IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 101 OF 2012

(Original Criminal Case No 189/ 2010 In the Resident Magistrate's Court of Dar es Salaam at Kisutu)

THE DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

PETER KIBATALA.....RESPONDENT

JUDGMENT

Date of Last Order: 12/9/2014
Date of Judgment: 10/10/2014

Bongole,J

The abbreviated facts of this appeal are that the Respondent PETER KIBATALA was charged before the RM's Court of Dar es Salaam at Kisutu in Criminal Case No 189/2010. Two counts were preferred against him to wit:-

1st Count: Corrupt Transaction Contrary to S.15(1) of the Prevention and Combating of Corruption Act No 11 of 2007. The particulars were that the respondent between the 22nd day of August

2010 and the 1st day of September, 2010 at Trust Mark Attorneys Premises located within Ilala Municipal, Dar es Salaam Region being an Advocate of the High Court of Tanzania and Courts subordinate thereto save for Primary Courts, hence being an officer of the court and also being employed by RAJESH VOHOLA in a contract for employment as an Advocate to defend him (RAJESH VOHOLA) as defendant in a Civil Case Number 33 of 2009 hence the respondent being an agent of the later, did corruptly solicit the sum of Tanzania Shillings 7,000,000/= (Seven Million Shillings) from one JOSEPH TALAKA GAMBI as an Inducement to forebear from raising objections and taking any other legal action to delay the execution of a Decree arising from the herein above mentioned civil case with a creditable amount of Tshs. 24,000,000/= a matter which is in relation to the accused person Principal's Affairs.

Second Count: Corrupt Transaction Contrary to Section 15(1) of the Prevention and Combating of corruption Act No 11 of 2007. The particulars were that on the 1st day of September 2010 in the same place, holding the same position as stated in the 1st count, did corruptly obtain the sum of Tanzania Shillings 3,500,000/= from one Joseph Talaka Gambi as an Inducement to forebear from raising objections and taking any other legal action to delay the execution of a decree arising from Civil Case No 33 of 2009 with the creditable amount of Tshs. 24,000,000/= a matter which was in relation to the accused/respondent person Principal Affairs.

The prosecution case commenced where 4 witnesses testified where the prosecution closed their case.

Subsequently, the trial court ruled out that the evidence adduced in support of the prosecution case did not establish a prima facie case against the respondent, and hence the respondent was discharged under S.230 of the CPA Cap. 20 R.E 2002.

The DPP was aggrieved by the said discharge order hence this appeal. Before this court, the DPP is armed with (5) five grounds of Appeal to wit:-

1. That the learned trial magistrate erred both in law and fact by 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 on holding that the respondent was not instructed to file an application or appeal by PW.3 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 PW.2 JOSEPH TALAK 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 the respondent from PW.2 JOSEPH TALAKA GAMBI was bribery.

5. That the learned trial magistrate erred in law on holding that the prosecution failed to established a prima facie case against the respondent.

The DPP prays before this court to quash the discharge of the respondent and substitute thereof with an order for the case to be heard on merits.

In this appeal, Mr. Mutakyawa and Lucy Diganyick State Attorneys appeared for the Republic and Mr Stevin Urassa learned Advocate appeared for the respondent.

With the permission of the court, parties filed written submissions in disposing the appeal.

I owe gratitude beyond measure to the learned State Attorney and Counsel for their submission they presented.

With due respect to the learned State Attorneys and Counsel, both overlooked at the Impugned decision (Ruling) of the trial court and in particular the last paragraph of the order. For clarity the said paragraph reads. I quote.

"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).

Sign. R.G. Tarimo SRM

20/10/2011"

To say that both parties overlooked the trial court decision, it will be plain when one glances on the law i.e S.230 of the Criminal Procedure Act (Supra). It provides:-

> *"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, either in relation to any other offence of which under the provisions of S.300 to 309 of this Act; he is liable to be convicted the court shall dismiss the charge and acquit the accused person"*

As it appears above, the trial court discharged the respondent/Accused insteady of dismissing the charge and acquitting him. I find it as a matter of procedural law to invite the learned State Attorney and Counsel to address the court on the effect of the "*discharge"* order. I did so to be in line with the ancient maxim that goes *"hear him first and hang him laiter as opposed to hand him first and hear him laiter"*

It is the argument by the State Attorneys that in our jurisprudence, discharge of an accused person has been construed to mean release of the accused from Criminal liability but such release does not operate as bar for subsequent arrest and or prosecution of the said accused on the same offence (s). With exception of section

38 of the Penal code Cap. 16 R.E 2002, and normally, a discharge order is given where a case is not concluded on merit. Reference is made to sections 222 as amended by Act No 3 of 2011 and S.225 (5) of the Criminal Procedure Act. They cited the case of **R.Vs. TWALIB UMBWA (2005) TLR 420** in support of the prepositions.

They added that the impugned order was made under section 230 of the Criminal Procedure Act. That the trial magistrate properly cited the provision on finding that there was no prima facie case established against the accused person. That by citing S.230 of the CPA, the magistrate intended to acquit the accused not to discharge him as it appears in the order.

They went on arguing that the use of the phrase *"he is hereby discharged"* in the order of the trial magistrate is an error which did not occasion failure of justice and it is curable under S.388 of the CPA. They invited this court at this stage to resort to equity principles by treating the discharge order as if it was an acquittal. Cementing their argument, they took me to the case of **MUSA MOHAMED VS. REPUBLIC Criminal Appeal No 86 of 2005** CAT at Mtwara (unreported) where the CAT had this to say "*This court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity*" . *"Equity treats as done that which ought to have done"*

That what the trial magistrate intended in his order was to acquit the accused and not to discharge him.

Responding to this court order on the point raised, it was the Respondent's argument that the error that appears in the trial court's ruling is an error of description rather than one of substance. That it is so because the proceedings that culminated in the said ruling can be placed under the ambits of section 230 of the Criminal Procedure Act; save for the court's employing for the phrase "*discharge*" instead of "*Acquittal*". That the said ruling of the court is clear in that it emanates from a finding of a No case to answer within the provisions of Section 230 of the CPA, which provision was duly cited.

He added that the error of description contained in the use of the term "*discharge*" as opposed to "*acquit*" is remediable under the provisions of Section 366(1) (c) when read together with section 29(1) (a) and (c) of the Magistrate's Court Act. That this court may amend the legal phrase "discharge" used erroneously by the trial court and replace it with the proper phrase "*Acquit*" and proceed to determine the appeal.

I am thankfull that both parties appreciate that the trial court erred in employing the legal phrase "*discharge*" and the order made was not within the ambits and concomitant with the provisions of S.230 of the Criminal Procedure Act Cap. 20 R.E 2002.

My regret of correcting the error made by the trial court by ordering a re-trial is however tempered by the fact that both parties in this appeal are in consensor that the said error is remediable by amending it/substituting it to connotes its legal effect as per the

requirements of S.230 of the Criminal Procedure Act. I do not have any reason(s) to decline from conceeding to their observation. Under the circumstances I would invoke Equity and treat as ought to have been done by deleting the phrase "*discharge*" as it appears in the trial court ruling and substitute it with a phrase "*acquittal*". Wherefore, the order should read..." ***the charge is dismissed and the accused is acquitted under S.230 of the Criminal Procedure Act Cap. 20 R.E 2002".***

As the appeal stands, it would require labourers from Sysphous to persued me to agree with Mr Mutakyawa S.A that the evidence that was before the trial court established a prima facie case against the accused/the respondent. My position and finding is absoletely backed by the testimony of "*PW.3*" RAJESH BOHORA which I find to be the solvent of the whole saga. For avoidance of doubt, I find it pertinent to reproduce it hereunder:-

"PW.3 – XD by Pross"

My name is Rajesh Bohora. I have been in Tanzania for a long time. I was born in Nairobi Kenya and schooled in London. My parents however, stay in Tanzania we have a residential house at Masaki Dar es Salaam. I knew the accused person before this court. I came to know him in the year 2009. I know him when I was in legal dispute with another person. I have a lawyer in Arusha but since this matter was in Dar es Salaam I was introduced to Dr. Lamwai (Advocate) who then introduced me to the accused person, I do not

know why Dr. Lamwai decided to introduce me to the accused person. I discussed with Mr. Kibatala (the accused) the possibility of having the case start afresh as the other lawyer had consented to things I did not agree and the matter was finalized against me. I just wanted to see if anything could be done to help me get my right. It was instituted in Ilala District Court but I can not re-call the exact number of the case. I was the defendant in this case. Having discussed with the accused he said he will try to make an application to the same court or appeal to the High Court and I paid him the money for it. I can not remember the money but I think it was 3,000,000/=. I first paid him 2,000,000/= and later, 1,000,000/= Tshs. This matter has now been settled and I have already paid the plaintiff. Up to April or May last year I had contact with Mr Kibatala.

Later in September, I saw the matter in a newspaper and Mr. Kibatala (the accused) told me that when we meet he shall tell me. The matter has been settled six months age. I can not re-call well but it is between 5-6 months ago. It is my family which got involved in the matter as I am always on safari. I remember sometimes last years Mr. Gambi called me and said that he has a summons to serve. I received the call when I was in Mtwara I told him to serve the summons to Kibatala (the accused) I never called the accused or spoke to him. I was negligent as I was supposed to communicate with the accused after I had directed Gambi to give him the summons. The accused also did not inform of any summons.

We were always in communication with Mr. Gambi. My family has been doing these payments and so I can not recall when was the last payment done.

That all.

XXD by the accused:

The court had entered a consent judgment against my knowledge and so I wanted you to help me to apply for a review. Our contract was on appeal or application only.

That is what I instructed you. We however had conversation with Mr. Gambi regularly. The flat at Masaki has been bought this year and so before I had been sleeping in hotels. I did not have a fixed abode herein 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 tome and discuss and agree on fees to handle the new summons. I did not call you to instruct you to handle this summons. It was Mr Gambi brother who called and informed me aboutthe summons. It is not Gambi personally who called me. I was not aware of the matter and I came to know it when it was seen in the news paper. The Advocate who entered consent Judgment against my wishes is Ambrose Malamsha. It was not you who entered the consent judgment you do not work with Mr. Malamsha in your office. I do not remember to have got information that the application has been dismissed. I am very busy and my recollection is not that good and so possibly you have had informed

me about it. I did not have any problem with you at the time of conducting my case. I have been making payments but I can not recall what payments were done when you were still under my instruction. A consent judgment meant that I had agreed and so I had to pay. I preferred an appeal because Mr. Malamsha had gone against my wishes.

That is all

The revelation from this peace 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 Circumstance 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 "PW.3" the rest of the allegations levelled against the respondent were mere sweeping statements.

That been said and done, I find this appeal to be unmeritorious which deserves a dismissal order as I hereby do.

This appeal is dismissed for want of merit.

S.B. Bongole

JUDGE

3/10/2014

10/10/2014

Coram: Bongole,J

For the Appellant: Mr. Mutakyawa S.A

For the Respondent: In person

C.C Evelina

Mr Mutakyawa: My lord the appeal comes for judgment and we are ready to receive the same.

Court: Judgment delivered.

S.B. Bongole

JUDGE

10/10/2014

Right of appeal explained.

S.B. Bongole

JUDGE

10/10/2014