IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CRIMINAL APPEAL NO. 12 OF 2010

(Originating from Mufindi District Court

CRIMINAL CASE NO. 20/2009

AIGON JEREMIA KISOMA.....APPELLANT

VERUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

MKUYE,J

Ms Maziku, learned state attorney did not support the conviction in the case in which AIGON JEREMIA KISOMA in Criminal Case No. 20 of 2009 before the District Court of Mufindi at Mafinga was charged with two offences of soliciting an advantage and receiving an advantage both contrary to section 15(1) (c) of the Prevention and Combating of Corruption Act No. 11 of 2007. With regard to the sentence she asked the court to set aside the sentence of fine of shs. 700,000/= and order a refund thereof.

Briefly the facts constituting the appeal can conveniently be stated as follows:

Jelus Romanus Chalamila (PW5) (Who was relative of PW1 and PW2) was arraigned before the Primary Court at Malangali which was presided by the appellant for an offence of abduction c/s 134 of the Penal Code. He was granted bail and Adrian Romanus Chalamila (PW2) was his surity. On 6/1/2009, however, his bail was cancelled. PW5 was then taken to remand prison. PW1 allegedly approached the appellant to enquire about the cancellation of his relative's bail where upon the appellant confirmed it while demanding to be given shs. 200,000/= so that he can release him on bail. He is allege to have asked for the same amount from PW2.

It is further revealed from PW2 that he went to inform his relatives including Asterina Chalamila (PW1) about it and they decided to report to the Prevention and Combating of Corruption Bureau (PCCB) where they were advised to inform the appellant that they would sent it (money) on Friday.

The appellant allegedly rejected their proposition and directed them to sent it on Monday. PW1 was given shs. 150,000/= trap money by PCCB and on Monday she together with PCCB'S officials proceeded to Malangali Primary Court after phoning him and gave it to the appellant. The appellant was arrested by PCCB officers and was arraigned before the court for the offences.

The appellant in his defence did not deny cancelling bail for the said Jelus Chalamila (PW5), but he said he did so following an information from Alex Mlyuka, the village executive officer (DW2) that the appellant was corrupting the intended

prosecution witnesses who were to testify against him. He denied to have solicited or received bribe from PW1. His further evidence was that when the PCCB's official (PW9) entered in his office he was ordered to raise up his hands while he (PW9) proceeded to search every where in his office while pointing a pistol at him. Thereafter, he took his porch/wallet and told him that he had received the said bribe of Tshs. 150,000/=. He claimed further that the alleged money was planted in his porch by PW9 who had stayed in his office for almost 30 minutes alone before calling other people.

The appellant, through the services of Mr. Mushokorwa fronted three grounds of appeal as hereunder:

1) Having held that there was no evidence to prove the offence of soliciting advantage, the learned magistrate erred in both law and fact on the same evidence to convict for the offence of accepting an advantage.

2) The learned magistrate did not properly and correctly analyse the evidence before him as a result he did not accord due to consideration to the defence case which had cast serious doubts to the prosecution case.

3) The sentence imposed for the 2nd count was severe and manifest for a first offender.

Arguing for the 1st ground of appeal it was Mr. Mushokorwa's argument, which I think is quiet rightly in my view, that it was a double standard to believe PW1 and PW2's

evidence that they gave bribe to the appellant after having discredited their evidence that appellant had solicited bribe from them. This is because, in my view, the evidence that the appellant had solicited bribe from PW1 and PW2 was wanting for the following reasons:

One, PW1, much as she said she had the appellant's phone number to facilitate communication with him, she did not offer sufficient evidence to prove it. She failed to mention it or call it in court so as to verify it. The PCCB officials who was given such number never testified in court to that effect.

Two, the evidence that appellant solicited bribe from PW1 and PW2 was contradictory. Much as PW1 said the appellant solicited from her to be given bribe, she did not remember the date on which the appellant solicited to be given the said bribe. Also she gave two tongues regarding the purpose of the said bribe when she said it was to enable his relative (PW5) to be released on bail. But she told PW2 that it was intended to enable the appellant terminate the case. But again PW2 said the appellant solicited a bribe of shs. 200,000/= without explaining its purpose. This evidence left nagging questions as whom between PW1 and PW2 and when the said bribe was solicited and for what purpose. If this case was shown, it would have availed some clue as to what was intended to save.

The learned advocate for appellant also contented, which I again agree with him, there were no reasons for soliciting bribe as PW5s' bail was properly cancelled. There was evidence from

DW2 that PW5 bail cancellation was due to his acts third of tempering with prosecution witnesses. No motive existed.

As regards to the evidence relating to receiving an advantage the learned advocate argued that, that PW1 entered the appellants office was not proved since PW3, PW4, PW6, PW7 and PW8 denied to have seen PW1(her) entering the appellant's office. That the trap money allegedly found in appellants' porch was planted by PW9 who took it from him and continued searching the room for about half an hour while pointing a pistol to the appellant whose hands by then were raised up. He further submitted that PW9 was incidentally, not searched before that exercise and that neither PW3, PW4, PW6 and PW7 who were called in did ask the appellant as to how the alleged money got into his porch. The PCCB'S official said they have got their money (government money). As to how they got it, it was not stated. The learned advocate stressed that the appellant had his money in his porch which was his property as there was shs. 40,000/=. When he admitted that it was his money he was unaware that there was more money added in his porch. He lastly submitted that the ingredients of the offence of inducement as per section 15(1) (a) of the Prevention and Combating of Corruption Act were not proved.

The learned state attorney supported this ground of appeal along the same line of the appellants' learned advocate's argument such as failure to prove the ingredients of inducement; weak evidence that appellant received bribe, the act of PW9 spending more than 30 minutes with a pistol in appellants' office

without calling other witnesses immediately after entering the office. All these factors he said, raised doubts which ought to be resolved in favour of the appellant.

The issue here is whether the offence of receiving bribe has been proved beyond reasonable doubt.

But before examining the issue of whether the appellant received bribe I wish to pursue the issue of whether the ingredient of inducement was established. This is because it has been raised by both counsel.

It is not indispute that the accused in the 2nd count of the offence was charged with an offence under section 15(1) (a) of the Prevention and Combating of Corruption Act. In that section it is required to prove that the appellant/accused corruptly obtained or received from another person an advantage as an inducement to, or reward for or otherwise on account of doing or fore bearing to do anything in relation to his principals' affairs. The issue of inducement under the said section is among the essential ingredients of the offence which definitely require proof.

To my understanding, there cannot be inducement without motive or ill intention. It was held in the case of **Mohamed Katindi and Another V R (1986) TLR 134 at 143 -144** that:

> *Motive is thus an essential ingredient and a charge of corruption which is devoid of motive*

appears to be academic. For without motive, an intention to corrupt can hardly arise"

It means unless the motive or state of mind of a receiver is proved, there cannot be said that one received money corruptly or acted corruptly.

I have already upheld the trial courts' decision which I still believe to be the correct position that the appellant could not and cannot be said to have solicited bribe where cancellation of PW5's bail was properly done. It means there was nothing that could have been done or forborne to be done out of an inducement under the circumstances of this case. The appellant did not therefore act corruption. As such am in agreement with both Counsel that the ingredient of inducement was not proved beyond reasonable doubt.

Much as I have already ruled out that there was no inducement, I cannot keep a blind eye on the evidence regarding receiving the said bribe which resulted into the conviction of the appellant. Did the appellant receive bribe?

Basically, PW1 and PW9 are the witnesses who testified to the effect that appellant did receive bribe. PW1 testified to the effect that she on the fateful date, which was fixed by the appellant, handed over shs. 150,000/= bribe to the appellant . PW9 adds that he retrieved the said money from the appellant.

PW1's testimony was that after appellant had solicited to be given bribe of shs. 200,000/= they reported to the PCCB office who instructed her to inform appellant that she was taking the

money to him on Friday but appellant said she take it to him on Monday. PW1 said on Monday she together with PCCB's officials went to Malangali Primary Court and she entered into appellant's office where she introduced herself to him and was told to wait outside. After a while she entered in and handed the shs. 150,000/= to appellant as a bribe with a promise to bringing the balance of shs. 150,000/= later. Thereafter, she signalled PW9 who entered in appellants' office. Much as PW1 said she entered inside but PW3, PW4 and PW7 who were there through out that time denied to have seen her entering into the appellants' office. It raises doubt as to when PW1 passed and entered inside.

PW9 on his side testified that after being signalled by PW1 he entered inside the appellants' officer where he ordered him to raise his hands up and the appellant took the porch/wallet from the drawer and put it on the table. PW9 said he stayed for one minute before calling other people to witness. He did not explain why he stayed for such long and why he entered in the office alone.

The evidence that appellant received bribe came from the lone PW1 whose evidence regarding soliciting bribe has been discredited for reason that there wouldn't have been solicitation of bribe where his act of cancelling bail was properly done.

When pursuing PW1's evidence I think it is not free from problems. PW1 said when she went to the appellants' office on Monday, the day they had agreed to handover to him the bribe, while having shs. 150,000/= from PCCB, she introduced herself to the appellant who told her to wait for five minutes. But this

really surprises me as to how and why she had to introduce herself to the appellant when according to her evidence they had met twice before i.e. when she (PW1) went to enquire from the appellant about the cancellation of her brother's (PW5) bail and when she went to inform appellant that she will take the money to him on Friday. Why did she had to introduce herself when the appellant himself advised her to take it to him on Monday and for that matter he knew that she was coming on that date.

PW1 testified further that when she entered in the appellants' office and handed over the money to the appellant, he put it in the porch which he later kept it in the drawer on the right side of the table. She said further on going outside the office she signalled PW9 who entered inside the appellant's office. PW1 also shows that PW9 entered in appellants' alone. This was followed by other scenario between PW9 and appellant.

PW9 said on entering in the appellants' office he ordered him to raise his hands up. PW9 said further the appellant took his porch from the drawer and put it on the table. The fact that PW9 ordered appellant to raise hands up was supported by appellant. Appellant went further to explain that apart from ordering him to raise up his hands, he ordered him not to turn around and he was pointing a pistol to him while searching on various parts of the office including himself and that he spent about 30 minutes for the exercise. But here again questions arise. Why did PW9 enter inside the office alone when taking into account that they went there as a team and there must have been other people in the court premises as was confirmed,

the evidence of PW1 and PW7. Why did the appellant as stated by PW9, take his porch and put it on the table. At what time did the appellant take the said porch and put it on the table while according to PW9 himself, on entering the office he ordered him to raise up his hands. Was he afraid of the pistol that was pointed at him?

Of course, regarding the time that PW9 spent in appellants' office, PW9 said he spent only one minute before calling other witnesses. But this cannot be easily swallowed. Why? This is because according to the appellant many activities were performed by PW9 while in that office. Apart from ordering the appellant to raise up his hands without turning around; he searched his body, on shelves and in files kept in that office while pointing a pistol to appellant. As one hand was holding a pistol it means search was conducted by using one hand which means sufficient time was needed for the exercise. The fact that some items in the office were scattered in the office was confirmed by PW 11, an independent witness who entered later. I am satisfied that PW9 had to spent a long time unlike one minute which he suggested. But PW9's evidence that he spent only one minute is defeated by the evidence given by himself. In other words, he contradicted himself. During his testimony in examination in chief he said he spent one minute. On cross examination he said he did not know or remember the time spent before calling other people. Clearly he gave two tongues on the same breath. I find PW9 to be not a truthful witness. Also, since he ordered the appellant not to turn around (which is a

normal practice to enable effective arrest) it was not impossible for him to plant some money in appellants' porch unnoticed.

The appellant said PW9 was pointing a pistol towards him. PW9 denied to have a pistol while alleging that it was left in the motorvehicle. But one wonders why did they have to travel with a pistol to Malangali and leave it on the motorvehicle when they were going to arrest a culprit. What could have happened if the culprit was resistant, violent or could have his pistol in his office. I don't believe in his story. It is my view that they took the pistol with them with a purpose of assisting them in case of any resistance or unconducive atmosphere during arrest and thus the possibility of PW9 having a pistol while inside appellants' office cannot be overruled. After all PW9 was not searched before entering the appellants office. Even if other witnesses said they did not see it, a pistol is such a small item. It could have kept in his pockets unnoticed.

With regard to the wallet/porch, I think I have to comment on it. PW9 said when he entered in the appellants' office and asked for the bribe he has received, the appellant took the wallet and placed it on the table. The appellant on the other hand said it was PW9 who took it while he (appellant) was ordered to raise up his hands without turning around. I would agree with the appellants' version because even PW9 himself said on entering in the office he ordered the appellant to raise up his hands. I think appellant would not have done differently from what he was ordered to do for doing otherwise would have endangered his safety. But appellant also said that the PW9 was searching on various places in the office. He could not see all what was

happening as he was not allowed to turn around. The question is why did PW9 had to engage in searching and locating the money while he had a team of other PCCB's Officials and other people around who were there for different reasons. But PW9 also seems to have not even asked the appellant in the presence of other witnesses as to how the trap money found its way in his wallet. Even the other witnesses did not have the benefit of knowing it.

To the contrary it is gathered from the courts' record that it was PW9 who told other witnesses about the existence of government money (fedha zetu, fedha za serikali za rushwa) in the appellants' wallet.

Again, here one wonders as to how he was able to know that the said wallet contained the government money when considering that the appellant had quite politely denied to have taken bribe and he had his own money. What was the purpose of having or calling other witnesses if not to witness each and every step of search and recovery of the said trap money. In my view the evidence that appellant received bribe is wanting and it is enhanced by the fact that there was no motive or ill intention to solit and receive it in the circumstances where appellant had rightly cancelled PW5's bail for tempering with intended prosecution witnesses who were to testify against him. The evidence that PW5 was corrupting witnesses was brought to appellant by the VEO who testified as DW2. The VEO being a justice of peace was entitled to inform the appellant who was

presiding over the criminal case against PW5. The VEO was a reliable witness.

There was concern that PW5 was not brought to court even after the removal order was issued. It seems to me that this could have been taken as a signal to PW1 and PW2 that appellant demanded to be bribed. But an explanation was offered that the said Jelus Chalamila (PW5) could not be brought to court due to lack of transport/fuel to convey him from Isupilo Prison to Malangali Primary Court. Under the circumstances I find that the appellant had no motive that could have prompted an intention to accept bribe. There was no reason for inducement.

Perhaps, it would be prudent to comment on the manner the PCCB's officials handled this case.

It appears they acted under a great enthusiasm and overzealous in order to see to it that the appellant, culprit is arrested without considering other facts regarding search and arresting. Such circumstances can create a room for the accused to come up with a good defence. It must always be kept in mind that it is the duty of the prosecution to prove their case beyond reasonable doubts and not for the accused to prove his innocence. It is for the prosecution to fill up any loopholes in their case in order to succeed.

Having said that, I agree with both learned counsel that the case was not proved beyond reasonable doubt.

As a result I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant, and further order that shs. 700,000/= paid by appellant as fine be refunded to him forth with.

Ordered accordingly.

R.K.MKUYE

JUDGE

1/2/2012

Date: 1/2/2012

Coram: R.K.Mkuye,J

Appellant: Absent

For Respondent: Mr. Lwena Principal State Attorney for the respondent

C/C: Mr. Charles.

Delivered on this 1st day of February 2012 in the presence of Mr. Lwena Principal State Attorney for respondent Republic but in the absence of the appellant.

R.K.MKUYE

JUDGE

1/2/2012