IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

(CORAM: MUGASHA, J. A., SEHEL, J.A And MWAMPASHI, J. A.)

CRIMINAL APPEAL NO. 42 OF 2022

SIYOI WILSON NICODEMUS..... 1st APPELLANT
SAID MOHAMED..... 2nd APPELLANT
WILBERT LIMBE KASUKA..... 3rd APPELLANT
GABRIEL IBRAHIM GASTO..... 4th APPELLANT
PETER JAPHET BITESIGIRWE..... 5th APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma)

(Mugeta, J.)

dated the 25th day of October, 2021
in
DC Criminal Appeal No. 9 of 2021

.....

JUDGMENT OF THE COURT

2nd & 7th June, 2023.

SEHEL, J.A.:

The appellants were former police officers employed by the Tanzania Police Force (TPF) working in the Anti- Robbery Squad at Kasulu Police Station within Kasulu District in Kigoma Region. On 2nd August, 2019, they were arraigned before the District Court of Kasulu at Kasulu (the trial court) facing three counts.

In the first and second counts, the appellants were charged with the offence of corrupt transactions contrary to section 15 (1) (a) and (2)

of the Prevention and Combating of Corruption Act, Cap. 329 R.E. 2019 (the PCCA). It was alleged in the particulars of offence that on or about 21st June, 2019 around 02:00hrs to 03:00hrs along Heru Juu Road within Kasulu District, the appellants being police officers employed by TPF jointly and together did corruptly obtain the sum of TZS. 5,000,000.00 from Elisia Solomon Hejeje as inducement in order to forbear taking legal action against Doto Wilson and Gerald Wilson both of Nyenge Village after they were arrested allegedly for being found in possession of six and half bags of cannabis sativa (commonly known as bhang), the matter which was in relation to the principal's affairs.

In the third count, they were charged in the alternative that on the same date and place the appellants corruptly solicited to obtain bribes in the sum of TZS. 5,000,000.00 from Elisia Solomon Hejeje as an inducement for not taking legal action against Doto Wilson and Gerald Wilson both of Nyenge Village who were allegedly arrested for unlawful possession of six and half bags of bhang. The appellants did that in their capacity as police officers from TPF and the alleged offence was contrary to section 15 (1) (a) and (2) of the PCCA.

They pleaded not guilty to all counts. Hence, a full trial ensued. The prosecution paraded a total of thirteen witnesses while appellants

were the only witness in their defence. The prosecution side did not tender any exhibit but the 1st appellant tendered a copy of entry in the investigation register book, exhibit D1. After a full trial, they were found guilty to all three counts and convicted to all counts. Regarding sentence, for the 1st and 3rd counts, the trial court sentenced each of the appellants to pay TZS. 500,000.00 and in default, to serve a jail term of three years but for the 2nd count they were given an absolute discharge under section 38 (1) of the Penal Code Cap. 16 R.E. 2019 because the offences in the 1st and 2nd counts arose from the same transactions. Their appeal to the High Court of Tanzania at Kigoma (the first appellate court) was partly successful in that it quashed the conviction and set aside the sentence in the 3rd count as it was charged in the alternative. For the sentence on the 2nd count, the first appellate court observed that the act of receiving bribe charged in two separate counts constituted independent offence although each transaction was part of a bigger deal. Accordingly, it set aside the sentence of absolute discharge and substituted it with a fine of TZS. 500,000.00 for each appellant or three years imprisonment in default. Still aggrieved, the appellants have preferred this second appeal.

The facts as obtained from the record of appeal are such that; on 20th June, 2019, Magdalena Kipenda (PW9), the Village Executive Officer (VEO) for Nyenge Village received a phone call from a police officer who wanted her assistance in conducting search in her village. As she was not around Nyenge area, she directed the said police officer to Nimrod Moses Mlaligwa (PW1), the acting VEO.

According to PW1, he said that he received a phone call from a person who introduced himself as a police officer requesting a meeting at Nyenge Health Centre. He went there and saw a Police Force motor vehicle make Toyota Landcruiser station wagon. He was asked to get in a car. He obliged. They then went up to the residence of Dotto Wilson Kisanza (PW12). Upon arriving there, they found therein PW12 and his young brother, one Gerald Wilson (PW13). They searched the house and retrieved six and a half bags of bhang. The appellants handcuffed PW12 and PW13, took the impounded bags of bhang and left.

On the way to the police station, PW12 and PW13 claimed that the appellants solicited TZS. 5,000,000.00 as inducement to be set free. PW12 said he tried to bargain for the amount to be reduced to TZS. 3,000,000.00 but the appellants refused and insisted on TZS. 5,000,000.00. He therefore phoned his wife, Jesica Solomon who was in

Dar es Salaam asking her to send money to the police officers. PW12 further said that, when they were still on the road heading to the police station, his sister-in-law, one Elisia Solomon (PW3) asked for his whereabouts and told her that he was at Heru Juu Road.

According to Nestory Wiston (PW2), in the midnight hours of 21st June, 2019, he received a phone call from the wife of PW12 and informed him that PW12 was arrested by police officers and the said police officers demanded TZS. 5,000,000.00. PW2 relayed the information to his wife, PW3.

According to PW3, on the very night, she managed to raise TZS. TZS. 3,000,000.00 and handed over to the 4th appellant. She said, at the time of handing over, the 4th appellant was seated in the police motor vehicle at the driver's seat while she was seated beside the driver's seat. The 1st, 2nd, 3rd and 5th appellants were also in the same car at the rear seat together with PW12 and PW13. It was her evidence that the remaining balance of TZS. 2,000,000.00 was sent by the wife of PW12 through mobile money transfer into her Mpesa account. After receipt of the money, she went to withdraw the same from Musa Hamisi Sogoti (PW5), an agent of mobile money services. PW3 further recalled that the balance was paid to the appellants on the next day in the morning at

Murusi police station. She went there with Editha Solomon (PW4) and met with the 1st, 2nd and 4th appellants who were in their motor vehicle parked beside the police station while the 5th appellant was outside the car. She also saw PW12 and PW13 in the same car, handcuffed. She got in the car alone and left PW4 outside. She counted the money and handed it to the 4th appellant. Having handed the money, she left. After a while, she checked with PW12 and PW13 and was told that they had been released and they were heading home. The account of PW4 is similar to the account of PW3 that on 21st June, 2019, she accompanied PW3 to Murusi Police Station. Also, PW5 said that PW3 withdrew TZS. 2,000,000.00 but TZS. 8,000.00 was deducted as withdrawal fees.

The prosecution further paraded two investigative officers from the Prevention and Combating of Corruption Bureau (PCCB). These are Denny Mulaki (PW6) and Deus Msaki (PW7) who claimed to have recorded the cautioned statements of the appellants but the same were rejected to be admitted in evidence as they were illegally procured. There was also a Police officer with Police Force number E. 7844 Detective Sergent Abdul (PW8) who told the trial court that the appellants on 20th June, 2019 were on patrol. However, none of these investigative officers led any evidence as to who arrested the appellants.

Other prosecution witnesses were Gabriel Michael Tesha (PW10) Vodacom manager at Kasulu District and a lawyer from Halotel, Ebenezer Musimiseki (PW11). Basically, their evidence was to the effect that PW1 communicated with the 4th appellant on 20th June, 2019. PW10 further said that on 20th June, 2019, their client, PW9 while at Kasulu Township received a call from a non-vodacom number at around 11:00am. He also said, their client, PW3 withdrew money from her Mpesa account on 21st June, 2019 from PW5.

In defence, the appellants admitted that on the fateful day, they were patrolling in their car at night within Kasulu Township, Kijihama, Kanazi, Nyakitondo, Mugombe and Kagerankanda. They also admitted delivering the bags of bhang at the Charge Registry Office (CRO). However, they denied to have searched and seized the bhang from PW12 and PW13. They said that while on patrol, along Kagerankanda road, they saw people in the forest who took to their heels when they saw the policemen approaching and abandoned the bags of bhang. They tendered in evidence a copy of entry in the investigation Register Book dated 21st June, 2020 as exhibit D1. They also denied to have solicited and obtained TZS. 5,000,000.00 as bribe from PW3.

The trial court was satisfied that the prosecution sufficiently discharged its duty of proving the charges against the appellants beyond reasonable doubt. It found that the evidence of PW1, PW2, PW3, PW4, PW12 and PW13 taken together left no doubt that the bags of bhang containing bhang were seized from PW12's home that led to the arrest of PW12 and PW13. The trial court was also satisfied that the appellants solicited and received cash money of TZS. 5,000,000.00 from PW3 in two instalments. Accordingly, they were convicted and sentenced as indicated earlier on.

The appellants have filed a joint memorandum of appeal on four grounds as follows:

1. *That, the first appellate court erred in law by not holding that the case was not proved to the required standard.*
2. *That, the first appellate court erred in law by not considering that the appellants were convicted basing on contradictory evidence.*
3. *That, the first appellate court grossly erred in law and fact when used weak, hearsay, inconsistent, incredible, uncorroborated evidence that lacked corroboration as a basis of convicting the appellant.*

4. *That, first appellate court grossly erred in law and fact by holding the conviction and sentence of the appellants with an offence which was not proved at all.*

At the hearing of the appeal, the appellants appeared in person, unrepresented, whereas, Ms. Sabina Silayo, learned Senior State Attorney represented the respondent Republic.

When the appellants were invited to submit on their appeal, each of the appellants opted to adopt the grounds of appeal and preferred to let the learned Senior State Attorney to reply to their appeal while reserving their rights to rejoin, if need arise.

The learned Senior State Attorney prefaced by not supporting the appeal. In responding to the grounds of appeal, she conjunctively argued the 2nd and 3rd grounds of appeal that question whether the prosecution evidence was strong, credible and not contradictory. She also combined the 1st and 4th grounds challenging proof of the charged offences beyond reasonable doubt.

Responding to the 2nd and 3rd grounds of appeal that the prosecution evidence was weak, incredible, contradictory and had no corroboration, Ms. Silayo argued that the two grounds are baseless. She explained that both PW2 and PW3 detailed as to how they raised the

money and paid to the appellants. In trying to show that the evidence of the prosecution witnesses was consistent and coherent, the learned Senior State Attorney took us through the record of appeal. At page 37, where PW3 said that on 20th June, 2019 she paid the 4th appellant TZS. 3,000,000.00 in the presence of PW2. At page 42, PW3 insisted that she handed over the money to the 4th appellant who was seated at the driver's seat. At page 43, PW3 said that in the morning of 21st June, 2019, she went with PW4 to Murusi Police Station and handed over the balance of TZS. 2,000,000.00 to the 4th appellant.

She further contended that the evidence of PW3 was corroborated by the evidence of PW1, PW2, PW4, PW12 and PW13. For instance, she argued, the evidence of PW12 and PW13 to the effect that the appellants solicited bribe corroborated the evidence of PW2 and PW3. She added that the evidence of PW1 who witnessed the seizure and the arrest of PW12 and PW13 also corroborated the evidence of PW2, PW3, PW4, PW12 and PW13. In totality, Ms. Silayo contended that the prosecution witnesses were coherent in their testimony and corroborated each other. She thus urged us to dismiss the 2nd and 3rd grounds of appeal for lacking merit.

Regarding the 1st and 4th grounds of appeal on whether the prosecution proved the charged offence to the required standard, Ms. Silayo submitted that the appellants do not dispute that the bags of bhang were submitted to the police station on 21st June, 2019. She contended that there is proof from the evidence of PW1 to the effect that he witnessed the search and seizure of the bags of bhang from the house of PW12. She added that there is also evidence from PW12 and PW13 that they were demanded money by the appellants so that no criminal charges could be preferred against them. She argued that the act of the appellants demanding money prompted PW12 to look for his relatives who then started to raise money as evidenced by PW2 and PW3. She submitted further that there is evidence from PW2, PW3 and PW4 that the bribe was paid in two instalments, and that, upon full payment PW12 and PW13 were released by the appellants. With that evidence on record, Ms. Silayo concluded that the offence of soliciting and obtaining corrupt money was proved to the hilt by the prosecution as required by section 15 (1) (a) and (2) of the PCCA. She therefore beseeched us to dismiss the 1st and 4th grounds of appeal.

When probed by the Court on the visual identification of the appellants, the learned Senior State Attorney readily conceded that,

given the evidence on record that, the witnesses identified the appellants for the first time while at the dock, prior, there ought to be conducted an identification parade. She also conceded that the record of appeal is silent as to who reported the crime and where was it reported. She further admitted that the seizure certificate was not tendered before the trial court which would have shown where the search was conducted, who conducted it and what was seized therefrom. Nonetheless, the learned Senior State Attorney insisted that the totality of the prosecution evidence proved beyond reasonable doubt the two counts which the appellants were convicted of.

In rejoinder, the 4th appellant made a reply submission on behalf of other appellants whereas the 1st, 2nd, 3rd and 5th appellants intimated to the Court that they would support the submission of their co-appellant and if need arise, they would make some additions or clarifications.

Responding to the 2nd and 3rd grounds of appeal, the 4th appellant pointed out that the evidence of PW12 contradicted that of PW13 as PW12 said that at the time of their arrest no one was at home while PW13 said the parents were at home. On proof, the 4th appellant replied that Jesica Solomon was a material witness but not paraded to establish

that there was mobile transfer of money from Jesica to PW3. He further contended that the witnesses identified them at the dock while there was no prior identification parade which ought to have been conducted. Lastly, he wondered why they were belatedly arrested if truly they were identified by witnesses on 20th June, 2019. The 1st appellant added that their arrest was done in the office of the District Commissioner on 28th June, 2019, and, further that, PW12 and PW13 were forced to testify before the trial court. The 2nd, 3rd and 5th appellants fully supported the submissions made by the 1st and 4th appellants and had nothing to add. At the end, the appellants urged the Court to allow the appeal.

Having considered the grounds of appeal and heard the submissions from either side, we entirely agree with the learned Senior State Attorney that the four grounds of appeal boil down into two issues. **One**, whether the evidence of the prosecution was coherent, corroborated, strong and credible. **Two**, whether the evidence on record proved the offences against the appellants beyond reasonable doubt to warrant the Court to sustain the convictions and sentences. In deliberating the two issues, we shall be mindful that this is a second appeal. As a general rule, we are not expected to interfere with the concurrent finding of facts made by the lower courts. We can only do

that where we find that there was a misapprehension of evidence or failure to take material point or circumstance into account an appellate – see: for example, our decision in the cases of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Shabani Daudi v. The Republic,** Criminal Appeal No. 28 of 2001 (unreported), **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387 and **Issa Said Kumbukeni v. The Republic** [2006] T.L.R. 227.

We shall start with the complaint that the prosecution evidence was weak, hearsay, inconsistent and contradictory. After having dispassionately examined the entire evidence on record, we find that the prosecution case largely depends on the identification of the appellants.

There are numerous decisions of the Court to the effect that where the evidence alleged to implicate an accused person is entirely that of identification, that evidence must be watertight to justify a conviction. For instance, in the case of **Waziri Amani v. The Republic** (1980) T.L.R. 280, the Court warned trial courts not to act on the evidence of visual identification unless fully satisfied that the evidence on the conditions favoring a correct identification is watertight to eliminate any possibility of the mistaken identity. It said:

"No court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence is watertight. The following factors have to be taken into consideration; the time the witness had the accused under observation; the distance at which he observed him, the conditions in which such observation occurred for instance whether it was day or night (whether it was dark, if so, was there moon light or hurricane lamp etc.) whether the witness knew or had seen the accused before or not."

See also: the cases of **Raymond Francis v. The Republic** [1991] T.L.R. 100; **Issa s/o Mgara @ Shuka v. The Republic,** Criminal Appeal No. 37 of 2005 (unreported).

The Court further stressed in the case of **Felician Joseph v. The Republic,** Criminal Appeal No. 152 of 2011 [2012] TZCA 93 (28 May, 2012; TANZLII) that visual identification when given by a stranger and done in unfavorable condition such as at night, it is of the weakest kind and most unreliable hence it should be approached with the utmost circumspection.

In the appeal before us, we have stated that PW3 went to meet with the appellants in the dead night hours and claimed to have given the 4th appellant the bribe. Ms. Silayo impressed upon us to find that the evidence of PW3 was corroborated by the evidence of PW2 and PW4 who were with her when she went to hand over the bribe to the appellants. She further argued that the evidence of PW3 that the appellants arrested her relatives was supported by the evidence of PW1, PW12 and PW13. To appreciate her contention, we find it apt to reproduce the extract of the evidence of PW3 when identifying the appellants. At pages 40-41 of the record of appeal, PW3 said:

> *"We were going there to look for Dotto and Gerald. We just passed a motor vehicle that was at Manyovu junction. This motor vehicle was parked over the way. After we have passed a few paces one police officer asked us, are you not the ones [we are waiting for]. I was with Nestory, James Elias and Jackson Elias. This policer officer was behind the motor vehicle. We had to reverse.* ***The police officer who asked us is this one here (touching the accused no. 5).*** *Nestory Chahanga went to the left side door of the motor vehicle.... To the left side there were two doors.* ***Nestory had conversation with these (pointing to accused no. 1, 2, 3***

and 4). This was a driver (pointing to accused no. 4). *He was seated on the steering wheel (sic.).* ***And this and this and this (touching accused no. 1, 2 and 3) were in the motor vehicle.*** *I was outside the motor vehicle. In that motor vehicle there was a light though there were trees. At this time Dotto and Gerald were in the motor vehicle. Then Nestory Chahanga told me that they have demanded TZS. 5,000,000.00 as a bribe that they release Dotto and Gerald arrested in possession of bhang. I asked to go and re-negotiate as I had only TZS. 2,000,000.00. Then we just left and went to look for TZS. 1,000,000.00."* (Emphasis added)

She went on to say:

"I just entered in the motor vehicle. I just sat on the seat and started to count these three million. I just sat beside the driver's seat. At this time my children Jackson Elias and James Elias were outside the motor vehicle. Also, Nestory was outside the motor vehicle. At the time I was counting the money ***I was together with this one here the driver (touching accused no. 4). Also, there were this one here and here here (touching accused no. 1, 2 and 3).*** *As I was counting the money, I was giving the same*

to accused no. 4. Accused no. 4 was putting the money in the hole in the middle of the two front seats. These sums were TZS. 3,000,000.00." (Emphasis added)

As to whom she handed over the remaining balance of TZS. 2,000,000.00, at page 43 of the record of appeal she said:

"As I entered in this motor vehicle, I just left this Editha Solomon outside the motor vehicle. I just counted TZS. 1,000,000.00 and ***gave the same to this one here (touching accused no. 4)*** *and again I just counted another one million and gave it to accused no. 4."* (Emphasis added)

We have bolded part of the account of PW3 to show that she identified the appellants for the first time, in dock, during the course of the trial itself. Much as she did not say anything as to whether she knew the appellants before or not, we gather from the record that she did not know the appellants before the incident. Ideally, PW3 was supposed to give, prior to the dock identification, descriptions of the appellants in terms of their attire, height, complexion or any other peculiar features, if any, of the persons she purported to have identified when handing over the bribe in order to give credence of her identification. Such description

would have helped the investigative officers to mount an identification parade to test her memory.

In the case of **Omari Iddi Mbezi & 2 Others v. The Republic**, Criminal Appeal No. 227 of 2009 [2021] TZCA 474 (14 September, 2021; TANZLII), the Court stated:

> *"The witness should describe the culprit or culprits in terms of body build, complexion, size,* attire*, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence....ideally, upon receiving the description of the suspect (s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again."*

Nonetheless, in the present appeal, the above was not done. As exhibited earlier, PW3 only identified the appellants in dock during the trial and there is no evidence suggesting that the witnesses reported or even gave description of the appellants to anybody. Equally, the evidence on record shows that PW1, PW2, PW4, PW12 and PW13 made a dock identification of the appellants who were strangers to them. It is

settled law that the identification of accused persons by a witness in the dock for the first time cannot be given credence without corroborative evidence of identification parade. This is the position we stated in the case of **Musa Elias & 2 Others v. The Republic** Criminal Appeal No. 172 of 1993 (Unreported) when we said:

> *"It is a well-established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."*

Since PW1, PW2, PW3, PW4, PW12 and PW13 made dock identification their evidence is worthless and cannot be relied upon to uphold the convictions. With respect to the submission made by the learned Senior State Attorney, we strongly believe that valueless evidence cannot corroborate each other because there is nothing to corroborate.

On the argument that the bags of bhang taken to the police station corroborate the evidence of PW1, PW12 and PW13, to us we find that there is no connection between the bags of bhang the appellants collected from the forest and the incident of bribe that occurred on 20th

and 21st June, 2019. We say so because we find that exhibit D1 supports the defence case that the bags of bhang were abandoned in the forest. Weighted that evidence with the evidence of PW1 who claimed to have witnessed search and seizure but no seizure certificate was tendered in evidence, we failed to go along with the submission of the learned Senior State Attorney.

Doubt on the reliability of dock identification of the appellants is further compounded by the lack of a complainant. Having gone through the entire record, we failed to know who was the complainant in the case. When the Court probed the learned Senior State Attorney, she replied that the record is silent thus she cannot say who was the complainant in the appellant's case. We gather from the record, in the defence case, that the appellants were arrested at the office of the District Commissioner eight days after the alleged incident and no investigative officer assigned to investigate the case was paraded as a witness. On this, we find instructive to repeat what PW7 said before the trial court that he did not know who brought the appellants to their PCCB offices for questioning.

Coupled with that, another material witness in the case, namely Jesica Solomon was not paraded to give credence to the account of

PW12 and PW3. It be noted that Jesica Solomon was the first person to have been informed about the solicitation of the bribe and was alleged to have sent money to PW3 to bribe the appellants. With these doubts, we hasten to echo that eyewitness testimony can be devastating when false witness identification is made due to honest confusion or outright lying-see: the case of **Mengi Paulo Samwel Luhana & Another v. The Republic**, Criminal Appeal No. 222 of 2006 (unreported). That said, we find merit on the 2nd and 3rd grounds of appeals.

We now turn to the 1st and 4th grounds of appeal that is whether the prosecution discharged its obligation to prove the charged offences beyond reasonable doubt. In the present appeal, the case against the appellants stands or falls on the evidence of dock identification done by PW3. We have stated herein that the evidence of PW3 was unreliable because the identification parade was not conducted to give credence on her account. Admittedly, if the trial court could have properly directed its mind to the principle governing dock identification, it would not have arrived at the guilty verdict. Strictly speaking, no court could have acted on that evidence. Therefore, even the first appellate court was not supposed to act upon such unreliable evidence. In that respect, we find that evidence of PW3 did not prove beyond reasonable doubt that it was

the appellants who solicited and received bribe. We thus find merit on the 1st and 4th grounds of appeal.

In the end, we find that the appeal has merit. We therefore allow it and proceed to quash the convictions and set aside the sentences. We further make an order that the imposed fine be refunded to the appellants, if paid.

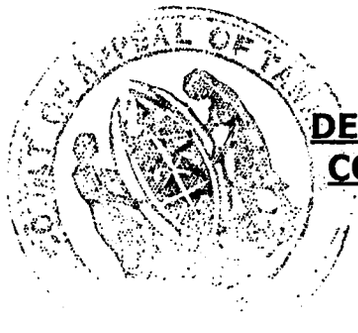
DATED at **KIGOMA** this 6th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 7th day of June, 2023 in the absence of 1st and 4th appellants, in the presence of 2nd, 3rd and 5th appellants and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Amina Mawoko, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL