IN THE HIGH COURT OF TANZANIA

AT IRINGA

CRIMINAL APPEAL NO. 45 OF 2009

[From the District Court of Njombe at Njombe,
Criminal Case No. 108 of 2008]

TUMAINI D/O MFUGALE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MKUYE,J

The above appellant Tumaini Mfugale was charged in the District Court of Njombe at Njombe for the offence of corrupt transaction c/s 15(1) (a) of the Prevention and Combating of Corruption Act, No. 11 of 2007. The appellant was found guilty of the offence, convicted and ordered to pay fine of Tshs. 500,000/= or to serve a sentence of 5 years imprisonment. She paid the fine. Convinced of her innocence, she has lodged her appeal to this court on the grounds that: **one**, the trial court erred in law and fact in holding that the offence of soliciting bribe has been established beyond reasonable doubt; **two,** the trial court erred in law and fact in convicting the appellant despite

discrepancies between charge sheet and the evidence as regards the date when the offence was allegedly committed and also inconsistency between PW1 and PW5 as to the amount alleged to have been solicited. **Three**, the trial court misdirected itself in law and in fact in holding that at the school on the material day there were two separate gatherings i.e. the one involving about 19 teachers including PW1, PW3 and PW6 in the staff room and another involving 5 teachers, including PW1 and PW6 in the head the teacher's office (where bribe was allegedly solicited) and further that such fact (of two gatherings) was corroborated by DW6; **four,** the trial court misdirected itself in law as to the burden and standard of proof in criminal cases; **five**, that on the totality of circumstances of this case the trial court erred in fact in not holding that the whole episode of soliciting bribe was a sheer concoction by PW1 in conjunction with PW5 and (unfortunately) PCCB officers in order to save PW1 from looming rape charges.

It appears that in convicting the appellant the trial magistrate based on the testimony of PW1 in that the taking of his (PW1) phone was tantamount to solicitation of bribe. The rest of the prosecutions' witnesses only supported the PW1's testimony.

Briefly, the facts of the case are that Rehema Mkagila (PW3) a student at Kilimani Primary School was suspected to be with unbecoming behaviour at her school which involved also Amani Mgaya (PW1). She was then summoned by her teachers

and on being questioned she divulged that she had an affair with PW1. On the 1st day of October, 2007, PW1 was called by the teachers to appear before them. Upon inquiring about the allegations, PW1 admitted although under pressure. The PW1's phone was left with the teachers which according to PW1 it was part of appellant's solicitation to get bribe. However, the appellant testified that it was PW1 who proposed to leave his phone as his assurance that he would come back with letters involving Rehema Mkagila which he was asked to bring. PW1 allegedly went home to look for the said solicited amount of money as required by the teachers and on the 02nd day of October 2007 he decided to report the matter to PCCB who gave him trap money, but the trap proved futile. The teachers had reported the matter to the police on the 2nd day of October, 2007 as per the testimony of DW1, DW5, DW6 and DW8.

In this appeal Mr. E.O. Mbogoro, learned advocate appeared for the appellant, while the respondent, Republic was represented by Mr. Faraja Msuya, learned State Attorney. The appeal was argued by way of written submissions following an order of this court dated 13/4/2012.

The lengthy submission by the appellant attack the trial court's findings in trying to establish that the offence against the appellant was not proved beyond all reasonable doubts and in doing so the appellant's counsel tried to show those points in respect of each ground of appeal.

First is on the issue that the prosecution's side failed to establish who exactly solicited the alleged bribe as PW1 talked of "they" (meaning more than one person) instead of pointing to the appellant as the person who demanded or solicited the alleged bribe. He argued further that the appellant had reported the incident to the police and hence, it went contrary to the PW1's allegations because if there was such an arrangement then the appellant could not have reported the alleged incident because she had expected to get that money. The learned counsel contented further that it was PW1 himself who proposed to leave the alleged phone so that he can go home to search for the alleged letters (paragraph 3 of page 13 of the typed judgment).

The reply by the Respondent is that, they concede with the appellant's concern in the sense that it is not clear as to who actually solicited the alleged bribe due to the number of the said teachers who were in the room. The respondent also wondered as to how the appellant was even arraigned before the trial court and the trial magistrate went on entertaining the case to its end while even PW1 did not mention the name of a person who actually solicited bribery from him. This alone was and still is enough to cripple the prosecution case. Thus the case against the appellant was not proved.

Looking at the generality of the prosecution case and the defence it is undisputed that PW1's phone was left in possession of the teachers and lastly the chairperson of the school board and it is from this point where the whole prosecution's case centres.

There are lengthy of authorities on the clear position that, it is the duty of the prosecution to prove its case and the standard is beyond all reasonable doubts. The prosecution case stands on the action of appellant of leaving the said phone as a solicitation of the alleged bribe by "**those people**". It is a common knowledge that the standard of proof in all criminal cases is to the same standard. Be it to direct evidence or circumstantial evidence; that the burden is always on the prosecution to prove its case beyond all reasonable doubts. See the case of **Yustas Katoma V. Republic, Criminal Appeal No. 242 of 2006, Court of Appeal, at Mbeya.** (Unreported).

It has been held in times without number that circumstantial evidence may be not only as conclusive as, but even more conclusive than, the evidence of an eye-witness or direct. On top of that the circumstantial evidence can be used to base the conviction of an accused person/appellant provided that the circumstantial evidence must lead to the irresistible conclusion that the appellant's action amounts to solicitation. If there is an alternative which can with reasonable probability account for such a situation, this excludes certainty which is required to justify a verdict of guilty.

The alleged trick by the PCCB and PW1 failed to take those teachers on board. On the other hand the said teachers managed to report the alleged incident to the police, which signifies something of moral concern on the side of the teachers. The fact that the alleged phone was left with those teachers can have several explanations or accord different stories or

justifications and therefore those doubts are to taken to the advantage or in favour of the appellant. In the first place, it is quite unclear as to who, amongst the said teachers, actually demanded the alleged bribe and later on proposed that PW1 should leave his phone until he brings the money. None was mentioned for that matter. It is on record through (DW1 and DW2's testimony) that, it was PW1 himself who had proposed to leave his phone to the teachers as his assurance of coming back after he had been told to go back home and fetch the letter written to Rehema Mkagila but snatched from Jackson Mkagila according to his admission before the teachers.

The fact that there is no direct evidence pointing to the appellant regarding such solicitation as PW1 testified that "... they want to punish me by paying them 155,000/=..." it is unsafe to find the appellant guilty on the offence charged and I totally agree with learned State Attorney that this alone was and still is enough to cripple the prosecution case as I am about to find so.

How can it be said that there was solicitation while the trick which was set up to apprehend the appellant failed. To whom exactly the said bribe was taken/was to be presented. On the other hand the appellant took necessary steps of reporting the matter to police. Had it been that the appellant failed to report or fell into the said trap it could have been properly said that the appellant did solicit for that bribe and was eager to get it. It is not clear as to how the said teacher came to detect about the alleged trap which was set by the PCCB in order to confirm the offence, because if it was in their intentions or in the appellant's

intention she could have fell into the trap and confirm the PW1's allegations. Were PW1's allegation one of his tricks to distort his charge of rape in the manner the efforts to send the victim to hospital were spoiled. The teachers could have been justified by their action of remaining with the alleged phone, as one of their efforts to be sure of that allegation before subjecting their student (minor) into such a humiliation which could have spoiled her education if it could afterwards turn out to be false allegations. These are some of the doubts which can be reasonably be entertained from the evidence on record which are in favour of the appellant.

In the upshot and for the above detailed reason, the appeal before me has merits and I find that this ground of appeal alone disposes of the whole appeal without going into the merits of the remaining grounds. I therefore find that the offence was not proved beyond reasonable doubts and I hereby quash the conviction and set aside the fine sentence of shs. 500,000/= imposed to the appellant and order that the said amount be refunded to her forthwith.

Ordered accordingly.

R.K.MKUYE

JUDGE

24/10/2012