IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO. 126 OF 2004

ORIGINAL CRIMINAL CASE NO.348 OF 2004 OF

THE DISTRICT COURT OF SHINYANGA DISTRICT

AT SHINYANGA

BEFORE; - M.R. GWAE, Esq., RESIDENT MAGISTRATE.

ENOCK S/O ISAYA FUMBUKA .....APPELLANT

(Original accused)

Versus.

THE REPUBLIC..... RESPONDENT

(Original Prosecutor)

JUDGEMENT

28th March, 07 & 28th May, 07

MZIRAY, J;

The appellant was charged in the District Court of Shinyanga with two offences of corrupt transactions contrary to section 3 (1) of the Prevention of Corruption Act No.16 of 1971. It was alleged that he corruptly solicited and received

a bribe of shs.1,500/= from PW6 Haidari Hamisi Mungi as an inducement to attend his child and wife who were sick, a matter which was related to his principal affairs. The trial court found that the facts of the case disclosed both soliciting and receiving so basing on the case of Issa Athumani V.R (1983) TLR 337, the appellant was convicted of receiving contrary to section 4 (1) of Prevention of Corruption Act and sentenced to two years imprisonment.

The appellant has been aggrieved by the conviction and he submitted three grounds of appeal in his Petition of Appeal. He challenged the evidence to be inconsistent and contradictory. He further pointed out irregularity in conducting the Preliminary Hearing. He asserts that the above mentioned loopholes have tainted the case for the Prosecution to warrant his release. On the part of the Republic through the services of Mr. Mkoba, learned State Attorney, he concede to the grounds of appeal and for that matter, on behalf of the Republic, he is not supporting the conviction of the appellant.

Briefly, the facts of the case were as follows. On 28/8/2003 PW6 Haidari Hamisi Mungi took his child and wife (PW4 Aisha Mungi) who were sick at Shinyanga Regional Hospital for treatment. According to PW4 and PW6, the

appellant who was the doctor, assigned to attend them, solicited a bribe of shs.1,500/=. PW6 consulted the office of Prevention of Corruption Bureau who arranged a trap. PW6 was given the trap money. PW3 Cosmas Batabita and PW5 Orest Mushi from the Bureau were dispatched at the scene to effect the arrest. PW6 gave the appellant the trap money. PW3 who was at the scene arrested the appellant. The trap money was counted and the serial numbers checked in the presence of PW1 Revona Exavery and PW2 Paulo Shija. The appellant was then charged.

In his defence the appellant denied involvement. He denied also to have acted as an agent of the Ministry of Health alleging that at the material time he was a medical student on practical attachment. He completely denied to have come across PW4 and PW6 on the material day. He attacked the Prosecution evidence to be inconsistent and contradictory. His version to what happened on that day is that one person who was at the hospital gave him a parcel which he did not receive and he was forced under intimidation to pick it. This version is supported by DW2 Stephen Kaira who happened to be around the scene.

In resolving this appeal, I will go by the grounds of appeal filed. I will start with the Preliminary hearing

proceedings. On going through the record of the trial court it is evident that the undisputed facts were not read over to the appellant as required by the law. The necessity to read and explain the Memorandum to the accused is highlighted by the provisions of rules 4 and 6 of the Accelerated Trial and Disposal of cases Rules, 1988. I had an advantage to look at these rules. There can hardly be any doubt that they are couched in mandatory terms. In certain cases, non compliance to the rules may result into quashing convictions on appeal. (See Bahati Masebu V.R. - Court of Appeal at Mwanza, Criminal Application No.135 of 1991 (unreported). From the above, it is my view that failure to read the Memorandum of matters not in dispute resulted in unfair trial leading to failure of justice.

The injustice did not end there. The alleged bribe money (shs.1,500/=) and the piece of paper where the serial numbers of the money were recorded were tendered as exhibits P1 and P2 respectively. From the record of the trial court it clearly shows that the appellant was not given an opportunity by the trial court to state if he objected or not to the admissibility of the two exhibits. In my view, failure to give the appellant such opportunity must have prejudiced the appellant and no doubt it again occasioned to another failure of justice in this case.

The last issue to determine is whether there was contradiction in the evidence which went to the extent of vitiating the Prosecution case. In his submissions, Mr. Mkoba, learned State Attorney concede that there were material contradictions in the Prosecution case. He pointed contradictions in the evidence of PW2 and PW5 on how the appellant was arrested. While PW2 said that the appellant was assaulted at his arrest, on the other hand PW5 who was also at the scene stated that the appellant did not resist arrest hence he was not assaulted. It is also submitted by the learned State Attorney that there are contradictions on the evidence of PW5 and the rest of other witnesses on the sum of money solicited as bribe. He invited this court to resolved the contradictions in favour of the appellant. He referred to the case of Michael Haishi V.R. (1992) TLR 92 to fortify his argument.

Normally, contradictory evidence in a trial should be viewed with great suspicion unless a satisfactory explanation is given for the contradiction. The same applies to inconsistent evidence. As it has been seen from the evidence PW2 and PW5 gave contradictory statements on how the appellant was arrested. There has not been any reasonable explanation given by the Prosecution why the

two witnesses who were at the scene differed in their versions. In the absence of a reasonable explanation, this contradiction should be resolved in favour of the appellant as it has destroyed the credibility of the two witnesses.

In total the case for the Prosecution has not been proved beyond all reasonable doubt. I quash the conviction and set aside the sentence of two years imposed on the appellant. He is to be set at liberty unless lawful held in other matters.

R.E.S. MZIRAY

JUDGE

28/5/2007

Right of appeal explained.

R.E.S. MZIRAY

JUDGE

28/5/2007