IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: WAMBALI, J.A, SEHEL, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 217 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

PHILIPO JOSEPH NTONDA.....RESPONDENT

(Appeal from the decision of the High Court of Zanzibar sitting at Chake Chake, Pemba)
(Sepetu, J.)

dated the 19th day of March, 2020
in
Criminal Case No. 04 of 2017

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JUDGMENT OF THE COURT

23rd November, & 1st December, 2021

SEHEL, J.A.:

This is an appeal by the Director of Public Prosecutions against the decision of the High Court of Zanzibar sitting at Chake Chake, Pemba (the High Court) which, after the prosecution closed its case, found the respondent not guilty on account that a prima facie case was not made out by the appellant to require him to give his evidence.

Briefly, the respondent was arraigned before the High Court of Zanzibar with two counts. In the first count, the appellant was alleged to have solicited benefit corruptly contrary to sections 36 (3) (a) and 61 of the Zanzibar Anti-Corruption and Economic Crimes Act, No. 1 of 2012, of the Law of Zanzibar (henceforth the ZACECA). It was particularized that on 23rd February, 2017, at or about 12:00 hours at Jamhuri Garden, within Urban District in Urban West Region of Unguja, the respondent corruptly solicited TZS. 2,500,000.00 from Khadija Salum Suleiman who testified as PW3 (hereinafter we shall be referring to her as PW3). The money was for the purpose of helping her to secure an employment in the office of Wete Town Council where she was an applicant.

In the second count, he was alleged to have received benefit corruptly contrary to sections 36 (3) (a) and 61 of the ZACECA. The particulars of offence were such that; on the 28th day of February, 2017, at or about 2:30 p.m. at Misufini area within Chake Chake District and Southern Region of Pemba, he corruptly received TZS. 290,000.00 from PW3 as consideration in helping her to secure an employment in the office of Wete Town Council where she was an applicant.

The respondent pleaded not guilty to both counts. In that regard, the case proceeded to trial whereby the appellant called a total of five witnesses who were Mohamed Juma Makame (PW1), the uncle of PW3 whom according to the evidence, he handed over the trap money to the respondent while they were in Pemba and Zaidu Abdi Mbwana (PW2) said that he witnessed the respondent receiving the money but then he dropped it down. Two investigative officers from Zanzibar Anti – Corruption and Economic Crimes Agency (ZAECA), Kombo Shaame (PW4) and Gharib Mussa Hassan (PW5) set the trap and arrested the respondent. The two also testified before the trial court. The prosecution case was also built upon three exhibits, namely, 29 bank notes of TZS. 10,000.00 (the trap money) and the trap form (collectively admitted as exhibit P1), a letter dated 24th February, 2017 addressed to the Government Security Offices requesting for PW3 and another person to be vetted before being offered a job at Wete Town Council (exhibit P2) and a list of shortlisted candidates invited for interview (exhibit P3).

As stated earlier on, at the conclusion of the prosecution evidence, the learned trial Judge made a finding that a prima facie case was not

made out by the appellant to require the respondent to give his evidence. This is what he ruled: -

> *"... the duty lies with the prosecution side through five witnesses to prove to the court that the accused solicited and received corruptly, as alleged. Prosecution side managed to submit five witnesses to prove the offence committed by the accused. The court is of the view that PW3 is ... the source of the event... against the accused person. PW3 did not specifically disclose the situation that causing offences (sic.). Jurisdiction of the offence committed is also part and parcel to the commission of offence...Accordingly, the prosecution side failed to establish the reasons even the acts happened in different jurisdiction.*
>
> *Furthermore, there is no evidence showing that existence of intention from the accused to commit the offence, and as there is no evidence that there had been any legal agreement or promise between PW3 and the accused on how helping (sic.) her to secure*

employment in the office of Wete Town Council where PW3 was an applicant. Under these circumstances, this court views that the evidence on record does not prove ingredients of the offences against the accused person...therefore a prima facie case has not been established against the accused person."

Accordingly, he was found not guilty and discharged. Dissatisfied by that ruling, the appellant has brought this appeal advancing four grounds of appeal as hereunder: -

1. *That, the learned trial Judge erred in law by considering prosecution evidence produced unable to establish ingredients of the offences the accused was charged with.*
2. *That, the trial Judge erred in law by ruling out that the respondent was charged in a wrongful jurisdiction.*
3. *That, the trial Judge erred in law by failing to analyse properly the evidence adduced before him by prosecution side.*
4. *That, the trial Judge erred in law by delivering a ruling which does not fulfil the requirements of the law."*

At the hearing of the appeal, Mr. Ali Haidar Mohamed, learned Principal State Attorney assisted by Mr. Seif Mohamed Khamis and Ms. Ilham Sultan Malik, both learned Senior State Attorneys, appeared for the appellant. The respondent had the legal services of Mluge Karoli Fabian, learned counsel from MK Law Chambers.

After taking the floor to submit on the appeal, Mr. Mohamed chose to combine the first and third grounds of appeal into one ground, that is, whether it was proper for the High Court, given the evidence on record, to rule that the respondent had no case to answer. The second ground of appeal was argued separately while the fourth ground of appeal was abandoned.

Submitting on the ground that the learned trial Judge erred in holding that the respondent had no case to answer, Mr. Mohamed faulted the trial Judge on his failure to properly direct his mind on the law regarding *prima facie case* and the evidence that was placed before him. He submitted that, if he had properly directed his mind to the evidence of the five prosecution witnesses, he would have realized that the prosecution managed to sufficiently establish the ingredients of soliciting and receiving

benefit corruptly to justify the respondent to put up his defence. The learned Principal State Attorney elaborated that PW3 and exhibit P2 established the offence of soliciting. In particular, he argued, PW3 told the trial court that she was phoned by the respondent and they agreed to meet. That, they met in Unguja where the respondent bargained with PW3 on the amount to be paid so that she could secure employment at the respondent's office. He contended that exhibit P2 had the name of PW3 thus made PW3 to believe that the respondent was in a position to decide as to whom should have been offered the job.

For the offence of receiving benefit corruptly, Mr. Mohamed invited the Court to consider the prosecution evidence of PW1, PW3 and PW4 where they told the trial court that the envelope containing 29 notes of TZS. 10,000.00 was handed over to the respondent which upon receipt, he dropped it on the ground and thereafter he was arrested by ZACECA officials. As to what *prima facie case* means, he referred the Court to the decision of the defunct Court of Appeal for East Africa in **Ramanlal Trambaklal Bhatt v. R** [1957] E.A. 332 which originated in Tanzania.

On the complaint relating to the jurisdiction of the High Court, Mr. Mohamed argued that in terms of section 73 of the ZACECA, the High Court has original jurisdiction to try all offences falling under that Act. Besides, he submitted that the learned trial Judge was not specific in his ruling as to how the trial court did not have jurisdiction. Nonetheless, he submitted, section 93 of the Constitution of Zanzibar of 1984 as amended (the Constitution) established the High Court and conferred it with unlimited jurisdiction to try and determine any civil or criminal case within Zanzibar. He added that section 93 of the Constitution has to be read in conjunction with section 3 (1) (a) of the High Court Act No. 2 of 1985 and section 80 of the Criminal Procedure Act No. 7 of 2018 of the Law of Zanzibar (henceforth the CPA) that conferred the High Court with unlimited jurisdiction to hear and determine any civil or criminal proceedings within Zanzibar, that is, within Unguja and Pemba. In that respect, he argued that it was proper for the High Court sitting in Pemba to try the offence committed in Unguja. He did not end up there. He added that for convenience purpose since the place of domicile of the respondent was in Pemba and the evidence was also in Pemba, it was just for the High Court

to try and determine the offence of soliciting benefit corruptly committed in Unguja together with the offence of receiving benefit corruptly committed in Pemba. At the end, he urged the Court to exercise its general powers specified under Rule 38 of the Tanzania Court of Appeal Rules, 2009 as amended by reversing the decision of the High Court and remit the case to the High Court with the directions to proceed with the trial of the respondent.

Mr. Fabian strongly opposed the appeal. Responding on the submission that the two offences were sufficiently established by the prosecution to require the respondent to put up his defence, he argued that the charge sheet was defective because it lacked information on a key ingredient of the agent – principal relationship. He contended that for the two offences of soliciting and receiving to be sufficiently established, the prosecution ought to have led evidence that the respondent was acting as an agent of his principal, Wete Town Council. He contended that none of the five prosecution witnesses managed to establish it and neither was there any evidence that the respondent had powers and authority in a decision-making process concerning recruitment of employees in the Wete

Town Council. In the whole, Mr. Fabian supported the learned trial Judge's proposition that the proper charge ought to have in respect of obtaining money by false pretence or cheating.

Connecting the above argument with the second complaint on the jurisdiction of the High Court, Mr. Fabian argued that the High Court had no jurisdiction to try the offence of obtaining money by false pretence. He submitted that since there was no proof on the agent - principal relationship, the prosecution ought to have arraigned the respondent in the subordinate courts with the offence of cheating or obtaining money by false pretence. At the end, he urged the Court to dismiss the appeal.

Mr. Khamis reiterated the earlier submission on the prima facie case and jurisdiction of the High Court, in rejoinder. He added that during the preliminary hearing, the respondent did not dispute the fact that in February, 2017 he was the Director of Wete Town Council as evidenced by a memorandum of agreed matters signed by both parties which is found at page 137 of the record of appeal. Therefore, he contended that the appellant managed to prove that the respondent, while he was soliciting

and receiving money, he was a Director of Wete Town Council hence squarely fitting within the ambit of agent and principal relationship.

Having heard the competing arguments by counsel for the parties, we now proceed to make our determination. We shall start with the complaint that the High Court erred when it held that the respondent had no case to answer, that is, it erred in ruling that there was no *prima facie* case established against the respondent to require him to enter his defence.

In any criminal trial, at the closure of the prosecution case, be it at the subordinate courts or the High Court, the trial court is required to consider the evidence and make a finding as to whether the prosecution had sufficiently made out a case against the accused person to require him to mount his defence. If a *prima facie* case is not made out, the trial court is enjoined to find that the accused is not guilty.

That procedure for trials before subordinate courts and the High Court in Zanzibar, is provided under sections 215 and 263 (1) of the CPA respectively. Since in this appeal we are dealing with an accused person

who stood trial before the High Court, our discussion will focus on section 263 (1) of the CPA which provides: -

> *"263- (1) When the evidence of the witnesses for the prosecution has been concluded, the court if it considers, after hearing the advocates for the prosecution and for the defence, that* ***there is no evidence that the accused*** *or any one of several accused* ***committed the offence,*** *shall record a finding of not guilty." (Emphasis is added)*

The underlying principle which we derive from the above provision of the law is that after the prosecution had closed its case, the law requires the trial judge, to determine whether the evidence adduced by the prosecution witnesses sufficiently established the charged offence which could have warranted the conviction of the accused person, in case he does not put up his defence. It is to be noted that the law uses the words "*there was no evidence that the accused committed the offence.*" But to our understanding such words do not mean that "*no evidence at all*" but rather "*no evidence on which a reasonable court, properly directing its mind, could convict the accused person.*"

And here we wish to reiterate what was said in the case of **Ramanlal Trambaklal Bhatt** (supra) where at page 335, the defunct Court of Appeal for Eastern Africa said: -

> *"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 dose 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 is added)

The above position was followed by the Court in the case of **The Director of Public Prosecutions v. Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 (unreported) when discussing section 230 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) that deals with the rights of an accused person who stands trial before the subordinate courts. It held:

> *"So, on the principles set out in **BHATT's** and **MURIMI's** cases, we think that a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged or kindred cognate minor one. Which means that at this stage, the prosecution is expected to have proved all the ingredients of the offence or minor, cognate one thereto, beyond reasonable doubt. If there is any gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof."*

In this appeal, although the learned trial Judge appreciated the general rule that the prosecution bears the legal onus of proving its case beyond reasonable doubt, he evidently failed to appreciate the limitation of

the inquiry into a prima facie case. We find that the learned trial Judge went above of what was required of him in assessing as to whether the prosecution had sufficiently established a case to answer or not. He discussed the credibility of witnesses when he said "*PW3 did not specifically disclose the situation that causing offences*". He also erred when he assessed the weight of the prosecution evidence when he said "*there was no evidence that there had been any legal agreement or promise between PW3 and the accused...*". The issue of credibility and weight are matters that ought to be determined at the end of the trial but not at the stage of determining whether an accused has a case to answer. In the light of the position of the law and pursuant to section 263 (1) of the CPA, we hold that the trial judge erred in ruling that there was no case to answer against the accused person on either count.

Without going into the detailed evaluation of evidence, we are settled in our mind that considering the evidence of the five prosecution witnesses one cannot deny that the evidence led by the prosecution established a *prima facie* case against the respondent in relation to the two counts which he was charged. Whether such prosecution evidence proved the charged

offences against the respondent beyond reasonable doubt is a matter to be considered and determined at the end of the trial. We therefore entirely agree with the learned Principal State Attorney that the prosecution did make out a case to answer against the respondent on both counts of soliciting benefit corruptly contrary to sections 36 (3) (a) and 61 of the ZACECA and receiving benefit corruptly contrary to sections 36 (3) (a) and 61 of ZACECA. We do not agree with the submission of Mr. Fabian because we find that his argument is more suited at the end of the trial. Accordingly, we find that the first and third grounds of appeal have merit.

Another complaint raised by the appellant related to the jurisdiction of the High Court. On this, we fully agree with the submission made by the learned Principal State Attorney that pursuant to the provisions of section 73 of ZACECA, all offences falling under that Act are triable by the High Court. Consequently, since the respondent was charged with soliciting benefit corruptly contrary to sections 36 (3) (a) and 61 of the ZACECA and receiving benefit corruptly contrary to sections 36 (3) (a) and 61 of ZACECA, the High Court had jurisdiction to try him. This ground of appeal also has merit.

In the end, we allow the appeal. We quash the ruling and set aside the discharge order and substitute it with an order that the respondent had a case to answer. We remit the record in Criminal Case No. 4 of 2017 to the High Court to continue with the trial of the respondent for him to be explained his rights of mounting his defence in accordance with the provisions of section 263 (2) and (3) of the CPA.

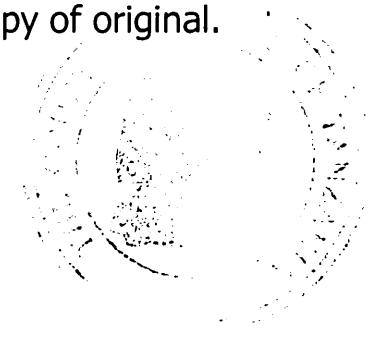
DATED at **ZANZIBAR** this 30th day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Judgment delivered this 1st day of December, 2021 in the presence of Ms. Ilham Sultan Maliki, learned Senior State Attorney assisted by Mr. Ahmed Mohamed Abdulrahman, learned State Attorney, for the appellant and respondent presence in person, is hereby certified as a true copy of original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL