IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 188 OF 2016

(*Originating from Criminal Case No. 61/2014 in the District Court of Kyela)*

VITALIS KYABONA MAGAI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: - 02/03/2021
Date of Judgment: - 31/03/2021

NDUNGURU,J;

Before the District Court of Kyela, the appellant **VITALIS KYABONA MAGAI** stood charged with two counts. The first count being **Solicitation c/s 15(1) (a) of the Prevention and Combating of Corruption Act, 2007 Act No. 11 of 2007**. It was alleged by the prosecution side that the accused on 12/3/2014 being WEO at Ikolo Ward that he corruptly solicits bribe worth Tshs. 50,000 from Tupyelesyege Juma Mwamfupa being a condition for not taking further legal action against her for her failure to ensure that her daughter attends her studies.

On the second count, the accused has been charged with the offence of **Obtaining Advantage c/s 15(1) (a) of the Prevention and Combating of Corruption Act, 2007 No 11 of 2007**. The prosecution as well alleges that the accused on 07th day of May, 2014 being WEO at Ikolo Ward did corruptly obtained bribe worth Tshs. 50,000 from Tupyelesyege Juma Mwamfupa being a condition for not taking further legal action against her for her failure to ensure that her daughter attends her studies.

The accused did deny the charge. Trial ensued during which the prosecution side paraded eight witnesses as to prove the charge against the appellant. As it were, at its conclusion, the appellant was found guilty on the second count, convicted and sentenced to serve three years jail term and or to pay 500,000/= as a fine. He opted to pay fine and was set free. Aggrieved, the appellant marshalled his three grounds of appeal to this court to wit;

(i) *Having acquitted the appellant on the first count of solicitation, the trial magistrate erred in fact and law to enter conviction on the second count of obtaining advantage without clear reasons for distinction*

(ii) *The trial magistrate erred in law to hold that the facts before his supported the meaning of advantage*

(iii) *The defense case was not given due consideration.*

When the appeal was placed before me, Mr. Mushokorwa, the learned senior counsel appeared for the Appellant whereas Miss Anna Rose, the learned state attorney appeared for the Respondent Republic. With the leave of the court, the appeal has been disposed by way of written submissions.

Before going through the merits of the case, I think and it will be sensible to give a brief summary of the facts leading to the arrest and the subsequent charge, conviction and the sentence entered at the trial court against the appellant. I glean these facts from evidence by the prosecution witnesses in the memorandum of appeal. It is somehow not complicated. According to the evidence on record, the appellant was a Ward Executive Officer at Ikolo ward within Kyela District. It appears that Emmy Fedom Mwakyelu, the daughter to Tupyasekege was found pregnant hence unable to attend school. Having observed such situation, the accused was told to prepare the report and submit the same to the police. The accused in turn asked for money in total of 70,000/= so as not to take the matter into the police hand. Unfortunately, the complainant had only Tshs. 10,000/=. The matter was reported at PCCB and a trap was set against the accused. A total of 50,000/= was issued by PCCB which culminated to the arrest of the accused.

In his defense, the appellant vehemently denied having committed the offence charged. He confidently stated that he was called by the Headmaster at Ikolo Secondary School and on how he went to hospital with the complainant and her pregnant daughter. The appellant testified on how he prepared the report and how the same was handle to Inspector Idrisa. He forceful denied having solicited and received a bribe from Tupelesyegele.

Submitting on behalf of the appellant Mr. Mushokorwa strongly opposed the conviction and the sentence metered out against the appellant by the trial court. He was puzzled on why the appellant was acquitted on the first count and was convicted and sentenced on the second count. He further submitted that there was no proof of solicitation hence the second count is as well not proved. He maintained that the accused has denied having solicited and received the alleged bribe from PW2. Mr. Mushokorwa was of the view that the trial magistrate was unduly influenced by the admitted fact that the accused was found with the trap money in his mouth and the cautioned statement and convicted the appellant. The leaned counsel went on to state that the trial magistrate did not give a due consideration to the defense case. He invited the court to find its inspiration in the case of

John Nkize V R (1992) T.L.R 213 where the court stated that the accused has no duty to prove his innocence rather to raise a reasonable doubt.

In his reply, Ms. Anna Rose supported the conviction and the sentenced entered by the trial magistrate against the appellant. She went on to challenge the appellant submission by stating that it is not true that the there in nowhere in the trial court judgment where the court required the appellant to prove his innocence. She went further to state that there is no proof that PCCB officials forced the appellant to swallow the alleged money. She was confident to state the when the appellant was being searched, he was seen chewing something and later it was discovered that it was a trap money. Ms. Anna Rose went further to state that the offence of solicitation and receiving are two distinct offence and are to be treated and proved as such hence the trial magistrate was right to convict and sentence the accused after having satisfied that the second count has been proved beyond reasonable doubt.

In his rejoinder, Mr. Mushokolwa reiterated his earlier submission that the appellant did not receive the money that was found stacked in his mouth. He went on to insist that it is the PCCB Officers who forced

the money in his mouth after mishandling him and was bitten by four officers because he refused to sign the documents. He prayed for the court to allow this appeal and

After a carefully analysis of the rival submissions from the both parties, the court is called upon to determine on whether this appeal has merit or otherwise. However, upon having scrutinized the record of the trial court at page six, seven of the of the typed proceedings of the court, I noted that the charge was not read over to the accused before PH and during the commencement of hearing. In addition to that, at page 14 of the typed proceedings as well, the facts of the case are not reflected on the court proceedings.

Undoubtedly, the proceedings of the case reveals that plea was neither taken during PH on 4/6/2014 nor on 23/6/2014 when the hearing of the case commenced. The prosecution simply told the court that they had witnesses ready for hearing. The appellant is recorded saying; "I am read for hearing". It is clear that the parties do not dispute the fact that the trial court did not read the charge to the appellant upon conducting preliminary hearing and before the commencement of prosecution hearing. The appellant did not thus, plead to his respective count at that stage of the original case. It is my considered view that,

the context if this appeal do not encourage answering the raised issue under consideration favorably. This is because the law is quite certain that reading and explaining the charge to the accused who is before the sub ordinate court and taking their plea is not only mandatory, but also it is also to ensure that the appellants fundamental right to plead is observed. This is in compliance with **Section 228(1) of the Criminal Procedure Act, Cap 20 R.E 2019** which initially promotes right to fair hearing. Additionally, the law requires that even after taking of the accused plea before conducting PH, a trial court must ensure that the charge is read over to the accused and his plea must be recorded. The same has to be done before the commencement of the trial by recording the prosecution evidence. The same stance was observed in **Emmanuel Malahya V Republic, Criminal Appeal No. 212 of 2004, CAT at Tabora** (unreported), **Cheko Yahya V Republic, Criminal Appeal No. 179 of 2013**, CAT at Tabora and also in the case of **Joseph Osmund Mbilinyi @ Sugu and Another V Republic, Criminal Appeal No 29 of 2018 HCT at Mbeya** (unreported) which was decided by Senior Brother Hon Utamwa, J.

I am alive that the CAT in **Emmanuel Malahya** case observe that according to our established practice pleas are taken at two states; one is when the plea triggers off a preliminary hearing, that is, if it is plea of

not guilty as per Section 192(1). Another stage is where is plea is taken and the trial begins. There is no gainsaying that failure by the trial court to read the charge to the accused and take his plea after conducting preliminary hearing and before the commencement of the trial that when the prosecution case commences, is fatal to the proceedings and renders them a nullity. This was highly observed in the case of **Cheko Yahya Case(supra).** What can be gleaned from this case is that according to our law on criminal procedure, the actual trial commences after the completion of preliminary hearing. Failure to adhere to this procedure therefore violates the accused right to a fair trial hence any decision reached upon violation of the accused right to a fair trial cannot stand. This was also observed in the case of **Kabula d/o Luhende V Republic, Criminal Appeal No, 281 of 2014, CAT at Tabora** (unreported).

Basing what I have enunciated stating herein above, I have the confidence to state that it was highly improper for the trial court to skip reading the charge to the appellant and record his plea after conducting preliminary hearing and during the commencement of the prosecution case. This omission is also fatal to the proceedings before the trial court hence renders it a nullity and deserves to be quashed. The impugned judgment and the sentence metered against the appellant merits to be

set aside. The findings made by the court are sufficient to dispose the whole appeal.

Next issue to be determined is that the facts of the case are not reflected in the court proceedings. Looking closely at page 14 of the typed proceedings, the trial magistrate is seen to have adopted the facts of the case. The said facts are not recorded or reflected in the proceedings. This is against the principles of fair trial the proceedings reveals that the facts of the case during preliminary hearing were adopted by the court and form part of the record, this procedure is foreign in our jurisdiction. The facts must be recorded by the court and form part of the proceedings. The records of the court must be clear. The must revealed what transpired in court. This is important because the appellate court relies on court records and not otherwise. Failure to reflect the facts in the proceedings is fatal hence deserves to be nullified.

I have also considered whether or not to order retrial basing on the above analysis. There is no dispute that the sentence was entered on 27/7/ 2015. It is now almost six years hence ordering retrial will not serve the interest of justice amid the existence of undisputed fact that the appellant after being sentenced opted to pay fine and was released. I am therefore unenthusiastic to order any retrial. What remains is to

quash the proceedings of the trial court, set aside the impugned judgment and the corresponding sentence levied against the appellant.

Order accordingly.

D.B. NDUNGURU
JUDGE
31/03/2021

Right of appeal explained.

D.B. NDUNGURU
JUDGE
31/03/2021