

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF ARUSHA)  
AT ARUSHA**

**CRIMINAL APPEAL NO. 99 OF 2017**

**(Originating from Simanjiro District Magistrate Court at *Orkesumet*, Criminal  
Case No. 23 of 2015)**

**NICOLAUS Q. FINDA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT OF THE COURT**

**17/12/2014& 12/03/2020**

**Gwae, J**

In the District Court of Simanjiro at Orkesumet (trial court), the appellant, the then head teacher of Loltepes Primary School, was charged with three corruption offences, namely; abuse of position by omitting to expel pregnant pupils of Loltepes Primary School found pregnant c/s 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007, Act (**1<sup>st</sup> count**), person obtaining an advantage of Tshs. 1,950,000/=without lawful consideration (allowing the pregnant pupils to sit for Primary School Education Examination of 2014 c/s 23 of the said Act (**2<sup>nd</sup> count**) and in the **3<sup>rd</sup> count**, giving False Information to officers employed in the Public Service to wit District Executive Director (DED) c/s 122 of the Penal Code, Cap 16 Revised Edition, 2002 (Code).

The brief substance of the prosecution evidence which led to the conviction and sentence of the accused now appellant was to the following effect, that the accused, being the head teacher of the said primary school was aware of the fact that three pregnant pupils vide pregnancy tests conducted in July 2014 these were, **Helen Edward, Nekinyori Ngolwi** and **Nasila Letema** but he did not take any further action (s), particularly, expelling them from school. That, the accused when asked by his employer, DED through a letter dated 26<sup>th</sup> August 2014 (**PE6**) as to the issue of pregnant pupils in his school he denied through his letter dated 2<sup>nd</sup> September 2014 (**PE2**) the fact which he knew to be a wrong information to his employer. The prosecution also established that the accused received bribery money (Tshs.1, 950,000/=from the parents/guardians of the said impregnated pupils, namely; **Paulo Letema** (A guardian of Nasila Letea), **Isaya Nyangataiti** (guardian to Helen Edward) and **Ngolwi Kimasi** (parent).

The evidence for the prosecution is also to the effect that, the accused admitted to have obtained an advantage of Tshs. 1, 950,000/=as an inducement to refrain from expelling the pregnant pupils. That, on 22<sup>nd</sup> day of August 2014, the accused orally confessed before the justice of peace (WEO), to have received Tshs.1, 950,000/=from the pregnant pupils' parents / guardians aforementioned.

Similarly, the prosecution evidence established that, after spread of information of the fact that there were pupils who were diagnosed to be pregnant and that the appellant obtained Tshs. 1,950,000/=followed by the alleged oral appellant's admission before the Ward Executive Officer

(**PW3**) in the presence of the Ward Education Coordinator (**PW4**) on 22/08/2014, emergency meetings were held on 23/08/2014 and 24/08/2014 at the school where the minutes of the meetings were recorded and produced during trial as PE3 and PE4 respectively). In that emergency meetings among other agreements reached was to re-do pregnancy test to those pupils named above including three other pupils, the pregnancy test was conducted as agreed in the meetings and two among three pupils were revealed to be pregnant by the pregnancy test (**PE1**) which indicates to have been conducted at **Sukuro** Hospital on 4/9/2014 as opposed to testimony of PW1 as previously alleged.

After the 2<sup>nd</sup> pregnancy test was conducted, its report dated 5<sup>th</sup> September 2014 (PE5) was sent to the Village Executive Officer informing him that only two out of three pupils suspected to have been pregnant were diagnosed to be pregnant. It is also the prosecution evidence incriminatory to the appellant in that the appellant absconded from the office from 24<sup>th</sup> August 2014 to 4<sup>th</sup> September 2014 without informing any teacher.

Admittedly, the appellant during his defence in essence stated that he received the letter from his employer requesting him to explain if there were pregnant pupils as per information received and to have not present from 25/8/2014 adding that from 20/8/2014 to 25/08/2014 he had no information whatsoever about pregnant pupils in the school at which he was manning as head teacher that is why he proceeded with preparation of Standard seven National Examination, 2014 done on the 10. 09. 2014 to 11.09.2014. He seriously contended that a pregnancy of a female is proved

by a doctor and that he got no pregnancy test report adding that I just saw the pregnancy test report (PE1) during trial.

In its final analysis, the District Court (trial court) found the appellant guilty of the only offence of obtaining advantage c/s 35 of the Act, in the 2<sup>nd</sup> count. He was therefore sentenced to pay a fine to the tune of three million (say Tshs.**3, 000,000/=**) or serve a term of **four (4)** years imprisonment in default thereto. The trial went on ordering the appellant to reimburse to the pupils' parents the sum of money received by him as an advantage that is Tshs. **1,950,000/=**.

Aggrieved by both conviction and sentence as well as its ancillary order, the appellant is now appealing to this court armed with four grounds of appeal, to wit;

1. That, the trial court erred in law and fact for convicting the appellant on hearsay evidence
2. That, the trial court erred in law and fact to convict the appellant on the fabricated and contradictory evidence.
3. That, the trial court erred in law and fact to be moved by the Prosecutor by citing non-existing provisions of the law
4. That, the trial court erred in law and fact to order to return the monies to the parents.

On the 13<sup>th</sup> day of March 2019, this appeal was called on for hearing before my fellow judge, Hon. **Issa Maige, J** (appellate judge predecessor) and it was ordered that the appeal be disposed of by way of written submission. Throughout the appeal stage, the appellant was represented

by **Miss Recho Daniel**, the learned advocate whereas the Republic was represented by **Miss Hyra and Mr. Mwiteni** (SAs). Despite the scheduling order by my fellow judge the Republic could not meet the schedule as a result on 8/5/2019 the representative of the Republic, Miss Mwiteni sought and obtained leave for extension of time of seven days from me (appellate successor judge).

Unfortunately while the case is pending in court awaiting for parties' completeness of written submission, the judge in-charge transfer the file to the RM's Court to be dealt with a Resident Magistrate with an extended jurisdiction. The file was then remitted back to me for composition of a judgment on the 17<sup>th</sup> December 2019. Hence this judgment which is in ordinary circumstances can be said to have been delivered beyond the prescribed period.

Having briefly explained what transpired during trial in the court of first instance and in this court at 1<sup>st</sup> appeal stage. I am now going to deal with grounds of appeal herein by looking at the parties' respective submission evidence adduce in the trial

In the **first ground** of appeal above, it is true that no direct evidence that was given by the prosecution side as to obtaining an advantage of the money allegedly paid by the pregnant pupils' parents except hearsay evidence, three statements of the said parent/guardians which were admitted but not marked as exhibits for evidential value (see typed proceedings at page 48). I am holding that view for very obvious reason that the parents allegedly gave the appellant the said amount of

money in order to refrain from taking any action against the pregnant pupils or any other person nor was the one who is said to have told the PW11, investigator of the case that, they witnessed such unlawful transactions were summoned and gave their testimonies to that effect.

The Republic relied on the alleged oral confession before the PW3 and PW4 corroborated by the evidence adduced by PW5, and PW10 as well as the statements alleged to be parents or guardians of the pupils who were said to have been found pregnant during the 1<sup>st</sup> pregnancy report. The statements were tendered and admitted by the trial court in terms of section 34 (B) (1) of the Tanzania Evidence Act, Cap 6, Revised Edition, 2002 (TEA).

I am of the firm view that the pieces of evidence adduced by the prosecution together with the alleged conducts on the part of the appellant (see section 3 of the TEA), in law may be given weight to uphold the trial court decision that, the appellant obtained Tshs.**1,950,000/=** as alleged and as rightly submitted by the respondent's representative however this kind of evidence in this case leaves a lot to be desired since the alleged three makers of the same did not turn up before the trial court nor did the one (**Saitoti Laizer**) who is said to have witnessed the transactions did not appear and testify worse still those who are said to have spread the information or who prepared the information regarding the alleged 1<sup>st</sup> pregnancy test results did not turn up or appeared but turned hostile, these are; **Emmanuel Shauri** (PW9-appeared but turned hostile and he was eventually declared a hostile witness by the trial court), **Mrs. Mgaya - Mary Goreth**-appellant's wife did not appear though she was not a

compellable witness). Equally, there is no evidence of the said three pupils that was received by the trial court and on record. It is my established opinion that, the prosecution evidence is supposed to be strong leaving no doubt as the criminal liability to the appellant.

The submission by the Republic that the appellant admitted to have received the money before the members of the meeting held on 23/8/2014 and signed thereon. This is not the reality reflected in the exhibits (P3 and PW4) as the appellant has not signed the minute (**PE3**) except meeting attendance nor did he write to that effect more so the one who was acting as secretary of the meetings, **Leonard Benjamin** did not appear before the trial court for testimonial purposes. More so the appellant did not admit to have confessed obtaining the advantage of Tshs. 1, 950,000/= during his defence hearing as opposed to the submission by the learned state attorney for the Republic. (See the appellant's testimony from page 52 to page 58 of the typed proceedings). Due to the noted short falls the prosecution evidence in this regard ought to have been treated with great caution before entering conviction.

In the **2<sup>nd</sup> ground** of appeal, It is the submission of the appellant that, as earlier explained in the first ground the prosecution evidence leaves a lot to be desired, for instance, whether there was a first pregnancy test or not, here it should be borne in mind that no documentary evidence or cogent oral evidence to prove that there was 1<sup>st</sup> pregnancy test conducted which revealed that there were three pupils who were found pregnant.

Moreover there is apprehension of doubt as to where precisely the 2<sup>nd</sup> pregnancy test was conducted since the evidence of the PW1, a nurse is very contradictory. She is found saying that the same was conducted in the primary school in question and at the same time she is found saying that it was performed at the Sukuro Dispensary. For easy of understanding part of her testimony is reproduced herein under;

"Ex-in chief. On 2/9/2014 I was at Sukuro Dispensary. I took the instruments needed and went to the **stated school**....and test started (sic) immediately"

Xx It is true that girls were taken pregnancy test at the Dispensary Sukuro)

Surprisingly, when I carefully look at the 2<sup>nd</sup> pregnancy test report, it plainly reveals that the test was conducted on the 4<sup>th</sup> day August 2014 while the testimony of the PW1 is very inconsistent as depicted in the quoted part of her testimony that she went to the school and conducted pregnancy test on 2/9/2014 with the pregnancy test report, the report reads and I quote;

"Nathibitisha watoto/wanafunzi hawa wamepimwa katika hospital ya sukuro leo tarehe 04/09/2014 na majibu ni kama yalivyooneshwa hapo juu"

Sgd.....

I am alive of the established principle that contradictions if are minor should not affect the credibility of the prosecution evidence provided that



such inconsistencies are due to normal errors. In **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported-CAT)

“Normal discrepancies in evidence in evidence are those which are due to normal errors of observation, normal errors of memory due lapse of time, due to the mental disposition such as shock or horror at the time of occurrence and those are always there however honest and truthful a witness may be..”

In this instant case, the 1<sup>st</sup> report on the pregnancy test was vitally important to establish basis for receiving Tshs. 1,950,000/=and evidence as to the precision of the place and date on which the 2<sup>nd</sup> pregnancy test was conducted was necessary. The contradictions in the prosecution evidence, to my firm view, go to the root of the case against the appellant as the same provide different versions. In **Jeremiah Shemweta v. Republic** (1985) TLR 228 where it was judicially stressed that, the discrepancies in the various accounts of the story by the prosecution witnesses are capable of giving rise to some reasonable doubts about the guilt of the accused person. In this criminal appeal there are doubts apprehended which can be resolved in favour of the accused as explained herein above.

In the **3<sup>rd</sup> ground**, need not to curtail me as the trial court did not even find the appellant guilty of the offence in the **3<sup>rd</sup> count**, it therefore suffices to hold that the trial court ought to have amended such defect since no section 122 in the Act which is about the offence aforementioned in the 2<sup>nd</sup> count.


This court being aware of the principle of the law that the standard of proof in criminal cases is no less than that of beyond reasonable doubt and the burden is always on the prosecution. This legal position has been judicially stressed in a chain of judicial decisions, for instance the Court of Appeal when dealing with an appeal before it, in the case of **Nkanga Daudi v. Republic**, Criminal appeal No.316 of 2013 (unreported) had this to say:

“It is the principle of law that the burden of proof in criminal cases rest squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence ”.


In our case, I am not persuaded by the prosecution evidence if it is sufficient to justify this court to uphold the trial court’ conviction as the same is based on the hearsay evidence together with other contradictory pieces of evidence, thus leaving a lot to be desired, to say the least, it is doubtful as there is no foundation or reason as to why the appellant was given the advantage or received the said amount of money and for what? Even if one could ignore the base of the accusations leveled against the appellant that is the alleged 1<sup>st</sup> pregnancy test report yet the evidence on the 2<sup>nd</sup> pregnancy test is contradictory as explained above. In the circumstances and contradictions apprehended herein above, the trial court to my considered view ought to have been fair and sensible by scrutinizing the prosecution evidence and finally decide what weight or value could be justly given.

In the upshot, the appellant's appeal is hereby allowed. The trial court decision and its ancillary order are quashed and set aside. The appellant, if still serving his sentence in prison, is to be released from prison forthwith as soon as practicable.

Order accordingly.

  
**M. R. GWAE**  
**JUDGE**  
**12/03/2020**

Right of appeal to the Court of Appeal of Tanzania fully explained.

  
**M. R. GWAE**  
**JUDGE**  
**12/03/2020**

