

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: LUANDA, J.A, MASSATI, J.A And MUGASHA, J.A)

CRIMINAL APPEAL NO 143 OF 2015

**MOSHI HAMISI KAPWACHAAPPELLANT
VERSUS**

**THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Tabora)**

(Lukelelwa, J)

**Dated the 22nd day of August, 2011
in
Criminal Appeal No. 162 of 2011**

JUDGMENT OF THE COURT

27th November, & 1st December, 2015

MUGASHA, J.A:

In the District Court of Kasulu, the appellant was charged with corrupt transaction contrary to section 15(1) (a) of the Prevention and Combating of corruption Act No. 11 of 2007. It was alleged that, on 19th April, 2010 at about 8.00 a.m. the appellant who was a senior officer Assistant at Kasulu Urban Primary Court did receive a sum of Tshs. 50,000/- from one **YORAM NELSON MABODYA** as an inducement to prepare a removal order of **SAMSON YORAM** who was the accused in criminal case No. 211 of 2010. The said **SAMSON YORAM** is the son of **YORAM NELSON MABODYA**.

The appellant did not plead guilty. The prosecution paraded three witnesses and four documentary exhibits to establish its claim. After a full

trial, the appellant was convicted and sentenced to pay a fine of Tshs. 500,000/= or to serve a jail term of three years.

Aggrieved, the appellant unsuccessfully appealed to the High Court which dismissed his appeal. Still dissatisfied, the appellant seeks to impugn the decision of the High Court in a sole ground contained in the Memorandum of Appeal as follows:-

1. That, after the High Court had expunged from the record Exhibits P.I, P4 and P5 that were wrongly admitted in evidence, the remaining evidence on record is so shaky to ground a conviction against the appellant"

At the hearing of the appeal, the appellant was present and he was represented by Mr. Kumaliza Kayaga, learned counsel. The respondent Republic was represented by Mr. Iddi Mgeni, learned State Attorney.

Submitting in support of the appeal, Mr. Kayanga Kamaliza learned counsel argued that, after the first appellate court expunged the documentary exhibits the remaining prosecution evidence of **PW1 (YORAM NELSON MABADYA) PW2 DANIEL NGOMA and PW3 (MERICK KINUNO)** is insufficient to sustain the conviction of the appellant because it is riddled with inconsistencies and contradictions on the following account: While the complainant told the trial court to have handed the trap money to the

appellant at 08.00 a.m while at the plaza of the Court building, PW1 did not testify about the appellant's escape and the throwing of the trap money in the grass which prominently features in the evidence of PW2.

He added that, the evidence of the appellant that on the fateful day he was in the office from morning to midday and on the next day summoned to PCCB Offices, is supported by **DW2 (JOSEPH MUHINI)** and **DW3(REVANIA KALALULA)**. They all testified to have been together with the appellant on 19/4/2010 from 07.40 a.m up around 02.30 p.m. in the afternoon.

In this regard, when asked by the Court, Mr. Kayaga submitted that both the trial court and first appellate Court did not consider the defence evidence which vitiated the trial as the appellant did not get a fair trial. Mr. Kayaga also addressed the Court on the procedural irregularities whereby the caution statement of the appellant was admitted without being read. Also the statements of untraced witnesses were admitted contrary to section 34 B of the Evidence Act and more badly, without hearing the appellant.

On the other hand, Mr. Iddi Mgeni, learned State Attorney supported the appeal. He added that the prosecution ought to have paraded **NASHON** and **ABRAHAM** who witnessed the picking of the trap notes in the grass. The learned attorney argued that, the two were material witnesses and failure to parade them entitled the trial court to invoke adverse inference.

We wish to point out that, in as much as evidence of receiving corruption is there, the prosecution was very weak. However, the issue for determination is whether the charge was proved against the appellant.

In the first appellate court apart from expunging the documentary exhibits P.1, P.4 and P.5 for their wrong admission at the trial, it sustained the conviction of the appellant due to what the High Court considered as be credit worthy prosecution evidence as found by the trial court.

In our considered view, the expunging or otherwise of the caution statement of the appellant had no bearing whatsoever because the appellant did not confess to have committed the offence of corrupt transaction. In the event, the remaining evidence is that of PW1, PW2 and PW3 the issue to be resolved is if such evidence was inconsistent and contradictory and the conviction was erroneous. PW1 who is complainant is the one who handed the trap money to the appellant. At page 6 of the record, PW1 told the trial Court that, while he was processing bail for his son who was in remand, he was told by the magistrate to see the clerk for directions but the clerk demanded to be given Tshs. 50,000/= to avail service of preparing a removal order. PW1 agreed and he went to PCCB where he was given a trap money. At around 08.00 he gave the same to the appellant who after receiving the same and placing it in his pocket PW1 signalled (PW2) who arrested the appellant. According to PW1, he stood at a distant where he observed the arrest of the appellant by PW2.

However PW2, who was the arresting officer his own account of what transpired at the scene after the appellant was handed over the trap money is what appears at page 10 PW2 of the record when testifying that:

"... I saw the informed taking money from his pocket and handed over the money to the accused who quickly walked into his office. Our informer signalled me ascertaining that the accused had been given trap money. I rushed to the accused person when I caught up with when he was already at the door steps heading to the office. I ordered him to stand still but he changed direction trying to flee from me. My colleague from the other side started to chase him, I was following behind. We caught the accused person who immediately threw the money on the grass. People gathered around to witness.

PW3 an officer from PCCB had also had his own different account as to how the arrest was affected as evident at page 13:-

... I went to the spot where the complainant would meet the accused to hand over the trap money. I was with my colleague from the office. The complaint went directly to the Urban Primary Court herein Kasulu where he had a private conversation with the accused. He later signalled us that the accused had received the money Responsible arresting Officer charged forward and arrested the accused person. I

was vested with the duty to inspect the trap money handed over to the accused person. My inspection revealed that the money found with the accused i.e Tshs. 50,000/- were actually trap money.

As gathered from the record, contrary to the testimony of PW2, the evidence of PW1 and PW3 does not indicate that the appellant was arrested outside the office and when he was fleeing in a bid to escape arrest and that he threw the trap money in the grass. In this regard, each prosecution witness had a different account of what transpired at the scene of crime and in particular, as to when and how was the arrest effected. In the case of **BAHATI MAKEJA vs REPUBLIC CRIMINAL APPEAL NO 118 OF 2006** (Unreported) the Court considered discrepancies in the prosecution case and stated:

"Another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of occurrence of the event. Material ones are those going to the root of the matter or not expected of a normal person"

In another case of **MOHAMED SAID MATULA VS REPUBLIC (1995) TLR** at page 3, the Court considered among other issues contradictions and

inconsistencies in the prosecution evidence and the duty of the trial court to address the same. The Court held:

"Where the inconsistencies 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"

In the case at hand, the inconsistencies and contradictions in the evidence of the prosecution witnesses were not minor as they go to the root of the matter. The trial court did not address the inconsistencies and contradictions in the evidence of PW1, PW2 and PW3 which are on the record and render the evidence of such witnesses not credit worthy but it was relied upon to convict the appellant. As for the first appellate court and as a matter of law, it did not apprehend correctly the substance and quality of evidence which resulted into an erroneous finding of fact which necessitates our intervention in the light of the case of **LUDOVICK SEBASTIAN VS REPUBLIC, CRIMINAL APPEAL NO 318 OF 2009** (Unreported). We therefore find that, the inconsistent and unworthy evidence PW2 and PW3 is hereby discounted and as such evidence of PW1 remains not supported by any other evidence.

Moreover, the defence evidence was not challenged and it clouded doubt on the prosecution case. The appellant's evidence that on 19/4/2010 he was in the office throughout from morning to afternoon finds support in the evidence of DW2 and DW3. They gave an account of being together with the appellant on 19/4/2010 around 07.40 until to between 01.30 p.m. and 02.30p.m. Moreover, that the appellant was summoned at PCCB offices on 20th April 2010 is supported by DW2 and DW3 who told the trial court to have heard informed about the same. During cross examination this evidence was not at all shaken by the prosecution.

On our part we were concerned if the defence evidence was considered by the two lower courts below. However, we are of settled view that the defence evidence was ill-treated. In the trial court the defence evidence was treated as is evident at page 53 of the record:-

"DW2 had materially contradicted accused testimony for he ascertained that the accused was arrested on 19th April, 2010 on allegation of corruption transaction....This Court has gone through the accused cautioned statement which was recorded in the presence of his wife. On 19th April, 2010 where he stated that he was formally arrested without having committed any offence.

The accused had not objected or controverted third fact when the statement was tendered as exhibit in this Court.

The same had in his defence refilled any encounter with PCCB. This Court find that the accused defence is an afterthought hence it will not be accorded any weight. It is also the considered opinion of this Court that the accused general denial and attempt to disassociate transpired at the scene of crime on 19th April, 2010 is inconsistent with his innocence and it entail no other inference but of the guilt on his part”

The trial Magistrate misdirected himself to find the appellants evidence contradicted by the testimony of DW2 which was not the case because as earlier stated DW2 and DW3 all supported the appellant's account. In the premises, the trial magistrate did not evaluate the defence evidence which in our view controverted the prosecution's case. In **HUSSEIN IDD AND ANOTHER v REPUBLIC 1986 TLR 166 (CA)**. The first appellant together with another person were convicted of murder. The trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. The Court held:

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."

The trial court ought to have considered the defence evidence and failure thereto render the trial unfair particularly on the part of the appellant. Had the trial court considered the defence evidence it would not have convicted the appellant. Notwithstanding the fact that the appellant did not receive a fair trial, which could be remedied in a retrial, we do not find it worthy to make such an order in absence of any watertight evidence to prove a charge against the appellant.

We allow the appeal quash conviction and sentence and order the appellant to be set free.

DATED at TABORA this 30th day of November, 2015.



B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL