

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIDA, J.A., SEHEL, J.A. And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 38 OF 2021**

**JOHN MWENDAMAKA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**[Appeal from the decision of the Resident Magistrate's Court  
of Kibaha at Kibaha]**

**(Kabate, PRM - EXT. JUR.)**

**dated the 21<sup>st</sup> day of December, 2020**

**in**

**Criminal Appeal No. 61 of 2020**

-----

**JUDGMENT OF THE COURT**

*23<sup>rd</sup> September, 2022 & 12<sup>th</sup> April, 2024*

**MASHAKA, J.A.:**

John Mwendamaka, the appellant was an Administrative Officer at the Kisarawe District Administrative Secretary (the DAS) Office. On 22<sup>th</sup> February, 2019 he was arraigned before the District Court of Kisarawe at Kisarawe with two counts of corrupt transactions under section 15(1) of the Prevention and Combating of Corruption Act No. 11 of 2007 [Cap 329 R.E.

2019] (the PCCA). He was convicted and sentenced to pay a fine of TZS. 1,000,000.00 for each count or five years imprisonment on each count to run concurrently. His first appeal to the High Court was unsuccessful hence this appeal against conviction and sentence.

It was alleged that between 1<sup>st</sup> April, 2016 to 30<sup>th</sup> April, 2016 at Kisarawe District in Coast Region, the appellant being the Administrative Officer at the Kisarawe District Administrative Secretary Office, corruptly solicited TZS. 2,000,000.00 and obtained the said amount from Happiness Christopher Mkude as an inducement to favour her brother one Alfred Simon Mangala to be recruited in the *Jeshi la Kujenga Taifa* (henceforth JKT) training. After pleading not guilty to both counts, the prosecution paraded nine witnesses and tendered one documentary exhibit to prove the charge.

It is pertinent we narrate the facts which led to the conviction of the appellant. It is alleged that in 2016 Happiness Christopher Mkude (PW4) visited the Registrar for deaths and births offices at Kisarawe District to procure a birth certificate for her child. While there, she read a public notice at the noticeboard inviting applications from youths born in Kisarawe District for recruitment in JKT training. She enquired about the training and the appellant informed her that he was responsible for the respective

recruitment. The appellant informed PW4 the procedure to apply for her relative and that a fee of TZS. 2,000,000/= was to be paid for the recruitment.

PW4 informed Scolastica Mangala (PW7) mother of Alfred Simon Mangala (PW5) about the Jk1 recruitment and also directed PW5 to write an application. PW5 sent the application and he was successfully shortlisted. PW4 testified that she received TZS. 2,000,000/= from PW7 and paid the appellant. In his testimony, PW5 received TZS. 1,000,000.00 from PW4 and paid the appellant. However, after attending the interview PW5 was not selected to join the said training and PW4 refused the advice by the appellant that PW5 joins the Peoples' Militia training (*Mgambo*). PW4 demanded a refund of the alleged fees.

PW7 received information from PW4 about the JKT recruitment of her child PW5 and gave TZS. 2,000,000/= to PW4 as fees for PW5. She further stated that she assigned Paschal Anthony Hamisi Kizinga (PW6) the task to get the refund of the fees in which she had received TZS. 380,000/= from PW6.

The evidence on record concerning the refund of the said fees, one Sospeter Jotham Edward (PW3) handed TZS 380,000/= to PW6 part of the refund of TZS. 2,000,000/= as shown in exhibit P1 dated 25/05/2017. Exhibit P1 was a note written and signed by PW3 on behalf of the appellant without his knowledge and PW6 also signed to acknowledge receipt witnessed by PW4. The said amount was later given to PW7 and the remaining amount of 1,200,000/= remained unrefunded. After failing to get the refund of the remaining sum; PW4 reported to the Prevention of Combating Corruption Bureau Kisarawe office. An investigation ensued and the appellant was finally arraigned for corrupt transactions.

The appellant in his defence, admitted to have dealt with PW4 and PW5 on the issue of recruiting youths to join JKT. However, he strongly refuted the allegations that he solicited and obtained a bribe of TZS. 2,000,000.00 from them. After a full trial, the court was impressed by the prosecution evidence, found the appellant guilty, convicted and sentenced him as earlier alluded. His first appeal to the High Court was unsuccessful hence this final appeal.

The appeal is founded on six grounds of appeal; **one**, that the charge was incurably defective; **two**, there was variance of evidence and particulars

of the charge in the second count; **three**, the failure by the trial court to make a proper analysis and evaluation of the entire evidence; **four**, the trial magistrate erred in law relying on uncredible testimony of PW3, PW4 and PW9; **five**, the prosecution failed to prove the charge beyond reasonable doubt; and **six**, the trial magistrate erred in law by shifting the burden of proof from the prosecution to the appellant. Basically, the appellant's complaint is grounded on the failure of the prosecution to prove the charge to the hilt.

Mr. Othman Katuli, learned counsel represented the appellant who was present at the hearing of the appeal. While Ms. Mkunde Mshanga, learned Principal State Attorney teamed up with Ms. Rehema Mgimba, learned Senior State Attorney to represent the respondent Republic.

At the onset, it was Mr. Katuli's wish to abandon grounds one and six of the appeal and proceeded to argue the remaining grounds two, three, four and five of the appeal, which was not resisted by the respondent.

Commencing with ground two, Mr. Katuli argued that there is a variance between the particulars of offence of the second count and the evidence on record. He contended that this complaint was amplified before

the first appellate court that while the particulars of the offence accused the appellant of corruptly obtaining TZS. 2,000,000.00 from PW4, the evidence adduced by witnesses showed that the said amount was given in two instalments; first in March 2016 and the second on 24<sup>th</sup> April 2016, thus two counts ought to have been preferred for each respective payment. It was his contention that the prosecution failed to make any amendment to the charge thus such failure was fatal and he invited the Court to reverse the judgment of the lower court. Bolstering his argument, he cited the case of **Saidi Msusa v. Republic**, Criminal Appeal No. 268 of 2013 (unreported).

In response, Ms. Mshanga conceded that there was a variance between the particulars of the second count and the evidence on record. She pointed out that while the charge showed that the said TZS. 2,000,000/= was made in one payment, the record showed there were two payments of TZS. 1,000,000/= made on different dates; the first payment was paid by an unknown family member on unknown date and PW5 paid the second instalment on 24<sup>th</sup> April, 2016. She added that even the date stated in the charge is at variance with the evidence.

Clarifying on the discrepant charge it was pointed out that according to the particulars of offence the first count reads:

**"PARTICULARS OF THE OFFENCE**

*John Mwendamaka, on divers' date between 1<sup>st</sup> April, 2016 to 30<sup>th</sup> April, 2016, at Kisarawe within Kisarawe District in Coast Region, being an Administration Officer at District Administration Secretary office of Kisarawe District solicits to obtain Tanzania shillings two million from Happiness Christopher Mkude in order to give advantage her young brother Alfred Simon Mangala to join Jeshi la Kujenga Taifa's Training, which is wrong and contrary to the laws."*

While in the second count the particulars of the offence read:

**"PARTICULARS OF THE OFFENCE**

*John Mwendamaka, on divers' date between 1<sup>st</sup> April, 2016 and 30<sup>th</sup> April, 2016, at Kisarawe within Kisarawe District in Coast region, being an Administration Officer at District Administration Secretary office at Kisarawe District, accepts to obtain Tanzania shillings two million from Happiness Christopher Mkude in order to give advantage her young brother Alfred Simon Mangala to join Jeshi la Kujenga Taifa's training, which is wrong and contrary to the laws".*

We shall be guided by the rule that the Court in a second appeal sparingly interferes with the concurrent findings of fact by the subordinate court unless there is a misapprehension of the evidence or a principle of law resulting into an improper conviction occasioning miscarriage of justice.

We have considered the submissions of Mr. Katuli and Ms. Mshanga in support of ground two and the record of appeal. The appellant faults the first appellate court for upholding his conviction while the ingredients of the offence were not proved given the variance between the evidence and the charge which was conceded to by Ms. Mshanga. The charge is the foundation of the trial upon which the prosecution case hinges. Therefore, it is incumbent on the prosecution to adduce sufficient evidence to prove the allegations contained in the charge or else the allegations remain not proved beyond reasonable doubt. We have gathered that in this appeal there is variance between the charge and the evidence. The second count, it is alleged that the appellant corruptly obtained TZS. 2,000,000.00 from PW4 as an inducement to favour PW5 to join the JKT training. Our perusal of the record of appeal at pages 20 and 21 demonstrates that the appellant did not obtain TZS. 2,000,000.00 from PW4 as alleged. PW4 stated:



*"...the accused person phoned me...and wanted fees at least half fees it was on March, 2016...I notified my family and they agreed to go to Kisarawe...they gave him half of fees and they went back home."*

From the excerpt, the evidence of PW4 shows that the alleged half fee was paid by an unnamed family member who failed to testify to corroborate the assertion of PW4 that the said amount of money was obtained by the appellant as an inducement and not payment of half fees. Notwithstanding the assertion by PW4, at page 24 of the record of appeal, PW5 testified:

*"I was the one who paid the fees in the 2<sup>nd</sup> time. My sister is one who handed the money Tsh. 1,000,000/=. The fee was paid for me to join the JKT course."*

The assertion of PW5 is that the appellant obtained the first instalment of TZS. 1,000,000/= from his sister PW4 and obtained the second instalment of TZS. 1,000,000/= from him which was for fees to join the JKT training. As regards to the second instalment, the evidence on record is not supportive of the charge which stated that the appellant obtained TZS. 2,000,000/= from PW4. Moreover, there is contradictory prosecution account in the evidence of PW4 and PW5. At page 23 of the record of appeal, PW4 had

testified that the TZS. 2,000,000/= was required by the appellant as a fee for the shelter, clothes and exercises for PW5 to join the JKT and it was to be paid in two instalments. With such doubtful contradictory evidence between PW4 and PW5, the evidence did not support the charge of corruptly obtaining advantage. Moreover, it is not certain as to whether the appellant obtained the bribe from PW4 or PW5, which as a matter of principle such doubts have to be resolved in favour of the appellant. Hence the contradiction is material and affects the credibility and reliability of PW4 and PW5 evidence. With such discrepant prosecution account the second count of the charge was not proved. Thus, we find merit in ground two of appeal.

In respect of grounds three, four and five of appeal, the issue for our determination is whether the prosecution proved to the hilt that the appellant corruptly solicited TZS. 2,000,000/= from PW4 as alleged. The appellant complains that the first appellate court failed to make a proper analysis and evaluation of the entire evidence, relying on incredible evidence of PW3, PW4 and PW9 regarding the issue that the appellant solicited the bribe from PW4 as an inducement to recruit PW5 for the JKT training.

The evidence on record does not demonstrate that PW3 and Fred Mjema, a lawyer with MIC Tanzania Limited (TIGO) (PW9) were present

during the solicitation of the money for the recruitment in JKT training. PW3's evidence was in relation to refunding of the money to PW6 without any communication and authorisation to do so from the appellant and he signed exhibit P1 on behalf of the appellant. Besides, this leaves a lot to be desired given that the refund process involved PW3 and PW6, the appellant does not feature in this transaction. It seems the prosecution relied on this evidence on the refund process to prove that the appellant solicited the advantage. However, there is no link between the appellant and PW3 as he earlier alluded, which cast doubt on the prosecution case. Also, there was no evidence adduced to link PW4, PW9, the appellant and the solicitation offence. Hence, there was no proper analysis and evaluation of the prosecution evidence. The first appellate court ought to have found that the evidence of PW3 and PW9 failed to prove the first count.

Going through the evidence, there is no dispute that the appellant was employed in the office of the DAS at Kisarawe District and was the officer responsible to prepare the public advert inviting youths from the said District to join a training offered by the National Service (JKT). He also participated in the exercise for shortlisting and interviewing the applicants. The appellant does not dispute the fact that he had met with PW4 and PW5 in respect of

their efforts to process for her sibling PW5 to join JKT and providing advice to PW4 for the recruitment of his sibling. However, the appellant refutes the allegations that he received any money from PW4 or anybody else and also refutes the accusations that he refunded money to PW4.

PW4 had testified that the appellant solicited TZS. 2,000,000.00 as an alleged fee for the recruitment of PW5 to join the JKT and was to be paid in two instalments. The appellant vehemently denied to have solicited any money from PW4. The prosecution failed to adduce any evidence to corroborate the evidence of solicitation by the appellant. In proving the solicitation, PW4 is the only witness whose evidence was not credible in relation to the person from whom the appellant received the bribe/advantage. Besides, coming from a single witness, it is a matter of practice that her evidence should have been corroborated. It is only the word of PW4 against that of the appellant that:

*"The accused person told me that there is a fee for the employee to join the course. I asked him how much he replied that it is Tsh. 2,000,000/=."*

From the excerpt above, PW4 asserts that the money was for fees and corroborated by PW5. There is no explanation that the fees were a bribe

solicited as an inducement for the appellant to show favour to PW5 to attend the JKT training. It was expected of the prosecution to adduce evidence on the alleged solicitation showing there was no requirement for such payment of fees and an independent witness to testify on the solicitation. This casts a doubt and it is not certain if the appellant corruptly solicited the amount of TZS. 2,000,000/=, which we resolve to benefit the appellant. Thus, the respondent failed to produce evidence to prove the first count.

Regarding the appellant obtaining advantage from PW4, we intimated earlier that the first instalment was made by unknown family member. The unknown family member was a material witness to clarify if she or he did receive money from PW4 and handed it to the appellant and also explain its purpose. The absence of such material witness entitles the Court to draw an inference adverse to the prosecution. See: **Azizi Abdallah v. Republic** [1991] TLR 71.

In view of our observations, it is clear there was a misapprehension of the substance, nature and quality of evidence, misdirection on the evidence which occasioned a miscarriage of justice. The Court's intervention of the decision of the first appellate court is justified. Thus, in this second appeal having evaluated the evidence, we find the appeal is merited.

In the event, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from custody forthwith unless he is held for some lawful cause.

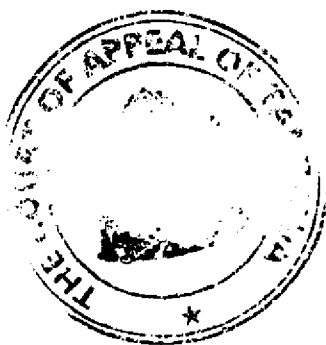
**DATED** at **DAR ES SALAAM** this 9<sup>th</sup> day of April, 2024.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

Judgment delivered this 12<sup>th</sup> day of October, 2024 in the presence of Mr. Othman Katuli, learned Counsel for the Applicant and Ms. Agnes Ndanzi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**