IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
DC. CRIMINAL APPEAL NO. 15 OF 2022

(Arising from the Judgment of Singida Resident Magistrate's Court in Criminal Case No. 07 of 2020)

ABDUL HUSSEIN SEWANDO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 02nd August, 2023
Date of Judgment:25th August 2023

MASABO, J:-

The appellant, Abdul Hussein Sewando was charged before the Resident Magistrate's Court of Singida with four counts of corrupt transactions contrary to section 15(1) (a) and 15(2) of the Prevention and Combating of Corruption Act, No. 11 of 2007. On the first count it was alleged that on 6th May 2020, the appellant who was working as Sonographer at Singida Referral Hospital corruptly solicited Fifteen thousand shillings (Tshs 15,000/=) from one Ndilahocha Mtula @Fatuma Yunus Lameck as an inducement to conduct her medical examination to wit, ultrasound examination. On the second count, it was stated that, on the same date the appellant corruptly obtained from the same person for the same purpose as in the first count fifteen thousand shillings (Tshs 15,000/=). On the third and fourth counts, it was alleged that, on the same date the appellant corruptly solicited and obtained Sixty thousand shillings (Tshs 60,000/=) from the same person as an inducement to provide her with medical treatment to wit,

manual vacuum aspiration (MVA) and he received the same through his mobile phone with number 0755-957661 (M-PESA).

The brief facts of the case as deciphered from the trial court record are that, the complainant (victim, PW1) and the appellant knew each other before the commission of these offences. On 4th May 2020 the complainant felt stomach ache which continued to the next day when she also started bleeding. Since she had the appellant's phone number, she called him and explained to him her health challenges. In return, the appellant told her to go to Mandewa referral hospital. On arrival at the hospital, she was taken by the appellant to the ultra sound room where she was medically examined. After the examination, the appellant told PW1 that the examination has revealed that she had an abortion and he required her to pay a sum of Tshs 15,000/=, a sum which she paid but was not given a receipt. The appellant also told PW1 that she needed to be cleaned and that such process would cost her Tshs. 60,000/= which she should send to the appellant by way of M-PESA.

As PW1 had no money at hand, he communicated with her husband who upon hearing that the money had to be sent to appellant through M-PESA doubted and suspected that a corrupt practise may be involved as Government payments are not done through M-PESA. Thus, he instructed PW1 to report the incidence at the Prevention and Combating Corruption Bureau (PCCB) office. PW1 obliged and reported the incident at PCCB. There, she was given 60,000/= which was credited in her mobile phone with number 0752 9408847 registered with name of Ndilahocha Mtula. She then

sent the said sum to the appellant's mobile phone number 0755 057661 registered in the name of Abdul Sewando. On the following day the complainant went to the hospital and had a manual vacuum aspiration (MVA) procedure conducted on her by the appellant who thereafter prescribed some medicines which she had to buy. Having attended PW1, the appellant was arrested by PCCB officers as he was leaving the room.

PW2, was an arresting officer from PCCB. He told the court that PW1 reported to their office that she paid Tshs 15,000/for x-ray at Mandewa hospital bus she was not given a receipt and that she has been demanded to pay a Tshs 60,000/= for MVA services which she should pay through M-PESA. That, they gave her the money and had her send the same through an M-PESA agent who transmitted the same to the appellant via his mobile phone. On the next day, 7th May 2020 they went to the hospital and immediately after the appellant has finished attending PW1 they apprehended him. PW3, an IT officer at Singida regional hospital certified that one Fatuma Yunus Lameck attended the hospital on 6th May 2020 as an OPD patient and paid a sum of Tshs 15,000/= for consultation. PW5, the medical in charge of Singida Regional Hospital and PW4, a medical doctor at the said hospital were called to the x-ray room after the apprehension of the appellant. Under the instruction of PW5, PW4 examined the said Fatuma Yunus Lameck and in the course of examination, he observed that an MVA procedure had been conducted on her. He thereafter prescribed medication and wrote a report which was admitted as exhibit P3. PW7, an employee of Vodacom tendered a printout of communications showing that between 5th

may 2020 and 7th May 2020, there were telephone conversations between the appellant and Ndalihocha Yona Mtula and that on 7th May 2020, a sum of Tshs 60,000/= was sent to the appellant from Ndilahocha Yona Mtula's number.

On his part, the appellant offered a total denial to the allegations. While he admitted to have known Fatuma Yunus Lameck and to have treated her and that they communicated through mobile phone, he testified that he treated her at Mzalendo Dispensary, a private owned dispensary where he works on part time basis after working hours. He also insisted that he had no expertise for MVA as he is a sonographer with no training on MVA, a procedure which is gynecologically oriented.

After analysing the evidence from both sides, the trial court found the prosecution to have proved its case. The appellant was subsequently convicted for receiving bribe and subsequently sentenced to a fine of Tshs 500,000/= or a prison term for three years if he failed to pay the fine. Although aggrieved by the conviction and sentence, the appellant paid the fine imposed on him and thereafter, he filed this appeal. Originally, the appeal had four grounds but later on and with the leave of the court granted on 25th of May 2022, he filed four additional grounds of appeal thus making a total of eight grounds.

When the appeal came for hearing the appellant was represented by Mr. Cheapson Kidumage, learned Advocate, whilst the Respondent Republic was

represented by Ms. Patricia Mkina, learned State Attorney. Submitting in support of the appeal. Mr. Chidumage abandoned some of the grounds of appeal while he also consolidated some of the remaining ground. He then proceeded to submit on the following remaining and consolidated grounds:

1. That, the trial court materially erred in convicting and sentencing the appellant based on weak and contradictory evidence.
2. That, the trial magistrate erred in law in not warning himself about the controversies between the name of PW1 as complainant and the name purported to send money to the accused.
3. That, the trial Magistrate erred in law by not looking at the testimony of PW1 with care as it suggests that there were private affairs between PW1 and the accused which eliminate the possibility for the commission of the offence.

Submitting on the first ground above, Mr. Kidumage argued that the trial court erred as no evidence was adduced to show that there was solicitation of bribe. The only evidence was PW1's oral testimony. She told the court that after telling her husband that the appellant has demanded from her a sum of Tshs. 60,000/=, he advised her to report the matter to PCCB. However, this witness who was a material witness was not called as a witness and his name was not disclosed although his evidence was needed to corroborate PW1's evidence. Its absence attracts a doubt on the prosecution's case.

He argued further that, the witness from PCCB that is PW2, told the court that they have no record of conversation between the victim and the appellant. The trial court ought to have addressed itself to this issue but it did not. It focused on the evidence from Vodacom showing that there was communication between the complainant and the appellant although no details of such communication were disclosed. It was Mr. Kidumage's prayer that the omission to call the material witness and to disclose the details of the communication should be used to draw an inference that the omission was intentionally done in the fear that PW1's husband would have given adverse inference against the prosecution. He cited the case of **Aziz Abdallah vs Republic** [1991] TLR 71 to bolster his submission.

With respect to the details of the communication between the appellant and PW1, he argued that since PW1 and the appellant knew each other, it is possible that their communication was an ordinary correspondence and had nothing to do with bribe. Besides, he argued that, the appellant being a sonographer could not under any circumstances perform or provide MVA services to a patient.

Mr. Chidumage proceeded that the count of receiving was not proved as there were several weaknesses. First, the money which was allegedly from PCCB was sent through M-PESA and in so doing, it entertains doubt as to whether the said money was indeed from PCCB and was intended to be used to set a trap. He argued that, under no circumstances can it be verified that the money was from PCCB considering that no witnesses from PCCB testified

that he/she is the one who gave the money to PW1. Even the M-PESA agent from whose shop the money was sent to the victim was not called as a witness to prove that indeed the victim or PCCB gave her/him the money. Again, no reason was advanced as to why M-PESA agent was not called as witness. The omission attracts a doubt.

On the second ground, Mr. Chidumage argued that, the number that allegedly sent the money to the appellant was registered in the name of Ndilahocha Mtula while the victim's name is Fatuma Yunus Lameck. Yet, no explanation was given as to the relationship between these two names. Therefore, it was not clear whether Fatuma Yunus Lameck is the one and the same as Ndilahocha Mtula. When cross examined on the discrepancy of the names, PW1 stated casually that the number is hers and that she registered it using her National Identity Card. Mr. Chidumage argued that, since the names of the person who sent the money was the centre of the second count, in the prevailing uncertainty of names, this count remained unproved. He argued further that, even the M-PESA witness did not state if the alleged transaction was the only transaction in the appellant's phone on that day. Moreover, he argued that the fact that the appellant did not make a follow up to know the person who sent him the money does not constitute the offence of receiving bribe.

It was argued further that, the trial magistrate ought to have warned himself about the discrepancies in the name because in the proceedings, the victim used several names such as Fatuma Yunus Lameck, Fatuma Yunus Lameck

Mtula, Ndilahocha Mtula, Ndilahocha Yona Mtula and Ndilahocha Yona Mtula@ Tafuma Yunus Lameck Mtula and no better explanation was rendered as to the interchangeable use of such names. Thus, the court ought to have been attentive and cautious of these names so as to be sure if indeed the alleged money was sent by the victim. Concluding this point, it was argued that since the appellant admitted to have received the money but he said he didn't know the one who sent it, it was incumbent for the discrepancy to be resolved. As this controversy remained unresolved, he prayed that it should be resolved by this court in the appellant's favour.

On the third ground, it was argued that PW1's and DW1's evidence proved that the two were familiar and that PW1 was benefiting from the appellant's medical services outside the appellant's employment. They met at Mzalendo Dispensary where the appellant used to work overtime. Had the court directed its mind to this issue it would have found merit in the appellant's defence that the service was rendered at Mzalendo. He also stated that, if the court was objective, it would have discovered that the case was fictitious because even arrest was done before informing the appellant's superior.

In conclusion, he submitted that the prosecution did not prove the case beyond reasonable doubt. He supported his submission with the case of **Nathaniel Alphose Mapunda vs. R** [2006] TLR 195 and prayed that the appeal be allowed, the conviction and sentence be quashed and set aside and the appellant be discharged.

In reply, Ms. Mkina objected the appeal and submitted that, the case against the appellant was proved beyond reasonable doubt. She argued that the testimony of PW1 sufficiently proved that the appellant solicited and received a bribe of Tsh. 60,000/=. PW7 tendered exhibit 7 showing how the transaction were made. The fact that PCCB money was sent through M-PESA and the fact that the M-PESA agent did not testify in court did not water down the fact that the appellant solicited and received bribe. Besides, PW2 was with PW1 when she was sending money to the appellant and after sending it, PW1 went to receive the service. As to the argument that there was no witness from PCCB who testified to have given PW1 the money and the fact that the M-PESA agent was not called to show that indeed the victim was given money, it was responded that, it is with no merit as per section 143 of Evidence Act, no particular number of witnesses is required to prove the case.

As to the name registered with phone number which sent the money to the appellant's mobile phone, he argued that the complaint is an afterthought as the appellant did not cross examine the victim on this issue. Besides, the victim cleared the doubt after she testified that both, Fatuma Yunus and Ndilahocha are her names. It was Ms. Mkina's further submission that PW1, PW2, PW3, PW4 and PW5 went to the crime scene and found out that the appellant attended the victim at his work place which is a government hospital and it was at that hospital where he was arrested.

She concluded that, the appeal is seriously wanting as the charges were proved beyond reasonable doubt and the appellant was properly convicted and sentenced. Thus, she prayed that the appeal be dismissed, the trial court's judgment, conviction and sentence be upheld.

Rejoining, Mr. Kidumage argued that section 143 of Evidence Act is not a shield for failure to summon material witnesses. All material witnesses must be called as per the law. As for the absence of messages and recording of the correspondences between the victim and appellant, he argued that the print out produced in court did not sufficiently corroborate PW1's testimony and did not prove the allegations. On the argument that PW2 was present when the victim was sending money to the appellant, he rejoined that, the State Attorney's submission on this issue is incorrect as the proceedings show that PW2 was present when the victim was given money, but not when he was sending the same to the appellant. Also, this witness stated that she saw the victim communicating with appellant but the gist of such communication remains a secrete as no details of such communication was disclosed. On the issue of names, he reiterated his submission in chief. He also rejoined that none of the witnesses who went to the crime scene found the appellant attending the victim. Thus, there was no proof that he attended her. Besides, assuming he did, it was intriguing why the arresting officers waited the appellant to finish the procedure. Concluding his rejoinder, he reiterated the prayer that the appeal be allowed.

I have carefully considered the trial court's record, the petition of appeal, submissions by the parties, the authority cited and the law. This being a first appeal, I am mindful that as a first appellate court, this court has a duty to re assess the evidence on record and make its independent finding as to whether the trial court properly discharged its mandate. Articulating this duty in **Makuru Jumanne and Another vs. Republic**, Criminal Appeal No. 117 of 2005 TZCA 52 (TANZLII), the Court of Appeal of Tanzania held thus:

> It is a settled principle of law that a first appellate court can make fresh assessment of factual issues raised during trial and before the first appellate court.

Cementing this position in **The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (unreported), it held thus:

> The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (**Peters v Sunday Post**, 1958 EA 424; **William Diamonds Limited and Another v R**,1970 EA 1; **Okeno v R**, 1972 EA 32).

I will be guided further by the dictates of cardinal law that in criminal cases, the prosecution is duty bound to prove the charges against the accused person to the required standard which is proof beyond reasonable doubt. The burden never shifts to the accused as he need not prove his innocence. All what the accused needs to do is to raise some reasonable doubt on the prosecution case (see **Mohamed Haruna @ Mtupeni & Another v.**

Republic, Criminal Appeal No. 25 of 2007, CAT (unreported) and **Mwita and Others v. Republic** [1977] TLR 54. Thus, the ultimate question to be answered after considering the grounds of appeal is whether, the prosecution discharged its burden and if so, whether the accused was properly convicted and therefore, his conviction and sentence can be sustained.

As already stated, the appellate stood charged with four counts of soliciting and accepting corruption all of which falling under corrupt transactions prohibited under section 15(1) (a) and (2) of the Prevention and Combating of corruption Act, Cap. 329 R.E 2019 which provides that;

> 15(1) Any person who corruptly by himself or in conjunction with any other person:
> (a) Solicits, accepts or obtains, or attempts to obtains, from any person for himself or any other person, any advantage as an inducement to, or reward for, or otherwise on account of, any agent, whether or not such agent is the same person as such first mentioned person and whether the agent has or has no authority to do, or forbearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, commits an offence of corruption.
> (2) A person who is convicted of an offence under this section, shall be liable to a fine 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.

As the charges against the appellant were soliciting and accepting corruption, it was incumbent for the prosecution to prove beyond reasonable doubt that he solicited and obtained corruption as alleged. From the evidence on record, there is no dispute that on 6th May 2020 the appellant received Tshs. 60,000/= by M-PESA from one Ndilahocha Mtula. Thus, the outstanding issue is whether the appellant solicited the money and whether the money was paid to him as corruption.

The appellant has complained that the prosecution case was weak as it has several missing links and was contradictory hence insufficient to support a conviction as the prosecution case was not proved to the required standard. He has argued that, some material witnesses were not called notably, the appellant's husband (name undisclosed) and the M-PESA agent at whose shop the PCCB money was deposited. For the respondent it has been argued that, such requirement is inconsistent with the position under section 143 of the Evidence Act Cap. 6 R.E 2022 which provides that, no particular number of witnesses is required to prove a case.

Both parties are correct in their respective submissions on the twin cardinal principles of law. The first and which is relied upon by Ms. Mkina, is derived from section 143 of the Evidence Act and which states that, no particular number of witnesses shall be required for the proof of any fact. Applying this principle in **Yohanis Msigwa vs. Republic** [1990] TLR 148, the court held that;

> As provided under section 143 of the evidence Act 1967, no particular number of witnesses is required for the proof

> of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility.

In another case, **Richard Jared vs. Republic**, Criminal Appeal No. 23 of 2018 (unreported), the Court of Appeal held that;

> It is certain that under section 143 of the Evidence Act, no specific number of witnesses required to prove any particular case. As often stressed, what is important is for the prosecution to call witnesses who may prove their case beyond all reasonable doubts.

The twin principle relied upon by Mr. Kidumage states that, it is the legal duty for a party to summon all material witnesses to the case the failure of which might attract an inference adverse to the respective party. Applying this principle in **Boniface Kundila Tarimo vs. R,** Criminal Appeal No. 350 of 2018 (unreported), the Court of Appeal held that:-

> It is thus now settled that, where a witness who is in a better position to explain some missing link in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one.

In a subsequent decision in **Pascal Mwinuka vs Republic** (Criminal Appeal 258 of 2019) [2021] TZCA 174, the Court of Appeal while dealing with the twin principles stated thus:

> At this juncture, while we agree with Ms. Mpagama that in terms of section 143 of the Evidence Act, Cap 6 R. E. 2019, a

party is not compelled to parade a certain number of witnesses to support his case as also rightly observed by the Court in **Separatus Theonest @ Alex v. The Republic,** Criminal Appeal No. 135 of 2003 (unreported), we **however hold the firm view that this is not always the position in every case. Equally important, it is settled that depending on the circumstances of the case, failure to summon an important witness at the trial entitles the court to draw adverse inference to the respective party's case.** It is in this regard that in Aziz Abdallah v. The Republic (1991) TLR 91 it was stated that:-

> **"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a, permissible one".** [the emphasis is mine].

Under this guidance, I have re assessed the evidence on record to ascertain if PW1's husband and the M-PESA agent were material witnesses and if so, whether the omission to summon them attracts an inference adverse to the prosecution. In my considered view, PW1's husband was not a material witness. Much as it is true that the testimony of PW1 shows that her husband is the one who mooted the idea of reporting the transaction to PCCB hence his evidence could have corroborated PW1's story, the absence of his testimony is less injurious to the case as he was not there when the appellant solicited the bribe. He neither gave PW1 the money and was absent when PW1 obtained the money from PCCB. Also, he was neither involved in sending the money to the appellant nor was he present when the appellant

received the same from PW1. Save for his advice to PW1 that she should take the matter to PCCB, his account would have been mostly hearsay with no substantive value.

Inversely, I find the M-PESA agent to be an important witness because, according to the evidence on record, this agent whose name was undisclosed, received the money which PW1 had collected from PCCB and through him, the equivalent of such money was electronically transmitted to Ndilahocha Mtula who later on sent it to the appellant's phone number. As correctly argued by Mr. Kidumage and considering that no receipt or document was issued by PCCB or signed by PW1 in acknowledgment of receipt of money obtained from PCCB, it was crucial that this witness be called to collaborate PW1 and PW2's story. Surprisingly, this witness was not summoned and his name was not disclosed. In my firm view, much as there is no certain answer to the question whether the omission of this witness was accidental or tactfully employed to conceal some facts unfavourable to the prosecution as argued by Mr. Kidumage, one thing is certain, that is, the omission had a serious ramification on the prosecution's case as it rendered the fact as to the obtainment of cash from PCCB and the solicitation of bribe by the appellant, unproved.

On the second ground regarding the inconsistencies in the victim's name, I am convinced by the appellant's counsel argument that where a person uses more than one name, there must be evidence to prove that such names refer to one person and are used interchangeably. In circumstances such as the

one in the present case where PW1 was allegedly using more than two names interchangeably, the presence of a registered deed poll showing that PW1 was interchangeably using the names Fatuma Yunus Lameck, Ndilahocha Mtula and Ndilahocha Yona Mtula @Fatuma Yunus Mtula, cannot be overstated. The omission to tender such evidence or any documentation showing the interchangeable use of such names left a million question as to whether, Fatuma Yunus Lameck who was familiar to the appellant is the same as Ndilahocha Mtula who sent the money to the appellant.

Besides, even if I were to underate the requirement of such evidence and assume that Fatuma Yunus Lameck, Ndilahocha Mtula and Ndilahocha Yona Mtula @Fatuma Yunus Mtula are one and same person, the question as to the purpose of the money sent to the appellant's phone number will remain unanswered. The mere act of tendering exhibit P7 which shows that there was communication between the victim and appellant, was not enough to prove that indeed the appellant committed the offence he was charged with. More concrete evidence was required of the gist of their conversation to substantiate the allegation that the appellant solicited bribe from PW1 and that the amount sent to the appellant's phone was a bribe. Needless to reiterate that the duty to prove these facts beyond reasonable doubts rested solely on the prosecution and that by failure to render such concrete evidence, the prosecution abdicated its legal duty and its case remained unproved. Holding otherwise entails shifting the burden of proof contrary to the cardinal laws and principles.

Consequently, the appeal is hereby allowed, conviction entered against the appellant is quashed and the sentence imposed to him is set aside. It is further ordered that the fine already paid by the appellant be refunded to him. It is so ordered.

DATED and **DELIVERED** at **DODOMA** this 25th day of August, 2023

J. L. Masabo

JUDGE