

MTWARA
IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION
(Mbeya Registry)

CRIMINAL APPEAL NO. 131 OF 2002

(Originating from Criminal Case No. 880 of 1999
of Mbeya District Court at Mbeya)

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

DR. BENEDICT NKUWI RESPONDENT

J U D G M E N T

MREMA, J.

This appeal has stemmed from Mbeya District Court's Criminal Case No. 880/1999 in which the Respondent DR. BENEDICT NKUWI, an employee of Mbeya Referral Hospital, was criminally arraigned on an indictment containing two counts of corrupt transactions C/s. 3 (1) of the Prevention of Corruption Act, 1971. After a full trial, no doubt, as depicted from the proceedings, the Respondent was nevertheless acquitted of both the counts on the account that as observed by the Learned trial Resident Magistrate, the case for the prosecution was not sufficiently made out. Aggrieved by the finding of acquittal the public prosecutions preferred this appeal based on two points of complaint, to wit:

- (1) That the trial court failed to properly assess the evidence before it which is overwhelmingly strong against the Respondent.
- (2) That the trial court failed to properly construe and apply the provisions of section 3 - (1) of the Prevention of Corruption Act, Act No. 16/1971.

In this appeal the D.P.P's watch-brief has been taken care of by the Learned State Attorney Mr. Boniface, whereas the interests of the Respondent has been handled by Mr. Naali, Learned Advocate, who also counselled the case for the Respondent - accused at the trial court.

The facts of the case can conveniently be narrowed down, in like manner as the same were nut-shelled by the learned State Attorney, as follows:- Nathaniel Mng'ong'o (PW.1) is the king-pin and key witness for prosecution. Undisputedly, he is a resident of Mafinga Township in Mufindi District, in Iringa Region. Also not controverted at the trial and in this appellate court is the fact that PW.1 has a son called Isaack Mng'ong'o. There is no doubt as well, that in October, 1999 this Isaac was fatally injured in his leg. Consequent upon that, the son of PW.1 was briefly and unsuccessfully attended at Mafinga Hospital and subsequently on the 11th of October, 1999 he was referred to Mbeya Consultant Hospital and he was admitted in Ward No.1. The nature of the ^{injuries} ~~injuries~~ no doubt as per the facts of the case, demanded for orthopaedic surgical operation to be made on PW.1's son. It is common ground that between 11th of October, 1999 and 25th of October, 1999 (inclusive) when the patient was admitted no treatment of any kind, including medicine, was administered on the son of PW.1. Surgery was conducted on him on 25/11/1999. As a matter of clarity it may be noted that PW.1's son had a plaster of Paris (POP) fixed on his injured leg at Mafinga Hospital. It is also a settled fact that at the material time when PW.1's son was admitted at Mbeya Consultant Hospital there was only one orthopaedic surgeon, and that was none but the present respondent. The prosecution was not challenged on the fact that owing to that shortage of specialist doctors in orthopaedic surgery department or unit the present respondent who was also a lecturer at the Medical School within the hospital was obliged to prepare his schedule of working every day per every week. It was never established, or even stated, that the Respondent knew PW.1 before their meeting on 13/10/1999.

The latter date (i.e. 13/10/1999) PW.1 approached the Respondent (DW.1) in his office with a view to requesting him (DW.1) to attend PW.1's son as expeditiously as possible. It was at this meeting between the two (PW.1 and DW.1) that the trial court was told by PW.1 that the Respondent solicited for Shs.40,000/= so that he could meet PW.1's request. PW.1's answer, however, was that he did not have the money and whereupon the Respondent informed PW.1 to keep on waiting.

Another meeting between PW.1 and DW.1 took place on 18/10/99, this time in a dispensary belonging to the Respondent. The Respondent was followed there by PW.1. According to PW.1, the Respondent told him to go to see "analyst", whatever that could mean. But this was interpreted by PW.1 to mean that the Respondent was urging for a bribe. The following day (19/10/99) PW.1 went to see the doctor (DW.1) who told him to see his nurses because he had completed his rounds to check his patients. The nurses told him that PW.1's son was on the waiting list but they could not tell PW.1 exactly which date the operation would be done. PW.1 returned to the Respondent and informed him about what the nurses told him. He (PW.1) was then advised by the Respondent to go back to Mafinga and leave the patient behind. This statement also conveyed another impression to PW.1 to mean that the Respondent was still insisting to be bribed.

At this juncture PW.1 sought to get assistance from the officers of the Prevention of Corruption Beaureau (PCB). The complainant (PW.1) was advised to implore the Respondent to reduce the amount of Shs.40,000/= he had requested on 13/10/99. Acting under that advise PW.1 returned to meet the Respondent and besought the latter to reduce the amount. It is the testimony of PW.1 that DW.1 was going back to Mafinga to sell his head of cattle. DW.1 then agreed and reduced the amount to Shs.35,000/=. It was also agreed that if PW.1 returned he should see DW.1 at 4.00 p.m. if it would be Friday, or 12.00 noon if it would be Saturday.

Later PW.1 learnt from his wife that the operation on the son had taken place. But this did not stop PW.1 from continuing with his understanding and belief that the Respondent was all out demanding bribe. According to PW.1, the operation (surgery) was carried out timely following the promise PW.1 gave to DW.1. In order to accomplish his trap against DW.1, the complainant went to see the PCB officials on 1/11/99 who gave him Shs.35,000/=. He was then accompanied by Deogratias Malongo (PW.4) and three other officers. The trap was adjourned to the following day (2/11/1999) as DW.1 was conducting surgery in the theatre. This time

PW.1 found the Respondent (accused) in his office. Meanwhile PW.4 and others took position in the Hospital corridors. No sooner PW.1 handed over the money to DW.1 than he (PW.1) walked out. He ^{signaled} ~~to~~ to PCB officials who then entered the Respondent's Office and arrested him. The finding of the trap money Shs.35,000/= in DW.1's pocket and the special chemical powder in his clothes are matters not disputed.

The Respondent's defence, inter alia, is that on 13/10/99 at 10.00 a.m. PW.1 approached him in his office and told him (DW.1) that PW.1's son was admitted on 11/10/99 in Ward No.1. ~~when~~ DW.1 was dealing with patients in the theatre. According to DW.1, on 12/10/99 he conducted ward rounds and observed that PW.1's son was not in the list of those to be operated, nor was his name entered in ^{his} ~~the~~ diary. DW.1, however, examined the X-ray-films depicting the injured area of PW.1's son's leg and observed that the patient sustained the injury two weeks ago and the injured leg had been fixed with a Plaster of Paris (POP). PW.1 then employed him (DW.1) to perform immediate operation on his child. But DW.1 informed PW.1 that he had four patients already listed down for operations and that preparations for the ~~the~~ job had been made. DW.1 then told PW.1 to wait until 18/10/1999. However, it was not also possible to do that job on 18/10/1999 because the death of the First President Mwalimu Julius Nyerere interfered with various official activities in the country. 21/10/99 was also proclaimed a public holiday when the body of the Late Ex-President was brought from London to Dar es Salaam.

On 23/10/99 the Respondent prepared a list of six patients, including PW.1's son, to be operated. Isaack Mng'ong'o having been operated DW.1 instructed the nurses to continue to supply the prescribed medicines even though the patient's father (PW.1) was nowhere to be seen to pay for the medicines - as cost sharing.

Then on 30/09/99 PW.1 went to DW.1's dispensary at Sokomatola, near Loleza Girls Secondary School, and thanked the Respondent for the good work he did to his son. DW.1 learnt from PW.1 that the latter had visited his son in the hospital ward and he had paid the medical bills. The complainant was then advised by DW.1 to get ready supporting sticks or

crutches ("magongo") because without these the patient would not be able to walk and do some exercises. On 31/10/99 PW.1, ^{PW.1} again, approached DW.1 at his private dispensary and asked if he would take away his son from the hospital. DW.1 declined to do so because the condition of the patient had not been assessed, also that PW.1 had not brought the crutches.

On 01.11.99 DW.1 did not have a scheduling duty in the ward but in the theatre, so he did not assess the condition of PW.1's son on that day. Then came the fateful day - 02/11/1999. DW.1 saw Mwine Dickson (PW.3) who entered DW.1's office and then he walked out. Soon thereafter PW.1 entered therein and put the trap money in the left pocket of his coat and then he walked out telling the Respondent that he was happy with what DW.1 did to his son. Dickson (PW.3) then went in but DW.1 chased him out, but before PW.3 went out the other PCB officers (PW.2 and PW.5) rushed in and identified themselves as officers from the P.C.B. DW.1 was put under restraint and asked if he received bribe. The respondent took out everything, including the trap money, from the pocket of his coat. DW.1 vehemently denied to have solicited or demanded anything from PW.1. At this juncture, however, DW.1 realized that the conduct of PW.1 was not good because he wondered why PW.1 had to put the money in DW.1's pocket of his coat if the money was an appreciation of good work DW.1 did to PW.1's son? The respondent now believed that PW.1 was not acting legally with clean hands.

The Learned State Attorney submits that the prosecution's evidence, which is built by the testimonies of PW.1, PW.2, PW.3, PW.4, PW.5 and PW.6, stood unchallenged by the Respondent who simply made a general denial that he did not solicit for a bribe from PW.1; and that the said evidence of the 6 witnesses sufficiently and cogently established solicitation for bribe on the part of the respondent. The circumstances, he suggested, were such that no reasonable tribunal worthy its name would have failed to arrive at that conclusion. Further that the fact that the son was operated on the 25th of October, 1999, which was after PW.1's promise that he was going to sell cattle to raise money goes in tandem to strengthen the case for prosecution.

Mr. Boniface went on to submit with all mighty force that the learned magistrate's misgivings that PW.1's delays to report the matter to the Prevention of Corruption Bureau, coupled with the non-calling of nurses from Mbeya Consultant Hospital to give evidence for the prosecution portrayed PW.1's evidence as a cock - and bull story were patently unjustified. For one thing, according to Mr. Boniface, PW.1 did not want to jump into conclusions of solicitation for bribe. That he (PW.1) had first to do his best to make sure that the respondent indeed demanded a bribe before he could relay information to the Bureau. For another, offences of this type are known for their notoriety of being committed in secrecy, between two confidants. And in this particular case, neither PW.1 nor DW.1 had suggested at the trial that there was anybody around, let alone a nurse, when the two met and conversed on the 13th October, 1999 or on any other occasion.

As for receiving of bribe, according to the State Attorney, there is abundant and cogent evidence, coupled with the Respondent's admission in his defence that he received Shs.35,000/= from PW.1. And that the Respondent's theory that PW.1 just forced the money into one of the pockets of the Respondent's coat is not here nor there. Mr. Boniface referred to the testimony of PW.1 regarding the receipt of the ^{bribe} money by the Respondent. On the material date, PW.1 entered the respondent's office and saw two other persons. Upon seeing him, the respondent told the other persons to wait outside. DW.1 then received the money and put it in one of the pockets of his working gown. According to Mr. Boniface, corroboration of the latter piece of evidence is found in the testimony of Dickson (PW.3) whose material testimony is hereunder appended:

"I entered the accused (sic) office to make enquiries. When I entered his office, he asked me to wait outside as someone else had entered. When that person went away, I entered the accused (sic) office. Before I stated anything someone came and introduced himself as an Ant Corruption Squad (sic) official and put the accused under arrest".

Concluding from the two pieces of evidence and when the same is read into the Respondent's admission in his defence, it is Mr. Boniface's view that it is no gain - saying that the respondent received Shs.35,000/= knowing it to be bribe money. Otherwise, there is no point in the respondent's conduct in telling the men in his office to wait outside and closing the door so that they remained only two of them, that is PW.1 and the respondent himself.

Thus, the learned State Attorney wound up by saying that the evidence on record sufficiently proved the guilt of the respondent in both the counts. That the wasted effort in the construction of the provisions of section 3 - (1) of the Prevention of Corruption Act, 1971, was erroneously made. Accordingly he has prayed this court to quash the order of acquittal and substitute therefore conviction and pass a sentence which is prescribed by Law.

I have also taken time to go through the submissions made by Mr. Naali, learned Advocate for the Respondent. He starts by criticising the prosecution for failing to file written submissions as duly ordered by the trial court on 15/6/2001. The Respondent's Counsel duly complied within the prescribed period, which was on 29/6/2001, though he filed it on 26/6/2001. That the prosecution never continued to file theirs despite the fact that time was enlarged to 17/7/2001. According to Mr. Naali, the learned trial resident magistrate was therefore right to consider the defence submission in the light of the evidence and law applicable and in the result he acquitted the respondent, albeit uncontradicted submissions. In his view, the prosecution therefore were not interested, so they failed to argue their case to strengthen and advance reasons as to why the Respondent should not be acquitted.

With respect, pausing here for a moment, that is without delving into the merits of the appeal, I would agree with Mr. Boniface in his re-joinder submission ^{that} Mr. Naali should not take submissions to also mean evidence. In my considered view failure by a court to assess properly evidence adduced before it is indeed an error, omission or irregularity, the out come of which would indeed occasion a failure of justice.

But for a court to omit or fail to consider the submissions of the parties or advocates, which is not evidence at the trial court, that may not occasion ^a failure of justice as long as the trial court based its decision on the weight of the evidence on record. A submission is nothing more than suggesting or giving someone's view and a Magistrate or judge, in court proceedings, is not obliged to agree with that proposition. But if it is evidence the court is bound to accept it if the court is satisfied that the same is nothing but true. In the instant case the learned trial Magistrate did not base his decision of Mr. Naali's submissions but on the evidence before him. Therefore I find Mr. Naali's argument on this point irrelevant.

Coming to the main issues at stake, it does not need emphasis of this court that the duty to prove a criminal case always rests on the prosecution and the proof must not be less than beyond reasonable doubt.

According to Mr. Naali, the prosecution miserably failed to discharge that burden. He referred to the testimony of PW.1, in that the witness complainant categorically admitted that his son was already operated by Orthopedic Surgeon, namely, the Respondent Dr. Benedict. That the only evidence before the trial court, and now before this court, is that of the complainant (PW.1) who claimed that the Respondent solicited bribe. But there is no material or tangible evidence corroborating PW.1's testimony as whether it was true in fact that D1.1 solicited and accepted bribery. At all material time, Mr. Naali has urged, the said son (of PW.1) was being attended or taken care of by his mother and so if there was any of such move, the said mother could have been involved and called as a witness.

Further more, the respondent's Counsel laments, the manner in which PW.1 exhibited himself to give the alleged bribed money raises one's eyes-brows, hence a lot to be desired in his credibility as a truthful witness. His conduct, he emphasised, is a clear indication that the case is a frame up one and calculated to outsmart the respondent, the illegality of such move notwithstanding. The learned advocate is also of the view

that some of the hospital staff were involved because it sounds to be a perplexation as how and why they surfaced there and then at the scene when the PCB officers started the saga in the Respondent's office.

Even if the money amounted to "akante", according to Mr. Naali, the transaction occurred like a thunderstorm and lightning, as it provided no space and thought in the mind of the respondent to decide whether or not the money should be submitted to the Hospital Management. DW.1 was arrested there and then soon after the money was put in the pocket of his coat.

From the totality of the evidence on record, also putting into view the submissions of both the learned Counsel, including those of the learned trial resident magistrate it is now safe for this appellate court to answer the appellant's first limbo of the question - whether the respondent solicited for a bribe? This question, I think, can best be answered ^{answered} upon examining the testimony of PW.1 between the lines. It is open secret that P.W.1 had never met Dr. Bennedict (DW.1) before 13/10/99 and that is why he (PW.1) urged the nurses to show to him the said specialist. He was led to DW.1's office by a nurse. The meeting of PW.1 and DW.1 was like this (repeating PW.1's testimony at page 6 of the typed proceedings:-

"I saw him and asked him to help me. Dr. Benny told me that he had so many patients and asked for Shs.40,000/=. I told him I had no such money".

That was the first meeting of the two persons who did not know each other before. According to PW.1, Dr. Benny told him to keep on waiting. But we have the evidence of Dr. Benny who told the court that on 14/10/99 the Nation was grieved by the death of the father of the Nation Mwl. Julius Nyerere. His death, no doubt, interferred with smooth operations of public activities, a fact which was never contradicted by the prosecution. It is also the defence case that when PW.1's son was admitted Dr. Benny's schedule of duties had been set and he had not less than six operations to conduct or work. This piece of evidence was never contradicted by the prosecution. Again, according to Dr. Benny, PW.1 was assured by DW.1 that there was nothing serious on the injured leg

of PW.1's son that required an urgent operation. Also this was not contradicted by the prosecution. Now if it was true that Dr. Benny demanded to be paid Shs.40,000/= on 13/10/99, and PW.1 stated with clear terms that he did not have the money, why did he not complain to the PCB on the same day? Instead he decided to go back to Mafinga and returned to see Dr. Benny on 18/10/99. It is the testimony of PW.1 (at page 6) that Dr. Benny told him "to go and see the 'analyst'", a statement PW.1 said he did not understand what it meant. But this appears strange to me because PW.1 never told the trial court why he never sought clarification from Dr. Benny as to what he meant by those words. In my view, it would be a far fetching conclusion on the part of PW.1 to simply conclude that "I knew Dr. Benny needed money". It is trite law that courts of law do not peg their decisions on speculative facts not supported by material evidence. If PW.1 and DW.1 spoke same language, i.e. Swahili, there cannot be any good explanation as to why PW.1 did not ask for clarification as to what the Dr. meant. At page 6 we find another statement of PW.1:

"... On 19/10/99 I again contacted Dr. Beeny. He told me to see the nurse as he had made the rounds. I saw the nurse who told me that my child was on the waiting list for persons who were to be operated. I asked her when she did not know. I decided to follow Dr. Beeny. He was at Ward No. eight. he advised me to go to Mafinga and leave my child there. So, I know, again, that Dr. Benny needed a bribe".

For heaven's sake who does not know that in referral hospitals patients whose cases are to be attended by specialists are given special dates to be attended to by the relevant doctors? Now if in this case the nurse did not tell PW.1 on which date his son would be due for operation that could not be a conclusive piece of evidence that Dr. Benny wanted bribe. I cannot find any strange thing if Dr. Benny told PW.1 to go back to Mafinga and leave the child under the hospital management. After all, PW.1's son was being looked after by his mother (PW.1's wife). And if it

was true that the nurse whom PW.1 had contacted did not tell him the date PW.1's son was listed down for operation the said nurse ought to have been called for cross-examination by the defence. The copy of the time table containing the names of the patients to be operated was not even produced by the prosecution with a view to showing that Dr. Benny had very few patients for operation and so his conduct to delay operating PW.1's son was deliberate in order to induce PW.1 to give out some money to Dr. Benny in order to set the "ball rolling".

On the same day (19/10/99) PW.1 went to see officials of the PCB and reported the matter. There he was advised to convince DW.1 to reduce the amount. According to PW.1, that he did and DW.1 told him that he would accept Shs.35,000/=. PW.1 then told Dr. Benny that he was going back to Mafinga to sell his cattle to raise the money. Then we have a questionable statement from PW.1 (also at page 6), which reads as follows:-

"On the date I had forgotten I came back.
My wife told me that my child had been
operated".

One would then ask, if PW.1 would remember all the other dates he discussed with Dr. Benny, why not that crucial date he learnt from his wife that his son had been operated? If PW.1's son was operated in the absence of PW.1 this means that Dr. Benny fulfilled his promise, as he told PW.1 to go back to Mafinga and leave the child under the custody and management of the hospital. There is nothing in evidence showing or ^{tending} to show that Dr. Benny was all out looking forward to be paid the alleged bribe money from PW.1, although he had fulfilled his job to operate the injured leg of PW.1's son. At page 6 of the typed proceedings PW.1 conjectured as follows:-

"On the date I had forgotten I came back.
My wife told me that my child had been
operated. I know that had been done because
I had promised Dr. Benny the bribe".
(underlined to provide emphasis).

The underlined words merely form an opinion not based on firm evidence. In other words, PW.1 merely guessed that Dr. Benny conducted the operation pursuant to the alleged promise PW.1 had made to DW.1 that he would bring to him Shs.35,000/= after he sold his cattle. I have purposely used the words "alleged promise" because the evidence on record is only that of PW.1 and DW.1, the former alleging and the latter denying. Since this case is a criminal matter involving high standard of proof, beyond reasonable doubt, unlike in a civil matter in which standard of proof is on the reasonable balance of probability, the prosecution ought to have gone beyond the evidence of PW.1 to show that DW.1 was undoubtedly demanding bribe from PW.1. It is even more so because PW.1 had special interest to serve in this matter on the account that he did not want anything shorter or less than seeing to it that his son was attended as expeditiously as possible; the hospital procedures to him meant nothing against his wish and interest. I do not know what kind of language or words the Respondent (DW.1) ought to have used in order to put across the dilemma DW.1 was facing when PW.1's son was admitted at the hospital. For example at page 3 of Dr. Benny's statement to the PCB Officer Deogratias Malogo (exhibit D.1). Dr. Benny stated as follows:-

"Upasujaji wa wagonjwa wa mifupa hospitali ya Rufaa Mbeya unafanyika mora mbili tu kwa wiki - Jumatatu na Alhamisi hivyo kuzingatia msiba wa Baba wa Taifa siku ya Jumatatu tarehe 18.10.99 na tarehe 21.10.99 zilitangazwa siku za mapumziko na hivyo operation ambazo nilizipanga awali hazikufanyika".

And when PW.1 went to see Dr. Benny at his Mbonea Dispensary on 18.10.99, the following transpired (as per Dr. Benny's statement to PW.4, also at page 3):

"Ndugu Mng'ong'o alikuja Mbonea Dispensary akaniambia kuwa anakwenda nyumbani ona matatizo na akaniambia kuwa nisimschau mgonjwa wake. Nakumbuka nilimweleza kuwa siku hizi mbili zilikuwa za maombolezo zilituathiri kiupasujaji mifupa, na wagonjwa wanaohitaji huduma wataongezeka maradufu kwani niliowapangia

kuja tarehe 15.10.99 kwa ajili ya operation 18.10.99 hawatafanyiwa, na watakaokuja tarehe 20.10.99 kwa ajili ya operation 21.10.99 nao hawatafanyiwa hivyo nitajitahidi kuangalia ni vipi nitagawa wagonjwa hao wote kwa makundi. Lakini kutokana na muda wa Isaac Mung'ong'o kukaa wadini itabidi apewe kipaumbelo. Hakumini akawa ametoka na kusimama nje ya Dispensary wakati natoka nilimkuta amesimama kwa uchungu. Nikamwambia sende tu safari yake asiwe na wasiwasi.

As why DW.1 told PW.1 to go and see anaesthetist, and not analyst as recorded in the evidence by the trial magistrate, Dr. Benny is on record to have told PW.1 as follows (page 4 of Exh. D.1):

"Mimi nafanyia mgonjwa operation kama ometimiza mambo yafuatayo, kwanza anachekiwa endapo damu ni nzuri, yaani kiwango cha H6, kama anahitaji damu basi ndugu zake hulezimika "ku-donate" machara kabla ya operation na mwisho ni kufanya malipo ya Shs.10,000/= kama ni operation kubwa. Muhimu kuliko yote ni mgonjwa kuonwa na mtu wa usingizi amuone kama hana tatizo lolote linaloweza kukwemisha utoaji dawa ya usingizi, hivyo basi kama nilimwambia hivyo ilikuwa ni kupata uhakika huo tu na sio kingine kwani operation ingefanyika wakati yeye hayupo" (emphasis supplied).

I have read and re-read the entire evidence on record and I can conceive nothing material, whether direct or indirect which vitiates the quality of Dr. Benny's testimony. It is not impossible that PW.1 got a wrong impression that Dr. Benny was using technical reasons to delay attending PW.1's son so as to induce PW.1 to give bribe to DW.1 before the latter did what he was required to do. But as I have said above, conjectures or speculations have no place in the legal field, concrete proof of an assertion in criminal matter is the cornerstone on which conviction is based.

With respect, I agree with Mr. Nasli that there is strong evidence to prove that the respondent had many patients listed, including the chits which were exhibited in court. The delay to operate Isaac

Mng'ng'o was not therefore deliberate. I also agree that PW.1's testimony is speculative and imaginary and so the trial Magistrate was right to treat his testimony with the utmost extreme caution. Since the case is built up on circumstantial evidence, it is trite law that each evidence must irresistably point to no other hypothesis than the guilt of the accused. I am satisfied, as did the respondent's Counsel, that there is no tangible evidence to show that the respondent ever solicited bribe from PW.1. The conversations between PW.1 and DW.1 were never witnessed or heard by any witness and therefore PW.1's testimony remains doubtful in view of his personal interest in the matter. I would therefore answer the 1st issue in the negative.

The 1st issue having been answered in the negative, the next question is whether the Shs.35,000/= found in the pocket of the respondent amounted to a bribe? The testimony of PW.1 and Mwife Dickson (PW.3) is very crucial in answering this question. It is pertinent here to quote the relevant pieces of evidence by PW.1 and PW.3 on this aspect. At page 6 - 7 of the typed proceedings PW.1 is on record as follows:-

"On the second day I was given the money. We went and I entered the Dr's Office. There I met two other persons. When Dr. Benny saw me he told the persons to go out and wait for him outside. Then Dr. Benny closed the door. He blamed me for being late. I gave him money. He took the money and put the same in his working gown. He asked me to wait for him outside ...".

But contrary to what PW.1 stated, Dickson (PW.3) stated at page 8, as follows:-

"When I entered his office he asked me to wait outside as someone had entered. When that person went away, I entered the accused office ...".

First, the prosecution's evidence is silent as who were those two persons PW.1 met in Dr. Benny's office. None of those two persons was called to confirm that Dr. Benny sent them out when PW.1 was sighted by DW.1 and the complainant was allowed to go in. Second, it is not clear from the

testimony of PW.3 as whether he was one of the two persons sent out by DW.1 when PW.1 entered Dr. Benny's office. It is also uncertain from the testimony of PW.3 as when the person he met in Dr. Benny's Office was PW.1. That is not all. If Dr. Benny had closed the door as alleged by PW.1, it was not possible for PW.3 to enter Dr. Benny's Office when PW.1 was still therein for the purpose of giving the bribe money to the respondent. Third, Dickson (PW.3) is another witness of suspicious character. According to him, his going to the Referral Hospital was to see his "relative", who had come from Njombe. PW.3 went on to say:

"My relative was told to come on 29.10.99.

But nothing was done on that day. I decided to contact the accused. I entered the accused office (sic) to make enquiries".

In cross-examination, however, PW.3 claimed that he did not know the name of the person whom he visited at the hospital. His relative, he said, is the son of his sister. The relative was never treated, he (PW.3) told the trial court. As far as I am concerned, I find this witness not truthful. PW.3 never told the court what his relative was suffering from and why he had to see Dr. Benny on that particular day of his arrest. Also I find it hard to believe that he would not know the name of the son of his sister he had come to visit at the hospital.

The evidence of Joram Kabopele (PW.2) also appears to be inconsistent with the testimony of PW.3. PW.2 stated that when he led a certain woman to Dr. Benny's office (at the request of the woman) he (PW.2) found the Respondent sitting in the office with "two persons", who identified themselves as "police men from the Ant-Corruption Squad". Then they placed the doctor under their custody. PW.2 never mentioned in his testimony that he met PW.3 in Dr. Benny's Office. Contrary to what PW.2 stated, PW.3 said, inter alia, as follows:-

"Before I stated anything someone came and introduced himself as Ant-Corruption Squad Officials and put the accused under arrest. Then a woman came and went out, he came back with the hospital secretary. PW.2 also entered the office.

It is quite apparent therefore the whole saga surrounding the Respondent's

office on 2/11/99 was to meet him (DW.1) under any cost.

The respondent explained why the Shs.35,000/= was found in one of the pockets of his official coat. He narrated to the trial court (quoting ipssisima verba as follows:-

"On 2/01/2000 while going for work at the gate I met one youngman who told me that he had his problem. I told him that I could not hear his problem at the gate. He followed me and sat on the bench. I went on with my duties. The youngman turned out to be Dickson Mwile (PW.3) He told me that he had his child who had been admitted in Ward 8 and needed service. I asked him to wait durn during the ward round. He then reluctantly went away. Then there came inside Mzee Mng'ong'o who then put the money in the left pocket of the coat. He was very happy and then went out quickly. Then PW.3 entered and I chased him but there and then entered two people Suzana and Malogo who told me that I was under restraint"

From that account it goes without saying that PW.3 has some relationship with PW.1 and the "relative" he told the respondent needed medical attention was none but Isack (PW.1's son). PW.3 therefore had similar interest as PW.1 and their evidence could not be given strong credence as that of an independent witness. Putting into consideration all those unkind move-
ments which had been going on ^{around} ~~in~~ and in the office of the respondent in the morning of 2/11/99, it is not impossible that PW.1 forcefully inserted the Shs.35,000/= in the pocket of the coat DW.1 was wearing, without DW.1's consent. It is also difficult to say as what reaction or steps DW.1 was going to take as regards the money, or against PW.1 because Dr. Benny was not given a breasting moment to ponder over what had just happened. Under such environment, I think there is no reasonable court or tribunal which would, on the basis of the evidence on record, jump into a conclusion that the respondent freely and willfully accepted the Shs.35,000/=.

There is much to be desired in the conduct of PW.1, PW.3 and PW.4 and

for that reason the learned trial Resident Magistrate rightly resolved that doubt in favour of the Respondent, which finding and order for acquittal I accordingly endorse. In the result, I find this appeal to have no merit and on that premise I dismiss it. It is so ordered.



A. C. MREMA

JUDGE

07/10/2003

AT MBEYA this 7th day of October, 2003 in the presence of Mr. Mwenda, Learned State Attorney for the Appellant (DPP) and in the presence of the Respondent himself (Dr. Benny) and his Learned Advocate Mr. Naali.



A. C. MREMA

JUDGE

07.10.2003