

**IN THE HIGH COURT OF TANZANIA
AT BUKOBA**

(HC) CRIMINAL APPEAL NO. 42/2001

(Orising from Criminal Case No. 138/200 at Biharamulo District Court)

DAMIAN BANIGWA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGEMENT

LUANDA, J.

On 23/3/2004 I heard this appeal. After hearing, I quashed the proceedings, set aside the conviction and Ordered the release of the Appellant from custody unless he is held in connection with another matter. I promised to give reasons for taking that action at a later date, which I now give.

The Appellant in this appeal one Damian Banigwa, who was a Primary Court Magistrate stationed at Bunazi Primary Court in Biharamulo District and Sylivery Jeremia (whom I shall refer him as 2nd accused) who was a messenger in the same Court were charged in the District court of Biharamulo with two Counts under the Prevention of Corruption Act, 1971. In the first Count the Appellant alone was charged with soliciting a sum of Tshs:15,000/- from Edward S/O Buhamu as an inducement to assist him to appeal to the District Court of Biharamulo in respect of a Civil Appeal No. 1 of 2000 originating from a Ward Tribunal. The second count is for receiving in that both are alleged to have corruptly received Tshs:13,500/- from Edward S/O Buhamu as an inducement to assist the latter to appeal to the District Court. The two pleaded not guilty to the charge and the case went on trial.

After the trial, the two were acquitted with the offences they were charged. But the Appellant

was convicted with receiving money by false pretences C/S 302 of the Penal Code. However, it is not indicated the substitution was done in respect of what count.

Be that as it may, the Appellant was Sentenced to 5 years imprisonment.

Aggrieved by the finding of the trial Court, the Appellant appealed to this Court. The Appellant raised five grounds. All boil down to the question of evidence in that the evidence on record is weak to ground conviction.

In this appeal, the Appellant was represented by Mr. Rweyemamu learned Counsel, whereas The Republic was represented by Mr. Rwabuhanga learned State Attorney.

Before we go into the merits or demerits of the appeal, let us albeit briefly, narrate the Prosecution case.

Edward S/O Buhamu (PW5) filed a case in Bukome Ward Tribunal involving a piece of land against his villagemates. PW5 lost the case. He appealed to Runazi Primary Court. He also lost. And the Appellant with two assessors were the ones who handed down the unanimous decision of the Court. PW5 was dissatisfied, he intended to appeal to the district Court. He approached the Appellant for guidance.

In short, PW5 said the Appellant refused him permission to appeal, because there was a point of law involved. But the Appellant could waive that point if he dishes out money. The Appellant demanded Tshs;15,000/-. PW5 bargained. Finally they struck a deal. PW5 said the Appellant agreed to accept Tshs:13,500/-.

PW5 requested for time to look for the money. They also agreed that one clerk going by name of Pili will receive on behalf of the Appellant. PW5 left. PW5 reported the matter to the District Commissioner who inturn directed him to report to the Prevention of

Corruption Bureau (hereinafter referred to as (PCB). He went to PCB where he, was given Tshs:13,500/- in the following dominations 2 notes of Tshs:5000/- 3 notes of Tshs:1000/- and 1 note of Tshs:500/-. PW5 was specifically instructed by PCB to give the money to a Court Clerk. A trap was arranged. The PCB officials, PW5 and other people went to the said Primary Court.

On arrival, PW5 queried the whereabouts of the Court Clerk. The Clerk was not around. PW5 asked the 2nd accused whom he knew very well as an Office Attendant. The 2nd accused told him that the Clerk had gone to hospital. Then the 2nd accused told him that if he had a parcel he can collect on her behalf. PW5 sought directions from PCB Officials. He was told to handover to the 2nd accused. The 2nd accused was given the money, hence his arrest. When searched he was found with the money. That was the Prosecution case

The Appellant on the otherhand told the trial Court that he did not deny PW5 to appeal to the District Court. He also denied to instruct anyone to receive money on his behalf.

Mr.Rweyemamu argued with force that the evidence on record was not well considered. First, he said the Appellant had already decided the appeal. Why he asked the money for? Second, the Appellant was not the one who received the money. The money was received by the 2nd accused. And the 2nd accused did not say he was directed by the Appellant to receive on his behalf. He said in his defence he received the money as Court fees.

Third, he said the conviction for obtaining money by false pretences cannot stand against the Appellant as he was not the one who received the money.

Mr. Rwabuhanga did not support the conviction and Sentence. He subscribed to the views expressed by Mr. Rweyemamu. He, however, added that when the 2nd accused wanted to explain, he was not given opportunity. Last but not least he was wondering whether the

substitution done was proper.

PW5 told the trial Court that the Appellant demanded money to enable him appeal to the District Court. But when he was asked by the Court as to whether he could appeal to the District Court, PW5 said at Page 11 of the typed proceedings, I quote:

“1st Accused (Appellant) Orally told me to appeal to the District Court”

And Bartazar Bilama (PW4) one of the assessors who sat with the Appellant said the more or less the same thing when Cross-examined by the 2nd accused. He said, I quote:

“The Complainant showed the intention to appeal when the Case (Sic) was pronounced. The 1st accused agreed the Complainant to appeal.”

If PW5 was told he could appeal to the District Court, one would expect him to do that by going to the district Court and lodge his appeal. PW5 did not do that. As to why he did not do that, PW5 himself has an answer.

However, taking the circumstances of this case, it shows very clearly that PW5 had a sinister motive against the Appellant which he did not want to say or disclose. Of course one cannot rule out a bitter disappointment he was experiencing after losing the case. So there is doubt, which ought to be resolved in the Appellant favour as to whether he solicit and receive money from PW5 corruptly.

As regards to the substitution of the charge, I have the following to say. The evidence on record shows that the Appellant was not the one who received the money nor was it shown the 2nd accused received for the Appellant.

It goes without saying that there is no need of discussing as to whether obtaining money

by false pretences is minor offence to receive the same corruptly.

In sum, I quite agree with the submissions given by both learned Counsel in that the trial Learned Senior District Magistrate did not at all scrutinize the evidence on record.

Had he done so, he could not have arrived at the decision he had reached.

These are my reasons for the Order I made.



B.M. LUANDA

JUDGE

10/12/2004

ORDER:- Judgement be typed and supplied to the Appellant.



B.M. LUANDA

JUDGE

10/12/2004