sufficiently made out against the respondent to require him enter his defence. Mr. Mtobesya, for reasons above stated, was of a different view.

We wish to observe that the provisions of section 230 of the CPA are both conclusive and exclusive of any opposite interpretation. That section provides that:-

> *"230. If at the close of the prosecution evidence in support of the charge,* ***it appears to the court that a case is not made against the accused person sufficiently to require him to a defence*** *either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act,* ***he is liable to be convicted the court shall dismiss the charge and acquit the accused person.****"* (Emphasis added)

A natural and ordinary meaning makes it plain that, this being a criminal case, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt. What essentially the court looks at is prima facie evidence for the prosecution which unless controverted would be sufficient to establish the elements of the offence.

What is meant by *prima facie* case has been, with lucidity, elaborated and articulated in the case of **Ramanlal Trambaklal Bhatt v Republic** [1957] EA 332-335 where it was stated that:-

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt,* ***we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a***

***conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough****, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."*
(Emphasis added)

The above formulation was found by the Court to be good law in the case of **The Director of Public Prosecutions v Morgan Maliki and Another** (supra) cited by Mr. Mabrouk. That position to a large extent differs to that given in the case of **Rex v Jagjiwan M. Patel and Four Others** (supra) which held the view that a prima facie case is established even at the borderline where the court, though not satisfied as to the conclusiveness of the prosecution evidence, such evidence might possibly be thought sufficient.

We subscribe to the foregoing position by the Court and we add that it is not even the duty of the accused to fill in the gaps in the prosecution case. In the present case and on the evidence on record, calling upon the respondent to account on why he received the money if he was not representing PW3 or why he gave a different version as for what purpose the money he received was, as Mr. Mabrouk suggests, is tantamount to calling upon the respondent to assist the prosecution establish that the principal – agent relationship existed between him and PW3 which element the prosecution failed to do. To say the least that will amount to shifting the burden to the respondent.

In view of the above finding, we are constrained to agree with both courts below that a prima facie case was not made out against the respondent and the trial court was justified to dismiss the charge and acquit the respondent. The High Court, cannot also be faulted for concurring with the trial court.

Now turning to the pertinent issue raised by Mr. Mabrouk that both courts below made no order for disposal of the TZS. 3.5 Million, we, like Mr. Mtobesya, entirely agree that such an order is lacking. Of course it needs no over-emphasis that it was important for the trial court to make

such an order after it terminated the trial for no case to answer as the money was already a court's exhibit. That duty is cast on the court in terms of section 353 of the CPA. In terms of the provisions of section 353(3) the court is vested with powers to return anything, at any stage of the proceedings or at any time after the final disposal of such proceedings, to the person who appears to be entitled thereto. Mr. Mabrouk referred us to the case of **Magoiga Mnanka v The Republic**, Criminal Appeal No. 105 of 1988 (unreported). As it is clear from both the submissions of both sides and the evidence on record that it is not in dispute that PW3 got the TZS. 3.5 Million he gave the respondent from the PCCB and the respondent has no claims over it, we hereby order the same be returned to the PCCB.

All said, and save for the disposal order, the appeal is hereby dismissed in its entirety.

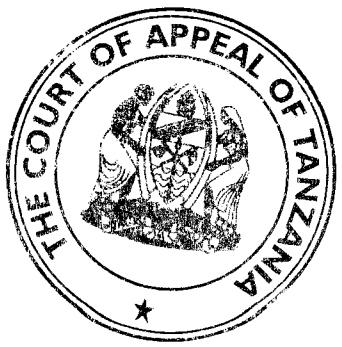
**DATED** at **DAR ES SALAAM** this 4th day of July, 2019.

S. A. LILA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.




B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**