IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 44 OF 2021

(C/f Corruption Case No.2 of 2018, District Court of Rombo at Rombo Mkuu)

JAMES LAWASARE MELISHO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

28th June & 30th July, 2021

JUDGMENT

MKAPA, J.

Before the District Court of Rombo at Mkuu, (the trial court) the appellant James Lawasare Melisho together with one Mathias Nindwa Gungumka (not a party to the instant appeal) were jointly

charged with two counts of corrupt transactions contrary to section 15 (1) (a) and (2) of the Prevention and Combating of Corruption Act No. 11 of 2007. On the 1st count, It was alleged by the prosecution that between 15th and 22nd November, 2018 at Mashati within Rombo District in Kilimanjaro Region being employees of Rombo District Council as District Health Officer and District Environmental Officer respectively, the appellant and the other accused person solicited corruption amounting shillings 100,000/= from Sabas Patrick Shirima as an inducement to allow him to continue with production in Mashati Oil Investment Ltd. As to the 2nd count it was alleged that after they had solicited the said amount they corruptly accepted a bribe amounting shillings 50,000/= from the said Sabas Patrick Shirima as an inducement to allow him to carry on with production in Mashati Oil Investment Ltd.

Trial ensued which involved a total of seven prosecution witnesses and three defence witnesses. At the end the trial court acquitted the other accused one Mathias Nindwa Gungumka. The appellant was not found guilty on the first count. However was found guilty on the second count. He was convicted and sentenced to pay a fine of Shillings Five hundred thousand (Tshs. 500,000/=) in default to serve three years imprisonment. Aggrieved by the conviction and

sentence of the trial court he preferred this appeal on the following grounds: -

1. That, the trial Magistrate erred in law in convicting the accused person basing on the disputed cautioned statement.
2. That, the trial Magistrate erred in law and fact in not considering the fact that the trap monies were meant to target the appellant as the complainant had grudges with appellant.
3. That, the trial Magistrate erred in law and in fact in disregarding all the evidence adduced by the appellant and defence witnesses without assigning reasons thereto.
4. That, the trial Magistrate erred in law and in fact in failing to properly evaluate evidence adduced by the prosecution and as there was no independent witness to back up the prosecution case on the fact of receiving bribe.
5. That the prosecution case was not proved beyond reasonable doubt.

When the appeal was called on for hearing parties agreed to argue the same by filing written submissions. The appellant was represented by Ms. Angel Edgar Mongi, learned advocate while Mr. Ignas Mwinuka, Learned State Attorney represented the respondent/Republic.

Submitting in support of the 1st ground of appeal, Ms. Mongi submitted that, it is on record as per the trial court's evidence that the appellant was arrested around 14:00 hours. However, his caution statement was recorded from 16:40 hours to 19:40 hours that made a total of five hours since he was arrested. It was Ms. Mongi's contention that this was contrary to the requirement of the law which requires the caution statement to be recorded for a period of four hours commencing from the time when the accused person is in restraint. In support of her contention he relied on section 50 (1) (a) of the Criminal Procedure Act, R.E. 2019 also the case of **Christopher S/O Chegula V R,** Criminal Appeal No. 215 of 2010 (CA) at Iringa (unreported) in which the Court held that;

> *"The basic period available for interviewing a person is four hours commencing at the time when he was taken under restraint in respect of the offence. The circumstances extending interrogation beyond four hours from the time of arrest are explained under section 51 of the CPA".*

Furthering her argument Ms. Mongi argued that, failure to take caution statement within the prescribed time is fatal hence illegal and inadmissible in evidence. She referred the Court to the case of **Lubinza Mabula, Emanuel Maswali & Dotto Kachembele**

@ **Loza V Republic**, Criminal Appeal No. 226 Of 2016 CAT at Mwanza (Unreported) at page 24 where the Court had this to say;

> *"As we are aware, it is settled law that non-compliance with the provisions of section 50 (1) (a) of the CPA is fundamental irregularity that goes to the root of the matter and renders illegality the obtained evidence and one that cannot be acted upon the court".*

The learned counsel submitted further that, at the time when the appellant was arrested PCCB were aware of the whole transaction prior to his arrest as evidenced by PW2's testimony at pages 21, 22 and 23 of the typed proceedings. It was Ms. Mongi's view that the two hours delay from the time the appellant was arrested to when the caution statement was recorded without rational reason by PW7, is doubtful and proof that the same was recorded under threat of PW7.

It was Ms. Mongi's further submission that for a person to be liable for a criminal liability two elements must exist, *mens rea* and *actus reus* and when there is a confession an accused person has to make admission to both elements. That, in the instant appeal the offence of corrupt transactions which the appellant was charged with is comprised of inducing and receiving monies. Ms. Mongi

explained further that, the appellant confessed to have received monies from the complainant for buying fuel for their private motor vehicle which they had used to reach the complainant's factory since no office car was available at that moment. It was Ms. Mongi's view that the said statement is not a confession that he had committed the offence in question and the trial magistrate misdirected herself in admitting the caution statement and construing the same as a confession.

On the second ground of appeal, Ms. Mongi submitted that, the evidence adduced at the trial court by PW2 (complainant) suggested that that he had some grudges with the appellant as reflected at pages 20 and 22 of the typed proceedings where PW2 admitted to have been informed by PW1 that production had been halted due to some defects found by the inspectors but blamed the appellant to have been responsible thus he reported the matter to PCCB and set up money trap amounting shillings 100,000/=. That, shillings 50,000/= paid to him on 22nd November, 2018 was intentional aimed at incriminating him due the grudges between them.

The learned counsel submitted on the third ground of appeal the fact that, the trial court's decision was bias for non-consideration

of the defence evidence while it is well settled that both prosecution and defence evidence adduced in court must be considered and evaluated in arriving at a decision in a criminal trial. In support of her contention she cited the case of **Daniel Severin & 2 Others V R**, Criminal Appeal No. 431 of 2018 CAT at Bukoba where the Court of Appeal observed that;

> *"It is a trite of law, non-consideration of the defence evidence is a fatal irregularity to the trial and the whole proceeding (s) and vitiates the conviction"*

Ms. Mongi's submission on the fourth ground was that, the evidence adduced at the trial court suggests that it was PW2 who created a conducive environment for the commission of the offence by making sure that the same happened on the exact date he had planned with the assistance of the PCCB. Thus, the absence of an independent witness in the whole course of event was a fatal irregularity.

As to the fifth ground of appeal, Ms Mongi submitted that the evidence adduced at the trial court by PW2 was to the effect that DW2 (acquitted accused) was the one who asked for the money at PW2's office and was him who instructed the monies to be paid to the appellant as evidenced at page 22 of the typed proceedings.

That, the appellant allegedly received the monies as instructed by DW2 and that was the reason for him to have been caught red handed with the monies therefore the prosecution failed to prove corrupt intention against him. She finally prayed for the court to allow the appeal, quash and set aside the trial court's decision.

Responding on the appeal, Mr. Mwinuka submitted on the first ground the fact that, the caution statement was recorded within the prescribed time as stated at page 58 of the trial court's typed proceedings where the appellant admitted and confessed to have received shillings 50,000/= for his private gains.

As to the second, fourth and five ground, Mr. Mwinuka argued that, it is undisputed that the appellant received the monies as a bribe and the same was established by the testimonies of other prosecution witnesses. He submitted further that, since the appellant himself confessed in his caution statement to have received the money for his private gains, the evidence implicated him was sufficient and cogent to ground his conviction.

Mr. Mwinuka argued in respect of the third ground of appeal that even if the trial court would have considered appellant's defence, the same would not have changed his fate as it did not create any doubt to the prosecution case. More so, such omission is curable

by the appellate court stepping into the shoes of the trial court in order to consider the defence evidence. This was held in the case of **Ramadhani Abdallah @ Namtula V R**, Criminal Appeal No. 341 of 2019 (unreported). He finally prayed for the Court to dismiss the appeal and uphold the appellant's conviction as the case against him was proved beyond reasonable doubt.

Rejoining Ms. Mongi reiterated her earlier submission in chief and maintained her stance that, the caution statement was recorded out of time (5 hours) after the appellant had been arrested contrary to the requirement of the law. She further maintained the fact that, the said caution statement was not voluntarily made hence fatal.

Having considered parties' submissions for and against the appeal the question that arises is whether the prosecution has proven its case beyond reasonable doubt to ground conviction against the appellant.

Considering the manner in which I intend to deal with the matter, I shall address the 1st, 2nd, 4th and 5th grounds of appeal jointly. The law is well settled the fact that the time for interviewing a person who is in restraint is four hours from the time of arrest. Section 50 (1) (a) of the CPA is categorical on the same. It is on record from the trial court's record that the appellant was arrested

at 14:00 hours and sent to PCCB offices at 16:40 hours where he was interviewed until 19:40 hours which is more than 4 hours against the time prescribed by the law. In **Janta Joseph Komba, Adamu Omary, Seif Omary Mfaume and Cuthbert Mhagama V R.,** Criminal Appeal No. 95 of 2006 (unreported), the Court emphatically held that:

> *"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. The legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."*

Turning to the present appeal, it has been sufficiently established that the cautioned statement (Exhibit PVII) was recorded five hours after the appellant's arrest which was well beyond the initial period of four hours prescribed by section 50 of CPA. There is also no doubt that no extension was requested from the court and no explanation was furnished as to the reason why the appellant had been restrained beyond the prescribed period. During the trial within a trial at page 53 of the proceedings, PW1 Antony Brighton Gang'oro testified that;

"Thereafter, I took the caution statement of James Meliho, we started at 16:40hrs ... and we completed at 19:40hrs, we thus spend three hours at interrogation. The trap was done away from the office thus we had time to travel from the crime scene to the office; we also spend time on ***other procedure*** *before we commence the interrogation...." (emphasis added)*

The same witness also testified the fact that the appellant was arrested around 14:00hrs and the journey from the crime scene was around 20-30 minutes, thus no rational reasoning was provided as to why such a delay from the time of arrest to 16:40hrs when the interrogation started. More so, the alleged "other procedures" to warrant such delay were not disclosed hence non-compliance to section 50 (1) and (2) of the CPA thus vitiated the said cautioned statement. In the circumstances, I have no option than to expunge the same from the record that leads to the question as to whether the remaining evidence can still ground conviction against the appellant.

There can be no doubt that the trial magistrate did not solely rely on the appellant's cautioned statement to convict the appellant but also the testimonies of PW1, PW2, PW3, PW4, PW5 and PW7. It

was PW7's testimony that, the monies trap was set after the inspectors ordered the factory to be closed and production halted due to technical issues but the appellant and the 2nd accused promised to ensure that the factory would continue to operate only if they were paid Tshs. 100,000/= which was later reduced to Tshs. 50,000/=. PW7 also informed the Court that, the appellant confessed to have received shillings 50,000/= from him for buying fuel for their personal car which they used to reach the factory and further that the monies were paid after conducting the inspection. This piece of evidence is undisputed by the appellant at page 67 and 68 of the typed proceedings that the complainant paid the appellant the monies for buying the fuel after they used their personal car to reach the factory and for the inspection and later on authorization to proceed with the production. It was PW2's testimony that, he asked his son PW1 to communicate with the appellant and the acquitted accused so that they could inspect the factory after they had complied with the requirements. He also testified the fact that the appellant and the 2nd accused had informed him that no official transport was available to take them to the factory and PW2 had agreed for them to use their personal car and promised to refund them with monies for buying fuel which turned out to be monies from the PCCCB. In the case of **Makubi**

Nana V R (1968) HCD 363 the Court observed that when a person is charged with the offence of corruption the key element of the offence is that the act of offering and or accepting inducement should be done corruptly i.e. unfaithfully and with corrupt mind or evil intention. In the instant appeal it is sufficiently established from the beginning that the appellant and the acquitted person used their personal car to the complainant's factory after the complainant had called them to visit and inspect his factory and agreed to pay them for their transport fuel. I find it difficult to comprehend the corrupt mind or evil intention.

As to the 3rd ground the appellant challenged the trial court's failure to evaluate and analyze defense evidence. It is plain clear from a perusal of the trial court's judgment that the appellant's defence testimonies is not reflected. The trial magistrate neither evaluated appellant's evidence nor that of defence witnesses in order to ascertain as to whether they raise any doubts. Such omission had in many occasions been found fatal by the Court of Appeal as was summed up in **Hussein Iddi & Another V Republic** [1986] TLR 166, where the Court of Appeal of Tanzania emphatically held that:

> *"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on it's own*

and arrive at the conclusion that it was true and credible without considering the defence evidence"

See also **Leonard Mwanashoka V Republic** Criminal Appeal No. 226 of 2014 (unreported) as cited in **Yasini s/o Mwakapala V The Republic Criminal Appeal No. 13 of 2012** where the Court observed that;

"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

Guided by the above legal authority and with all due respect, it is sufficiently established that the trial magistrate did not consider the defence evidence in the evaluation or analysis. As correctly submitted by the appellant's learned counsel that failure to consider defence evidence did prejudice the appellant legal rights. For the reasons discussed above, I am satisfied that the prosecution failed to clear all doubts. Therefore, the case at the trial court was not proven beyond all reasonable doubts as was

held in the case of **Edward Dick Mwakamela V Republic** 1987 TLR 122 (HC) that an accused person can only be convicted on a proof beyond reasonable doubt.

In the circumstances, I find the appeal has merit and therefore proceed to quash and set aside the trial court conviction and sentence respectively. In the event of the appellant being in prison, I hereby order his immediate release unless held for different lawful cause.

It is so ordered.

Dated and delivered at Moshi this 30th day of July, 2021

S.B. MKAPA.

JUDGE

30/07/2021