IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 87 OF 2021

(Originating from Criminal Case No. 5 of 2019 of the Resident's Magistrate Court of Dodoma at Dodoma)

AHMED AHMED CHITAGU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24/11/2022 & 30/3/2023

KHALFAN, J.

The Appellant, Ahmed Ahmed Chitagu, was arraigned in the Resident Magistrate's Court of Dodoma at Dodoma (henceforth 'the trial Court') with two counts of corrupt transaction contrary to section 15 (1)(a) & (2) of the Prevention and Combating of Corruption Act, No. 11 of 2007. The trial Court entertained the matter and found the Appellant guilty of both counts and sentenced him accordingly.

Particulars of the case are to the effect that, on or about 10th day of May, 2019 within Dodoma Region, the Appellant, being employed in the Vice President's Office as a senior waiter, did corruptly solicit the sum of TZS 1,500,000/= from one Michael David Sumaye as an inducement for him to

be given a letter dated 6th May, 2019. It was stated further that, on the same date, the Appellant received the stated amount of TZS 1,500,000/= from the aforementioned person being the amount he solicited from him for the stated purpose.

To prove the substance of the charge, the prosecution brought a total of nine (9) prosecution witnesses and six (6) exhibits. The exhibits were PE1 (trap money), PE2 (150 notes of TZS 10000/= each), P1 (the register and the letter dated 25/04/2019), P2 (the letter dated 17/04/2019), P3 (accused's cautioned statement) and P4 (letters dated 6/05/2019 and 25/4/2019).

During trial, PW6, Michael David Sumaye, being the key witness, testified that he was the director of Amico Trading and Services. While in his business duties, he was instructed by their client, Metro Plastic Industries to make follow up for their licence at the National Environment Management Council (henceforth 'NEMC') which is under the Office of the Vice President. He said, in making such follow up, his co-director one, Manase Mnuo, informed him that the said licence letter was with the Appellant who demanded the amount of TZS 1,500,000/= in order to release it. As such,

he was given the contact of the Appellant so as to communicate with him and comply with his demand.

PW6 added that having communicated with the Appellant, the Appellant insisted that he wanted the said amount of money in order to give them the letter. Having heard from the Appellant, he scrutinised the demand, and decided to go to Prevention and Combating of Corruption Bureau, (henceforth 'PCCB') to lodge his complaint. As such, the trap was set to arrest the Appellant and consequently, the Appellant was arrested in his car while PW6 was giving him the trap money in exchange with a licence letter of 17/04/2019.

This piece of evidence was supported by PW1, Emmanuel Prosper, an investigator of PCCB, who went to the scene of crime and witnessed the commission, PW2, Gervas Lucas Komba who was the co-employee of the Appellant and was with the Appellant on the material date as well as PW8, Lizy Kiwia who took the cautioned statement of the Appellant (exhibit P3). Similarly, PW7, Sinyael Kitomari who was around the scene of crime and witnessed a group of people chasing the Appellant who ran to the car and entered in it.

The Appellant, in his defence, denied the charge in its totality. He said that he neither solicited PW6 to give him the said TZS 1,500,000/= as an inducement to be given the letter dated 6/5/2019, nor received the said sum of money. He said that, he had never seen such a letter as well as the letter dated 17/04/2019. He added that he was arrested while heading to the car. In the circumstance, he testified further, a number of people surrounded him, shouting and saying that he was the one who was demanding corrupt money. They thus urged that he should take the money, and in that regard, he was forced to take the envelope which, after it was opened, had a total of 150 notes, each having a value of TZS 10,000/=.

The Appellant also countered the variation of the dates of the letter subjected to corruption allegation, and the number of the notes in the trap form (exhibit PE1) and the notes (exhibit PE2), whereas the prosecution agreed that there was a variation which they termed as human error as one note had double digit 5 instead of one. The other one was also written 4 instead of 5 which made the prosecution to remain with 148 notes only.

The Appellant, being aggrieved with the conviction and sentence meted to him by the trial Court, is now seeking this Court to allow his appeal, set aside the conviction and sentence; and accordingly, set him free. In his

Petition of Appeal, the Appellant has packed five (5) grounds of appeal basing on the following:

1. *That, the trial Court erred in law and fact to convict and sentence the Appellant while the Respondent failed to prove the case beyond reasonable doubt.*
2. *That, the trial Court erred in law and fact to convict and sentence the Appellant basing on the weakest and contradictory evidence adduced by the Respondent's witness.*
3. *That, the trial Court erred in law and fact by failing to critically evaluate and analyse the evidence adduced by the Respondent's witnesses.*
4. *That, the learned trial Magistrate erred in law and fact for offending Section 210(3) of the Criminal Procedure Act, [CAP. 20 R.E 2019].*
5. *That, the learned trial Magistrate erred in law and fact for admitting exhibit P4 which was previously rejected.*

On the date of hearing of the appeal, the Appellant was represented by Mr. Issaya Edward Nchimbi, the learned Advocate, and Mr. Ahmed Hatibu, the learned State Attorney, appeared for the Respondent. Mr. Nchimbi, in supporting the appeal, submitted that the prosecution side failed to prove the case. He started by analysing the testimony of PW1, saying that the same was weak as there was no proof of the offence of soliciting in the

evidence adduced by him. He insisted that throughout his testimony, he did not state how he came to know that the Appellant solicited a sum of TZS 1,500,000/=. Also, he said that PW1 failed to prove the amount received by the Appellant as he admitted that the two notes, the subject of corruption allegation, did not match with the notes in the trap form.

The learned Advocate went further to submit on the search conducted against the Appellant after the arrest. He said that, PW1's evidence did not show how the Appellant was found with the said amount of TZS 1,500,000/= since the explanation given on the things seized from the Appellant did not mention the said sum of money. He further argued that the search against the Appellant was not done in accordance with the provision of Section 38 (1) & (3) of the Criminal Procedure Act, [CAP. 20 R.E 2022].

He said that the above-mentioned provision of the law requires issuance of receipt after search as emphasized in the case of **Shabani Said Kindamba vs. The Republic**, Criminal Appeal, No. 390 of 2019, CAT, at Mtwara, and the consequence of not observing the same is that the impugned proceeding, judgment and sentence shall be rendered null and void.

Mr. Nchimbi, further, submitted that PW3, Paulo Henry Mauhula and PW5, Prisca Joachim Marcel, being the co-employees of the Appellant, who dealt with the letter of 6/05/2019 which is a subject of the corruption allegation, failed to prove that the Appellant solicited or received the said TZS 1,500,000/= for the letter given to the Appellant for dispatching.

He added that it was revealed by PW5 that the Appellant was not on duty to dispatch letters on the material date. Instead, it was Bertha Kombe, who was on duty. However, the said Bertha Kombe was not brought to the trial Court to testify. He argued that the failure to bring the said Bertha Kombe to testify as the key witness draws a negative inference against the Respondent. He relied on the case of **Raphael Mhando vs. The Republic**, Criminal Appeal No. 54 of 2017, CAT, at Tanga.

Mr. Nchimbi added that, the testimony of the complainant PW6 is doubtful in several respects. While PW6 mentioned Mr. Manase as the person who told him that the Appellant demanded TZS 1,500,000/=, gave him the Appellant's contact, and as a result, PW6 started to communicate with the Appellant, the said Mr. Manase was not called to testify during trial as a material witness. The failure creates doubts on the involvement of the Appellant in soliciting such sum of money as charged. He also emphasised

that PW6 was supposed to disclose the contact used to communicate with the Appellant. The failure to do so makes his testimony a mere hearsay which the Court ought to disregard.

Moreover, Mr. Nchimbi controverted the variation on the dates of the letter which is a subject of the charge levelled against the appellant. The evidence of PW6 states that the source of the charge against the Appellant was a release of the letter dated 17/04/2019 and not the letter dated 6/05/2019 as it appears on the charge sheet. He also contended that the evidence shows that the trap money was in an envelope which the prosecution however opted not to tender. Due to this,it was argued, a shadow of doubt is created.

Mr. Nchimbi, on the other hand, attacked the trial Court for failure to analyse and evaluate the evidence which renders the conviction and sentence unfounded. He referred me to the case of **Abel Masikiti vs. The Republic**, Criminal Appeal No. 24 of 2015, CAT, at Mbeya which held that failure to consider the defence case is fatal.

The learned Advocate contended that the trial Court erred by admitting the letter dated 6/05/2019 as exhibit P4 as it had previously rejected it. He added that the prosecution was not supposed to produce the same through

another witness. If they were not satisfied with the rejection, they had a room to appeal to the High Court as it was stated in the case of **The DPP vs. Mirzai Pirbakhshi @ Hadji and 3 Others**, Criminal Appeal No. 493 of 2016 (unreported).

Mr. Hatibu, for the Respondent, supported the conviction and sentence pronounced by the trial Court to the Appellant. He submitted that the charge was proved beyond reasonable doubt against the Appellant. He referred the court to the evidence adduced by all prosecution witnesses. He started with PW6 who explained how the Appellant solicited and consequently received the sum of TZS 1,500,000/= as an inducement whose evidence was, according to Mr Hatibu, corroborated by PW1, PW2 and PW7.

Mr. Hatibu, the learned State Attorney, went on to submit that the purported mismatch of trap notes and trap form was due to human error and the same cannot be affect the root of the case. As the evidence is clear, the notes were 150, as it appeared in the trap form. To cement his submission, he cited the case of **Eliah Bariki vs. The Republic**, Criminal Appeal No. 321 of 2016, CAT at Arusha which the Court insisted that where there is contradiction on witnesses' testimony, the Court should consider credibility of the witnesses.

On the issue of search and certificate of seizure as submitted by the learned Advocate for the Appellant, Mr. Hatibu argued that, every case is always determined in its own facts. As in the circumstance of this case, it was a trap and not a common arrest and search. The trap form therefore served the purpose. Mr. Hatibu went further to reply that Ms. Bertha and Mr. Manase were not material witnesses as it was contended. He added that the law under Section 143 of the Evidence Act, [CAP. 6 R.E 2022] provides that, no particular number of witnesses is required to prove the case except that what is required is to have evidence which carries weight as it was in their side.

Mr. Hatibu, replied further that there was no any law violated by admitting exhibit P4 by the trial Court as contended by the learned advocate for the Appellant as Section 192(3) of the Criminal Procedure Act, [CAP. 20 R.E 2022] does not set such conditions of identifying documents to be relied upon during trial. Moreover, Mr. Hatibu said that the facts that the Appellant agreed that Mr. Manase promised him that he should give the letter to PW6 and in turn he would be given *'bakishishi'* and that he was arrested in possession of TZS 1,500,000/=, and he did not know whether it was bribe or *'bakishishi'* suffices.

Replying to the contention that the trial Court did not analyse and evaluate the evidence, Mr. Hatibu argued that, the trial Court properly evaluated the evidence produced by both parties to reach at its decision. He added that, even if the trial Court did not analyse or evaluate the evidence, this court as the first appellate Court, has a duty to step into the case and make its analysis and evaluation. He cited the case of **Said Peter @ Ndira @ Said Ramadhani vs. The Republic**, Criminal Appeal No. 490 of 2020, CAT at Kigoma.

Mr. Hatibu wound up his submission by saying that the contradiction which appears on the dates of the letter which is a subject of the charge is immaterial as the letter is of 17/04/2019 and the letter of 6/05/2019 was the date when the Appellant was on duty to dispatch the said letter. Having replied as it appears above, he prayed to the Court to dismiss the appeal and to uphold the trial Court's decision.

In rejoinder, Mr Nchimbi reiterated what he submitted in submission in chief and insisted that PW6 as a key witness, his testimony was not corroborated. Thus, it remained as hearsay taking into consideration that Mr. Manase was not called to testify and he did not see the Appellant receiving the said TZS 1,500,000/=. He likewise insisted that the variation of notes

was not a minor irregularity as it goes to the root of the case and that the Appellant was searched in violation of the law as the same was not a trap but a search. He also insisted that the variation of dates of the letter subjected to the charge brings in a contradiction as there are two letters one dated 17/04/2019 and another dated 6/05/2019. He thus maintained his submission that the prosecution failed to prove the charge beyond reasonable doubt.

I have carefully considered the submission of both parties and examined the records of the trial Court in this matter. I will thus determine the merit of this appeal on one issue as to whether the prosecution proved the case beyond reasonable doubt.

It is trite law that the standard of proof in criminal cases is of beyond reasonable doubt and that the burden of proof is always on the shoulders of the prosecution side. This legal position is demonstrated in a chain of judicial decisions in our jurisdiction. For instance, the Court of Appeal of Tanzania in the case of **Nkanga Daudi Nkanga vs. The Republic,** Criminal Appeal, No. 316 of 2013, CAT at Mwanza had this to say:

> *'It is the principle of law that the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs, and that the accused has no*

duty of proving his innocence – See ***Armand Guehi vs. Republic,*** *Criminal Appeal No. 242 of 2010, CAT (unreported). It is important to underscore, as we stated in the case of* ***Nyeura Patrick vs. Republic,*** *Criminal Appeal No. 73 of 2013, CAT (unreported), that the burden of proof placed on the prosecution arises from the presumption of innocence in favour of the accused that no less than the* ***Constitution of the United Republic of Tanzania, 1977*** *as amended from time to time, has guaranteed- See Article 13 (6) (b) thereof.'*

This being the first appellate Court, I have a duty to bring the matter into a fresh examination, having in mind that it is the trial Court which is better placed to assess the credibility of the witnesses than this Court. See the case of **Ali Abdallah Rajab vs. Saada Abdallah Rajab and Others** [1994] TLR 132.

It is stated in the charge that the Appellant corruptly solicited the sum of TZS 1,500,000/= from PW6 as an inducement to be given a letter dated 6th May, 2019 and that he accordingly received the stated amount of TZS 1,500,000/= from PW6, being the amount, he solicited from him. To prove this charge, it was the duty of the prosecution to prove how the Appellant solicited and eventually received such amount of money.

I have carefully gone through the evidence adduced during the trial by starting with PW6 being the person who alleged that the Appellant solicited and obtained a sum of TZS 1,500,000/= from him and found that his evidence has left some gaps which I will reveal in due course.

Starting with the fact that, PW6 was linked with the Appellant by his co-director Mr. Manase as he gave him the contact of the Appellant and as such, he communicated with him concerning the letter dated 17/04/2019. Consequently, the Appellant demanded such amount of money. These facts by themselves miss the connection with the offence of soliciting as there is a gap as to which phone number was used to communicate with the Appellant as contended by the learned advocate for the Appellant. The same was crucially important since it would help to inquire into the communication that transpired between them.

Nevertheless, the fact that PW6 met the Appellant before the date of the incident to discuss this matter is not supported by any evidence. These gaps left by the prosecution during trial raise doubts as to whether the Appellant solicited such amount of money from PW6 as charged.

Additionally, the said Mr. Manase who connected PW6 with the Appellant and who seems to know the nature of the alleged demand of TZS

1,500,000/= in the first instance, and who later informed PW6 about the said demand, was not called to testify which also left a gap taking into consideration that the said Mr. Manase was also by the Appellant during cross examination, and in the cautioned statement (exhibit P3). In this regard, I agree with Mr. Nchimbi, the learned Advocate for the Appellant, that Mr. Manase was a material witness and the failure to call him to testify, an adverse inference should be drawn against the prosecution as per the case of **Raphael Mhando vs. The Republic** (supra).

I am alive to the provision of Section 143 of Evidence Act [CAP. 6 R.E 2022] as submitted by the learned State Attorney that no specific number of witnesses is required to prove the case but what is important is the weight of the evidence adduced. It is my firm opinion that in this matter Mr. Manase was a material witness and not Ms. Bertha as it was submitted by Mr. Nchimbi.

This is because, Mr. Manase would tell the Court the whole incident of soliciting money by the Appellant from him to PW6. The case of **Sadick Hussein Nyanza and another vs. the Republic**, Criminal Appeal, No. 186 of 2016, CAT at Dar es Salaam illustrates this position thus:

'...We agree with the learned State Attorney that under section 143 of TEA no specific number of witnesses is required to prove a case and that what is important is the credibility of the witness (See ***Yohanis Msigwa Vs. Republic*** *[1990] TLR 148). But, the watchman was an essential witness in proving both the occurrence of the alleged robbery and the identity of the bandits. The record bears out that he was not called and no reasonable explanation was forthcoming from the prosecution despite being said that he also resided at Kibiki. He was within reach but for unexplained reason was not called to testify. This, no doubts, leads us to an irresistible inference that had he been called as a witness he would have given a testimony unfavourable to the prosecution case.'*

Another doubt is on the letter which is the subject of the charge. And there the issue is whether the same was of 17/04/2019 or of 6/05/2019. PW6 on his testimony said the letter which led the Appellant to solicit from him the sum of TZS 1,500,000/= was dated 17/04/2019 while the charge reads 6/05/2019. Similarly, PW9, the author of the letter dated 6/05/2019 exhibit P4, contended that the same was the subject of the charge against the Appellant. This also creates a gap as to which exactly is the letter which initiated the offences that the Appellant was charged with. For that reason,

I find that the doubts are reasonable and the first count is therefore dismissed.

Coming to the second count, that the Appellant received the sum of TZS 1,500,000/= as an inducement to be given a letter of 6/5/2019, there is no dispute that the Appellant was arrested by PW1 an officer of the PCCB and he was found with the trap money exhibit PE2 of TZS 1,500,000/= which consisted 150 notes. According to the evidence of PW1, PW2 and PW7, they witnessed the Appellant receiving the money. However, their evidence does not state if there was exchange of envelope as stated by the PW6 who said that he handed the Appellant an envelope of trap money and the Appellant handed him an envelope containing the letter dated 17/4/2019. This omission raises doubts as to whether the Appellant did receive such corrupt money.

Nevertheless, PW7 brought a new version of the story as while PW6, PW1 and PW2 said that the Appellant received the said money in the car and hence his arrest, PW7 said that the Appellant was being chased by a number of people and as a result he ran into the car and whilst inside he closed the door. PW7 stated that he later came to know that the persons who were

chasing the Appellant were PCCB officers. He further stated that the said PCCB officers opened the car and found the Appellant alone inside the car.

Besides, this version of testimony supports the defence of the Appellant who said that while he was getting into the car, a lot of people surrounded him, shouting against him that he was the person demanding corrupt money and forced him to take the envelope which after he opened it, he found that it had a total of 150 notes with value of TZS 10,000/= each. This too raises doubt as to the commission of the offence of receiving corrupt money by the Appellant as there are two instances in respect of which the Appellant is alleged to have received the said corrupt money amounting to TZS 1,500,000/=.

Basically, the number of doubts illustrated above weaken the prosecution's case as the same relieves the Appellant's liability despite the contention by the learned State Attorney that the Appellant admitted to have received TZS 1,500,000/= from PW6, which Mr. Manase promised to give him as '*bakishishi*'after giving him the letter.

In my considered opinion, this piece of evidence does not prove the case because it is not revealed what does the term '*bakishishi*' meant to the Appellant and more so to Mr. Manase who was not brought to the Court.

Had the latter been brought, he would have told the Court the intention of the promise of giving the Appellant that amount of money if at all. Otherwise, the Appellant's intention has not been shown.

It is unsafe to conclude that the Appellant received *bakishishi* knowing the same was corrupt money without having been satisfied with the mental element or the deliberate intention of the Appellant (*mens rea*). That being the case, I have re-examined the evidence adduced by both parties during trial and the cautioned statement exhibit 3 of the Appellant and found that the mental element was not proved.

Therefore, basing on all what I have stated hereinabove, this Court finds that the charge laid against the Appellant was not proved beyond reasonable doubt. Thus, this appeal is meritorious and allowed accordingly. The conviction entered against the Appellant in both counts is quashed and the sentences imposed to him in respect to all counts, are set aside. The court is ordering that if the Appellant opted to pay fines imposed onto him by the trial Court to be refunded accordingly. It is ordered accordingly.

Dated at **Dodoma** this 30th day of March, 2023

F. R. KHALFAN
JUDGE