IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 145 OF 2020

PROCHES CHRISTIAN KAVISHE_____ APPELLANT

VERSUS

THE REPUBLIC _____RESPONDENT

(Arising from the decision and orders of the district court of Musoma at Musoma, Hon. Mushi SRM, in RM corruption case no 2 of 2018 dated 31.08.2020)

JUDGEMENT

10th November & 4th December 2020

GALEBA, J.

On 01.04.2018 two Tanzanian businessmen **John Werema Zephania** and **Alphonce Wambura Magesa** with businesses at Mwanza Central Market were travelling by road from Nairobi to Mwanza in two motor trucks with merchandize for replenishing their commercial outlets in Mwanza. At around 21:30 hours when they approached Mara River bank and reached Kirumi road block at the bridge, their travel was intercepted and were ordered to pull over by three government officials who were in a private car with registration no T 225 DJR. The officers in the car were **PROCHES CHRISTIAN KAVISHE** an employee of the Tanzania Revenue Authority (the TRA) on one hand and **IDRISA HASHIMU MAJAMBA** and **ZAKAYO SIMON MNGULU** being police officers, on the other.

According to the prosecution, the three officials demanded Tshs 40,000,000/= in corruption from **John Werema** and **Alphonce Wambura** otherwise, the motor trucks would not be permitted to leave for Mwanza. At around 23.30 hours, as neither did the duo have that amount of money nor were they ready to corrupt their aggressors, they were ordered by the officers to drive the lorries from Kirumi road block to Musoma town direction but before they were to get to Musoma, they were ordered to pull over and park the lorries at Lake Oil Petrol Station in Bweri, a suburb of Musoma town where the lorries with the merchandize were handed over to the security guards of the fuel station. By that time their mobile phones had forcefully been seized and were under control of those officers and the businessmen were not permitted to go anywhere. They remained at the petrol station resisting to give any money until 02:00 hours the next day (02.04.2018) when the government officials reduced the amount from the original Tshs 40,000,000/= to Tshs 15,000,000/= but still **John Werema** and **Alphonce Wambura** would not corrupt the officers. Thereafter **Zakayo Simon** demanded Tshs 400,000/= for him to go and plead with the other two, for the latter to accept a bribe of a reduced amount of Tshs 10,000,000/=. Because **John Werema** and

Alphonce Wambura were by that time tired, they agreed to pay Tshs 10,000,000/= in corruption in order to procure a release of the trucks to Mwanza. That, still had one setback; although they agreed to pay the illegal money, but they did not have it for delivery to the recipients, so no truck would be released until the money was to be received by the three officials.

The logistics of transmission of the money was facilitated and coordinated by **Proches Kavishe** who gave **John Werema** till number 86395 operated by **Jumanne Ogunya,** an m-pesa agent in Musoma, who would receive the payment from Mwanza. **John Werema** instructed a colleague in Mwanza, one **Warioba Warioba** to send that money to the above till number. The money was sent to **Jumanne Ogunya** who gave the money to **Proches Kavishe.** Sometime after noon on 02.04.2018, as the mission was over the trucks loaded with merchandize from Kenya were permitted to drive away from Bweri in Musoma to Mwanza, the original destination. Immediately **John Werema** reported the matter to the Prevention and Combating of Corruption Bureau (the PCCB) Tarime office and investigation started. When the investigation was complete, the PCCB charged **Proches Kavishe**, **Idrisa Majamba** and **Zakayo Mngulu** as

the 1st, 2nd and 3rd accused persons respectively in RM corruption case no 2 of 2018. The accused were charged on three counts based on engaging in corrupt transactions contrary to law. As efforts to arrest **Zakayo Mngulu** failed, the case against him was withdrawn. At the end of the trial, **Idrisa Majamba** was acquitted of all the charges but **Proches Kavishe was** convicted of having received Tshs 10,000,000/= as proceeds of corruption from **John Werema** and **Alphonce Wambura.** Consequently he was sentenced to pay Tshs 500,000/= fine or be imprisoned for three (3) years in case he would fail to pay the fine. He was further ordered to pay the Tshs 10,000,000/= to the PCCB for remitting the same to **John Werema** and **Alphonce Wambura** in Mwanza**.** The appellant was aggrieved by the above conviction and the sentence hence the present appeal.

Before me to argue the appeal, was Mr. Alhaji Majogoro learned advocate and the Republic was represented by Mr. Isihaka Ibrahim learned state attorney. Mr. Majogoro abandoned the 2nd ground of appeal and argued the remaining ground, namely that the prosecution failed to prove the case beyond reasonable doubt. He submitted that the prosecution did not prove the case beyond reasonable doubt because as the accused persons were acquitted of soliciting corruption of Tshs 40,000,000/= the

appellant was supposed to be acquitted also of receiving the Tshs 10,000,000/= adding that the complainants did not identify the appellant and that there was no evidence that the appellant promised any favor or that he restrained any trucks from proceeding to Mwanza. He concluded that, accordingly receiving of Tshs. 10,000,000/= was clear but soliciting it was not proved. He submitted that the document which show that the money was sent from **Warioba Warioba** in Mwanza was a photocopy but was received in evidence which act was unlawful, he added. He submitted that the document was computer generated but the same was admitted without there being a certificate, certifying the reliability and integrity of the computer system which stored and generated it. Citing the case of **Zacharia Luciano Mbedule and 2 others v the Republic,** Consolidated Criminal Appeals no 257 and 264 of 2017 decided by this Court, Kerefu J (as she then was), Mr. Majogoro submitted that document showing that money was transmitted from Mwanza to Musoma need to be expunged by this court. With those arguments Mr. Majogoro prayed that this appeal ought to be allowed, quashing the judgment of the trial court and ordering payment back of Tshs 500,000/= which was paid as a fine.

In reply to the above submissions, Mr. Isihaka Ibrahim, objected to the appeal, arguing that the case was proved beyond reasonable doubt because, the appellant was properly identified by the complainants as they stayed around with him from 21:30 hours to 23:30 hours in the car, citing the case of **Maulid Juma Bakari Damu Mbaya and another v the Republic**, Criminal Appeal no 58 of 2018. He submitted that at page 11 of the typed proceedings it was the evidence of **John Werema** that the appellant introduced himself to him adding that **PW3 James Ogunya,** the m-pesa agent testified that he handed the money to the appellant. It was the submissions of Mr. Ibrahim, that for the appellant to have committed the offence of receiving the bribe, it was immaterial that he solicited it, because soliciting and receiving the illegal money are two different offences. As for **EXHIBIT P4**, whose part was a computer printout, Mr. Ibrahim argued that that was not the only evidence incriminating the appellant, adding that **PW5 Jovit Ikate** from Vodacom testified that **Warioba Warioba** in Mwanza sent the Tshs 10,000,000/= to **PW3 James Ogunya,** which was later the same day handed to the appellant. Citing the case of **Kadiria Said Kimaro v R,** Criminal Appeal no 301 of 2017 (CA unreported), Mr. Ibrahim argued that even if the computer

generate document which is part of **EXHIBIT P4** was to be expunged, still the appellant's conviction would stand. He prayed that the decision of the trial court be upheld.

In rejoinder, Mr. Majorogo submitted that although the offence of soliciting and receiving are different, but that should not be the case in the circumstances of this case. He stated that the evidence of **PW3 Mr. Juma Ogunya** was not reliable because it was supposed to be supported by some other pieces of evidence. Counsel moved the court to allow the appeal and enter the order he prayed in his first submission.

I have considered the competing arguments of parties and I am of the view that deciding this appeal does not pose a serious challenge because it only requires this court to re-examine the evidence of the trial court and find out whether the trial court had sufficient material before it in terms of evidence upon which it relied to convict the appellant.

In the trial court the appellant was charged under section 15(1)(a) and (2) of the **Prevention and Combating of Corruption Act No. 11 of 2007** for having engaged in three different corrupt transactions. The appellant was acquitted of soliciting Tshs 40,000,000/= as, according to the trial court he was not identified by the complainants as it was night and

also that it was not clear who exactly solicited the money from the complainants amongst the three officers. As for the second count of receiving Tshs 10,000,000, the court was satisfied that the Tshs 10,000,000/= was received by the appellant. Mr. Majogoro was of the view that the court having found that the appellant was not identified when soliciting for Tshs 40 million, the same court ought to have held that, he was also not identified for receiving the Tshs 10,000,000/=. Respectfully, Mr. Majogoro's view does not have support of the evidence. According to the evidence of **John Werema** at page 11 of the proceedings, when their trucks were stopped at Kirumi road block, he was ordered to enter inside the private where he found 3 people including the appellant who introduced himself by name the name of Kavishe and also as a TRA officer. He gave them documents but they wanted an amount of Tshs 40,000,000/= which demand the complainants refused. That led to orders of driving the trucks to Musoma where at 02:00 hours the appellant and the other two police men came again to demand the Tshs 40,000,000/=, but when the complainants refused this time, the 3 officers reduced the amount to Tshs 15,000,000/=. Later the complainants settled at Tshs 10,000,000/= after partying with Tshs 400,000/= they gave to **Zakayo**

Simon in order to convince his two fellows to accept that lesser sum. On the same issue of identification, according to **Alphonce Wambura**, while they were at Lake Oil in Musoma the officers confiscated their telephones and told them that if they want to communicate with anybody they had first to have their permission. He testified that they told the accused persons that they wanted to communicate with Mwanza so that money can be sent, that is when they gave them back their telephones. The appellant gave them a till number at which the complainants could sent the money, to which indeed **Warioba Warioba** sent the money. There was no question in cross examination which showed that there was any issue with identification from the appellant. The complainants **John Werema** and **Alphonce Wambura** were not asked anything on how they identified the appellant. They were not even asked on many other issues especially on being called in the private car or any other issues. At least the issue of identity was not questioned. It is now an established position of law in this jurisdiction that where a point is not cross examined upon, it cannot later be challenged, see **Nyerere Nyegue v Republic,** Criminal Appeal no 67 of 2010 (Court of Appeal unreported) where it was held that;

'as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said.'

Other cases on that subject include, **Damina Luhere v Republic**, Criminal Appeal no 501 of 2007 and **George Maili Kemboge v Republic**, Criminal Appeal no 327 of 2013 both decided by the Court of Appeal but unreported.

That is one, but two, is the story as narrated. If **John Werema** was called in the car, produced his papers, and the people argued on the Tshs 40,000,000/= and failed to agree and they had to go to Musoma, and then at Musoma the complainants telephones are confiscated and also till numbers were given, surely it is impossible that all this happened in darkness. It is impossible for instance to read the customs document in the dark, it is not also logical to have telephones confiscated in the dark. The other next to impossible to do was for the appellant to recite the till number without reading it from somewhere without any light and even recording it by the complainants. In the circumstances, the trial court might have ruled that the complainants did not identify the appellant but

that was not right in view of the evidence. The appellant was fully identified by both complaints.

The other point raised by Mr. Majogoro was that because the appellant was acquitted of soliciting Tshs. 40,000,000/= then he was supposed to be acquitted also of receiving the Tshs 10,000,000/=. In this case, the Tshs. 40,000,000/= was solicited in the night and the next day the appellant received Tshs 10,000,000/=. I did not understand why Mr. Majogoro in all fairness had to mix the two, because, the sums were different and in any case each allegation referred not only to different sums of money but also each allegation is alleged to have happened at a different time from the other. In any event soliciting to receive corruption and actually receiving it are two different offences under the law. That said, Mr. Majogoro's argument is that line is refused.

The other issue raised was that there was no evidence that the appellant restrained the trucks or that he released them from Lake Oil petrol station in Bweri to Mwanza and that there is no evidence that he promised any favour to the complainants. May be I start like this; in law, unless there is reason to disbelieve a witness, courts are called upon not to disbelieve witnesses see **Goodluck Kyando v R [2006] TLR 363.** On the aspects

raised by Mr. Majogoro, both complainants stated that it was the appellant along with other two police officers who restrained their trucks at Bweri in Musona until they paid Tshs 10,000,000/= to them in order for release of their trucks to be sanctioned. Eventually, it turned out that it was indeed after the payment of the 10,000,000/= to the appellant through **Mr. James Ogunya,** that the trucks were released and started off to Mwanza. In respect of this point it is like Mr. Majogoro, wanted paper documentation in this transaction. Corruption is an offence and it is not done in the open. Detention of the trucks and their release, demanding the illicit money and illegal detention of the telephones none would be documented. In this case there was the evidence of **John Werema** and **Alphonce Wambura** that the appellant participated in detaining the motor trucks, promised to release them after payment of money and that is what happened. So the appellant's complaints surrounding detention and release of the complainants' trucks have no merit.

The final point raised by Mr. Majogoro was that a computer printout showing that Tshs 10,000,000/= was sent from **Warioba Warioba** in Mwanza to till no 86395 operated by **Juma Ogunya,** be expunged because, it did not meet all the criteria listed at section **18 of the**

Electronic Transaction Act. I agree with him and I actually expunge it from the record, but I do not agree with him when he submitted that if the document will be expunged then the argument that the appellant received the money would fail. That assumption is not right in all circumstances. It is only right where there is no other evidence other than that contained in the document expunged, see **Anania Clavery Batera v R** Criminal Appeal no 255 of 2017. In this case, **John Werema** and **Alphonce Wambura** abundantly testified on the Tshs. 100,000,000/= and how they instructed **Warioba Warioba** to send it to till no 86395. PW3, **Juma Ogunya** testified that the appellant called him requesting for the till number because he wanted to withdraw money. He gave him the number, later money was sent and the appellant came and took Tshs 10,000,000/=. Even with all this evidence, Mr. Majogoro submitted that the money was supposed to be withdrawn by **Warioba Warioba** who deposited it. That is right, but that is only where everything is in order and there is no criminality involved. The appellant's argument that expunging the computer printout means that the money was not sent and therefore the appellant did not receive the illicit funds, has no substance.

Based on the above reasons, this court holds that the corruption case in the trial court was proved beyond reasonable doubt and accordingly this appeal is dismissed, but this court is not done with the matter. There is sentencing. In the trial court, the appellant was convicted of corrupt practice, namely receiving Tshs 10,000,000/= in bribe from two innocent Tanzanian businessmen having legally imported merchandize from the neighboring Republic of Kenya through Sirari border to their homeland. The punishment for the offence, once one is convicted, is provided at **section 15(2) of the Prevention and Combating of Corruption Act,** which provides that;

> ***'15 (2) A person who is convicted of an offence under this section, shall be liable for to a fine of not less than five hundred thousand shillings but not more than one million shillings or to imprisonment for a term of not less than three years but not more than five years or to both.'***

After convicting the offender, during mitigation it was alleged that the appellant was young and that he was first offender so he deserved lenience. The court agreed and gave the appellant option to either pay Tshs 500,000/= or serve three years in prison. Respectfully, that is not the way that courts should handle proved corrupt public officials. To engage in

corruption while in office is committing one of the highest immorality and abuse of public office in untold proportions. The appellant was an officer of the TRA, an public agency responsible to ensure that Tanzanian businessmen grow and become large and compliant tax payers. Section **5 (1) of the Tanzania Revenue Act [Cap 399 RE 2002]** provides for functions of the authority. At paragraph (f) of subsection (1) of that section provides thus;

> ***'5. Functions of the Authority.***
> ***(1) The functions of the Authority are–***
> ***(a) to (e) (N/A)***
> ***(f) to take such measures as may be necessary to improve the standard of service given to taxpayers, with a view to improving the effectiveness of the revenue departments and maximizing revenue collection.'***

Being a statutory body, the TRA was working through its employees, the appellant being one of them at that time and in respect of the complainants, the above is what the appellant was expected to do, to facilitate their business growth, but unfortunately he did the exact opposite.

In the trial court, one of the two factors considered when sentencing the appellant to the minimum fine and the minimum term of imprisonment, was that the offender was young. The difficulty here is this; at what age did the trial court want the appellant to have attained for it to impose the appropriate punishment without lenience? What is obvious in law is that people below 18 years cannot go to jail and may be those with extreme old age may not be sentenced to long imprisonment terms, but again subject appropriate laws. Outside the two extreme examples above, it defeats reason that middle agedness is a factor for the court to exercise its discretion in sentencing a proven corrupt offender. The other consideration was that the appellant had never engaged in criminality and this was the first time. My quick question is how many times did the court want the appellant to have committed the offence for it to hand down a deserved punishment. In any event corruption in our society has grown and now it is a monster. It is a killer malady; it is killing the image not only of our nation but also our continent in the face of the international community to the extent of being monitored by foreign states as to our performance. This is shameful. Courts should refuse to hand down lenient punishment, they should seek to impose the maximum possible punishments when a person

in public office is found guilty and convicted of the offence of corruption or related offences. The vice is not only forbidden and outlawed by statute, but the same is also abominated and cursed by scripture see Exodus 23 verse 8. Corruption is not something to massage, to babysit, to play around with or to laugh at. It is an enemy that deserves to be hit hard, crashed and smashed into nothingness if we are to restore a society of complete integrity with moral principles and values. It is the holding of this court that corruption is not one of the offences in respect of which courts may exercise lenience.

In the circumstances, the conviction of **Mr. Proches Christian Kavishe** In RM corruption case no 2 of 2018 is hereby confirmed with further orders under the provisions of **section 366(1)(a)(ii) of the Criminal Procedure Act [Cap 20 RE 2019]** that;

(1) The sentence of payment of Tshs 500,000/= paid as per order of the trial court is upheld.

(2) In addition to the first Tshs 500,000/= paid in compliance with the order of the trial court, **Mr. Proches Christian Kavishe** shall pay another Tshs 500,000/= in order to complete the fine of Tshs 1,000,000/= provided under the law.

(3) **Mr. Proches Christian Kavishe** is hereby sentenced to five (5) years imprisonment. The term runs from today but if he will not start the sentence today, he will start it from the time of his arrest.

(4) The order in RM Corruption case no 2 of 2018 for **Mr. Proches Christian Kavishe** to pay the Tanzania Shillings Ten Million (Tshs 10,000,000/=) to the **Prevention and Combating of Corruption Bureau** is hereby is set aside and instead **Mr. Proches Christian Kavishe** is hereby ordered to pay the said Tanzania Shillings Ten Million (Tshs 10,000,000/=) directly to **John Werema Zephania** and **Alphonce Wambura Magesa.**

(5) In case the said Tanzania Shillings Ten Million (Tshs 10,000,000/=) shall not be paid to **John Werema Zephania** and **Alphonce Wambura Magesa,** the latter may, according to law, enforce recovery of this amount from the assets of **Mr. Proches Christian Kavishe.**

DATED at MUSOMA this 4th December 2020

Z. N. Galeba
JUDGE
04.12.2020