IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 86 OF 2022

(C/F Criminal case No. 160 of 2018 in the Resident Magistrate's Court of Arusha at Arusha)

MOHAMED JUMA MUHAYA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26/10/2022 &22/02/2023

GWAE, J

In the Resident Magistrate's Court of Arusha at Arusha (trial court) the appellant, Mohamed Juma Muhaya was charged with corrupt offences under provisions of the Prevention and Combating of Corruption Act, Act No. 11 of 2007 (Act) and other offences under the Penal Code, Chapter 16, Revised Edition, 2002 (Code). The charge was comprised of a total of twenty (20) counts.

Through its verdict dated 16th August 2021 the appellant was found guilty of two offences following under the offence of corrupt transactions contrary to section 15 (1) (a) and (2) of the Act in count one and count two. On 17th September 2021, the trial court sentenced him to pay a fine

of Tshs. 500,000/= or twelve months' imprisonment. However, the trial court acquitted him in other counts (18 counts) contrary to provisions of the Code.

Particulars for the 1st count read that, between 26th and 28th June 2017 at Arumeru within Arusha District in Arusha, the appellant being an employee of Department of Immigration in the Ministry of Home Affairs as an Immigration officer, did solicit United States Dollars (USD) six thousand (6,000,000) only from the Administration of Kennedy House School as an inducement to refrain from taking an appropriate legal action against foreign employees of the Said school.

Subsequent to the said solicitation, on the said dates the appellant did receive United State Dollars (USD) six thousand (6,000,000/=) from one Emmanuel Retagwelera, the then Human Resource Officer of the said School as an inducement for him to refrain from taking appropriate legal action against the school foreign employees who were living in the country without permits (2nd count).

Dissatisfied with the decision of the trial court, the appellant has opted to challenging both conviction and sentence before the court by way of an appeal. His grounds of appeal are;

1. That, the trial court erred in law and fact to convict the appellant of the 1st count of corrupt transaction while there is no evidence whatsoever in record to support such finding
2. That, the trial court grossly erred in law and fact to convict the appellant of the 2nd count of corrupt transaction while there is no clear and cogent evidence on the record that amount USD 6000 allegedly give to the appellant was a bribe
3. That, the Honourable Resident Magistrate convicted the appellant of the counts of corrupt transaction without proper reasoning and while the offence was not proved beyond reasonable doubt as required by the law

This appeal was disposed by way of written submission. Arguing the appeal, the appellant through his advocate one Robert Rogath combined all three grounds of appeal herein into one ground of appeal and his submission is as follows;

That, the prosecution failed to prove the guilt of the appellant to the required hilt since even her witness, PW6 plainly estified that, she made payment in the tune of USD 6,000 and that she received exchequer receipt of the amount duly received exhibiting that the said amount was paid to the Government. The counsel also argued that PW6 refuted the allegation

that she paid USD as briber as depicted in page 73 of the typed proceedings.

Further submitting for the appeal, the appellant's counsel stated that, PW2, PW2 and PW6, while under oath, testified that there were no corrupt transactions. Moreover, the counsel for the appellant argued that the charge itself is contradictory as the amount of money allegedly solicited and received as bribery by the appellant is words written six thousands UDS while in figure is written 6,000,000 (Six million USD).

In his final submission, the appellant's learned advocate argued that, there was no proof by the prosecution side that, on the alleged dates the school foreign employees had no valid work permits and residents' permits to justify the appellant to take action against them. Buttressing his arguments, the counsel for the appellant cited the case of **Mohamed Said Matula vs. Republic** (1995) TLR 3 where the Court of Appeal of Tanzania stated;

> *(i) Where the testimonies by witnesses contain inconsistencies and contradictions. The court has a duty to address the inconsistencies and try to resolve them where possible; else, the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter.*

(ii) *(ii) Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.*

Resisting this appeal, the respondent's learned state attorney one Alis Mtenga argued that there was ample evidence that the appellant solicited and received corrupt money (USD 6,000) from school via PW4 who was also given by her superior officer. She further submitted that the money received by the appellant was in indeed corrupt money since the same was neither deposited in the account of the appellant's employer nor was it receipted as adduced by PW3, the appellant's employer. It is therefore her view that, the trial court properly convicted and sentenced the appellant.

Reacting to the appellant's assertion that, the money given to the appellant was paid to the Government and that ERV receipts were issued. The respondent's counsel stated that, such assertion is a flat lie aimed at defeating justice since USD 6000 was directly paid to the appellant on 28th June 2021 through PE2 and that, the same amount of money was actually spent by him (Appellant). Cementing her stance, Ms. Mtenga argued that,

the appellant concealed his ill motive by making six fake exchequer receipts purporting to show that, the Government of Tanzania issued the same. Applying her analogy, Ms. Mtenga submitted that the Government services are preceded first followed by acknowledgment of receipts and then service. She went on arguing argued that, the charge relating to the offence of corrupt transaction was proved by the prosecution through her witnesses namely; PW1, PW3 and PW4. Similarly, she submitted that, the word facilitation fee taken by the appellant was a cover up word of corrupt money to hasten the whole process and not take legal actions against the giver or the giver's agents whose permits had expired or were about to expire.

As the appellant's grounds of appeal are on whether the required proof by the prosecution on the offence of corrupt transaction c/s 15 (1) (a) and (2) of the Act was fulfilled, it is therefore pertinent to have provisions of the section 15 (1) (2) of the Act cited herein under;

> ***15****(1) any person who corruptly by himself or in conjunction with any other person-*
>
> *(a) solicits, accepts or obtains, or attempts to obtain, 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 or

(b) gives, promises or offers any advantage to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any agent whether or not such agent is the person to whom such advantage is given, promised or offered and whether the agent has or has no authority to do, doing, 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 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".

Above quoted provisions of law denotes that, any person notwithstanding that, he or she is in authority or not who does an act or forbearing to do or having done an act or forborne, who corruptly solicits, accepts, obtains or attempt to obtain any advantage as an inducement to or prize for his benefit or benefit of another. Such acts or forbearance must be in connection with his principal's affairs or business. And that, upon conviction, the trial court shall sentence him or her to a fine of not less than five hundred thousand but not

more than one Tshs. 1, 000,000/= or custodial sentence of not less than three years and but not exceeding five years.

According to the evidence adduced by the prosecution through PW1, PW3, PW4 PE2 and PE7 before the trial court, at the outset, I am satisfied that, the appellant was given USD 6,000 as facilitation for work and residence permits in favour of the School foreign employee. The appellant's assertion that, he neither new PE2 nor did he sign a handing over of USD 6,000 by Emmanuel Rutagwelera (PW4) is an afterthought as depicted at page 106 of the typed proceedings;

> *"I don't understand exhibit P2 also the said amount was not handed to me.....Exhibit P2 shows that Emmanuel was a witness when money was handled to Mohamed Juma Muhaya. The one who handled the money is not known".*

The appellant's defence does not persuade me since the prosecution evidence satisfactorily adduced evidence in support of the charge through PW1, PW3, PW4 as well as PW6 who said PE2 was an acknowledgement of the receipt of USD 6,000 by the appellant as part payment. The issue on, who handled the money the appellant is, in my considered opinion, unambiguously clear that it was the school, the owner of the said amount of money.

Though the appellant's defence was that, the exchequer receipts were genuine as opposed to the prosecution complaints, but he patently denied to

have received the money allegedly received by him. This piece of defence evidence, leave a lot to be desired, how then, he could deposit the money to the Government, which was not given to him? The answer of this question is not in favour of the appellant.

More so, I have examined PE4, six exchequer receipts which are of 14th day of September 2017 whilst the appellant is alleged to have corruptly received USD 6000 on 28th day of June 2017. Ordinarily, exchequer receipts are issued upon made payment promptly or as soon as practicable. Of course, that was before new Government payments' system, electronic payments' system as far as payments to Government is concern. So, it was expected of the appellant, if he admitted to have received the said amount of money in Dollars, to have issued receipts as soon as possible and the payment ought to have been made in Arusha and not in Dar es salaam, if it was so. In **Jonas Nkize v. Republic** (1992) TLR 213 where it was held that;

> "*The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking".*

The same holding was stressed by South Africa court in **State vs. *Van Der Meyden*** 1999 (2) SA 79 (WLD) at 80H-81C, it was held that:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent".

In our instant appeal, the appellant via his counsel argued that the prosecution did not prove the 1st and 2nd counts to the required values since her witnesses namely; PW4 and PW6 denied to have corruptly given the appellant money. Examining the evidence adduced by PW4 and PW6, It is as submitted by the appellant. For the sake of clarity, let me reproduce parts of their respective testimonies;

PW4's evidence

"The whole process was done by Francis Victor Zephania Laiser who was my assistant, was the one who gave the said amount and he told me that Francis gave it to him. That was to facilitate the payment of permit for new teachers payment for the permit for new teachers who were to renew their contract. Mohamed Muhaya signed to approve that he received the said money and I also signed as a witness".

PW6's evidence

"The money was prepayment for the permits which were taking place.....

Xx *I did not give corruption in all process of obtaining the permits*

Rex*: The purpose of the letter was to acknowledge that the part payment was received".*

Carefully looking at the evidence adduced by the PW2 and PW6 as well as the wording of PE2, I clearly observe that, the words used "being payment for facilitation of the process" for work permits' connotes that, the money given to the appellant was not money paid to the Government as fees for the residence and work permits. It was the money paid for facilitation or easing the process of obtaining residence and work permits. It should be borne in minds that, residence permits and work permits are issuable by two different Government entities to wit; the Ministry of Home Affairs, Immigration Department and Ministry of Labour, at the Labour Commissioner's Office.

That being the case, it cannot therefore be said that, the appellant, an immigration officer received USD 6,000 as part of the Government fees/ charges for the work and residence permits. If the appellant was entrusted by the School to process the permits, it could be in an office in whic he worked and not in a different office. This is why the word used is facilitation of the process for permits. The appellant's acts, in my decided view, constituted an offence of corrupt transactions as stipulated under

provisions of section 15 of the Act. However, I have observed that no any piece of evidence establishing that, the appellant solicited the corrupt money save that he obtained the advantage.

Now as to the appellant's complaint that, the amount alleged corruptly received by the appellant in figure and words appearing on the charge are different. Thus, making the charge defective and thereby a failure by the prosecution side to prove exactly the amount allegedly solicited and corruptly received by the appellant. The charge reveals the complained anomaly. However, I am not convinced, if such anomaly goes to the root of the case or prejudiced the appellant during his defence. I am alive of the principle that a charge must be able to make an accused person know the nature of an offence and its ingredients. This position was correctly stressed in the case of **Musa Mwikunda vs. Republic**, Criminal Appeal No. 174 of 2006 (unreported), the Court of Appeal held;

> *"The principle has always been, that an accused person must have known the nature of the offence facing him. This can be achieved if a charge discloses the essential elements of an offence. If that is not done, the accused will not have been put on a proper notice of the nature of the case he has to answer. He cannot, therefore, adequately prepare himself to put up an effective defence".*

Basing on the above quoted principle, it is significant important the charge be understood by an accused person. However, the former case is distinguishable from the present matter as when I keenly examine the evidence on record, I find it is amply testified that, the amount involved of money in the 1st and 2nd count was six thousand USD (USD 6,000). Thus, the figure appearing in the charge sheet (6,000,000), in my opinion did not prejudice the appellant since the amount in words is in the charge correspond with the prosecution evidence. In the case at hand, the appellant knew the nature of the charge. Therefore the error complained by the appellant is curable under section 388 (1) of the Criminal Procedure Act, Chapter 20 Revised Edition, 2002.

During my composition of this judgment, I find the sentence meted against the appellant to be illegal in sense that, the fine imposed. was only Tshs. 500,000/=. However, the trial court did not state if it was for both counts or for one count. Equally, the custodial sentence ordered did not specifically state if it was for both counts or for only one count. According to the sub-section (2) of section 15 of the Act, the learned magistrate was mandatorily required to order a fine of not less than 500,000/=. Therefore, in view of the statutory provision herein above, the learned Resident Magistrate ought to have ordered as follows; the appellant to pay fine 500,000/ in each count or serve the term of 12

months imprisonment in each count. In the event of default of payment of the ordered fines, she ought to have further ordered that, custodial sentences shall be served consecutively. This position was rightly stressed in the case of **Republic vs. Mohamed Antoni** (1987) TLR 33 where accused/respondent was ordered to pay Tshs. 200/= being a fine in respect of each count or suffer two months imprisonment in default and in each count. This court (**Lubama, J)** interpreting section 29 (v) of the Penal Code, Cap 16, Revised Edition, 2019 stated

> *"Prison terms in default of fines are not served concurrently. They are served consecutively. The trial magistrate should thus have stated in passing sentence that the four months imprisonment in default of fine was in respect of fine imposed for each offence".*

The precedent quoted above is pursuant to proviso of section 36 of the Penal Code (supra) which reads;

> *"Provided that, a court* ***shall not direct that a sentence of imprisonment in default of payment of a fine be executed concurrently*** *with a former sentence under section 29(c) (i) or with any part of that a sentence (emphasis supplied).*

In the light of the above provision of the law and judicial jurisprudence aforementioned, it is clear that, when an accused fails to pay the imposed fines in two or more counts, the ordered terms of imprisonments shall be

directed to run consecutively instead of an order directing the same to run concurrently. Thus, it was an improper on the part of the trial court to order the custodial terms for the two (2) counts of which the appellant was found guilty to run concurrently in case he would fail to pay the fines imposed, if it was properly ordered.

In the upshot, the appeal is allowed to the above extent. It is consequently found meritorious only in respect of the 1st count as opposed to the 2nd count.

It is so ordered

DATED at **ARUSHA** thus 22nd February, 2023

M. R. GWAE.
JUDGE
22/02/2023

Court: Right of appeal explained

HIGH COURT OF TANZANIA

M. R. GWAE.
JUDGE
22/02/2023