IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 54 OF 2017

(Arising from Temeke District Court in Criminal Case No. 117 of 2015)

DIXUNDER MWAMELO MASEBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last Order: *09/04/2018*
Date of Judgment: *21/05/2018*

JUDGMENT

I. ARUFANI, J.

The appellant Dixunder Mwamelo Masebo and two others were charged in Criminal Case No. 117 of 2015 of the District Court of Temeke with the offences of corrupt transactions under the Prevention and Combating of Corruption Act No.11 of 2007. They were charged jointly and together in the first count, with the offence of corrupt transaction contrary to section 15(1) of the Prevention and Combating of Corruption Act No.11 of 2007 (hereinafter referred to as the Act) and the appellant was charged alone in the second count with the similar offence contrary to the same provision of the law and the same Act.

It was alleged in the particulars of the first count that, on 24th day of June, 2015 at Mbagala Kuu within the Municipality of Temeke, in Dar es Salaam Region the appellant and his fellow accused

persons being employees of Temeke Municipality as Auxiliary Police did corruptly solicited an advantage to wit TZS 2,000,000/= from one Sunday Allan Mokiwa as an inducement for them to facilitate Mr. Amani Mwakang'ata to continue with construction of his building at Temeke without building permit. As for the second count where the appellant was charged alone it was alleged that, on 28/6/2015 at Safari Bar within Temeke District the appellant did corruptly received an advantage of TZS 300,000/= from Sunday Allan Mokiwa as inducement for him to facilitate Mr. Mwakangata to continue with construction of his building without building permit.

After the full trial of the case the trial court was satisfied the appellant was guilty in both offence levelled against him and his fellow accused persons were found not guilty and acquitted accordingly. The appellant was convicted in both counts and sentenced to pay fine of TZS. 500,000/= in each count and in default to serve two years imprisonment in each counts but the imprisonment sentences were ordered to run concurrently.

Although the appellant opted to pay the fine but he was aggrieved by the decision of the trial court and decided to appeal to this court against both conviction and the sentence. The gist of his five grounds of appeal filed in this court is to the following effect:-

1. That the judgment of the trial court is a nullity because the proceedings was conducted in contravention of section 214(1) of the Criminal Procedure Act, Cap. 20 R.E 2002

2. That the trial court erred in convicting the appellant where the prosecution evidence was weak and tainted with contradictions.
3. That, there was insufficient evidence to establish communication between appellant and PW2 in relation to the offence of soliciting and accepting bribe.
4. That the trial court erred in law and fact by failing to consider the evidence of the defence and particularly the evidence of DW5 which cast doubt in reception of TZS 300,000/=
5. That the trial court erred in relaying on exhibit ID 1 as proof of the commission of the offence.

During the hearing of the appeal the appellant was represented by Mr. Gregory Lugaila, learned advocate and the Republic was represented by Miss Dhamiri Masinde, learned State Attorney. With the leave of the court the appeal was argued by a way of written submission. Submitting in support of the 1st ground of appeal, Mr. Lugaila argued that, the trial of the appellant's commenced on 26th day of June, 2015 before Hon. Mbonamasabo, RM who heard three prosecution witnesses. He stated that, on 16th day of June, 2016 the matter proceeded before Hon. Tarimo, RM who proceeded with the trial up to the end.

He stated that, the record of the trial court does not indicate as to why the magistrate was changed and the appellant was not given an option to recall witnesses who had testified before Hon. Mbonamasabo, RM. He added that, the magistrate did not warn

himself as to the necessity of re-summoning the said witnesses contrary to section 214 (1) & (2) of the Criminal Procedure Act. To amplify his stance, he referred the court to the case of **Liamba Sinanga Vs R (1994) TLR 97** and stated that, acting on the evidence recorded by a previous magistrate without recalling witnesses was prejudicial to the appellant.

Mr. Lugaila argued the remaining grounds together after seeing they are intending to establish the prosecution failed to prove their case beyond reasonable doubt. He submitted that, the evidence on record is weak and contradictory. He challenged the evidence of PW1, Sunday Allan Mokiwa who testified that the appellant wanted to be paid TZS 2,000,000/= and reduced the amount to TZS 1,500,000/=. He stated that, Amani Mwakang'ata (PW2) stated in his evidence that, the appellant told him to go to Temeke Municipal council room No. 1 and he never asked for money. Further to that the learned advocate lamented that, the trial court failed to consider the defence evidence particularly that of DW5 which cast doubt on the prosecution case in relation to receipt of TZS 300,000/=.

The learned advocate also challenged the reliance of the trial court on exhibit ID 1 as a proof of the commission of the offence. He contended that, although the trial court doubted the exhibit but it proceeded to rely on it to convict the appellant it had no any evidential value as it was not received by the trial court as evidence. At the end the learned advocate prays the court to reevaluate the evidence and enter its own findings. He also urged the court to quash

the conviction entered against the appellant and set aside the sentence imposed to him by the trial court.

On the other hand, Miss. Dhamiri Masinde, learned State Attorney for the respondent joined hand with Mr. Lugaila that, there was procedural irregularities with regard to noncompliance with section 214 (1) of the Criminal Procedure Act. The learned State Attorney was of the view that, the case be ordered to be tried de novo as a remedy for the observed irregularity. She argued that, section 214 (1) of the Criminal Procedure Act requires a magistrate who heard the matter whole or any part of the evidence to continue with the hearing of the case to its finality unless for some reason to be recorded in the matter is unable to complete the trial in which case another magistrate of competent jurisdiction may take over and continue with the trial. Despite the observed irregularity, the learned State Attorney opined that, there is enough evidence to warrant the appellant's conviction, and prayed the court to order retrial of the matter.

After going through the proceedings of the trial court I have found the hearing of the appellant's case commenced before Hon. Mbonamasebo, RM who heard the evidence of three prosecution witnesses and thereafter the trial continued before Hon. Tarimo, RM who at the end composed the judgment which convicted the appellant. However, there is no reason recorded in the trial court's record stating why the case was transferred to the subsequent

magistrate and worse still the appellant was not addressed in terms of section 214 (1) of the CPA which *inter alia* provides that:-

> *"(1) Where* ***any magistrate, after having heard and recorded the whole or any part of the evidence in any trial*** *or conducted in whole or part any committal proceedings* ***is for any reason unable to complete the trial*** *or the committal proceedings or he is unable to complete the trial or committal proceedings* ***within a reasonable time, another magistrate who has and who exercises jurisdiction may take over*** *and continue the trial or committal proceedings, as the case may be,* ***and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor*** *and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings."* (Emphasis added).

The above quoted provision of the law shows clearly that, if the trial judge or magistrate who commenced hearing of the matter failed for any reason to continue with the matter to its finality, another judge or magistrate with competent jurisdiction may take over and proceeded with matter. However, the reason for failure of the former judge or magistrate to proceed with hearing or concluding the matter must be recorded in the proceeding of the case. The above view of this court is supported by what has been stated by the Court of

Appeal in many cases including the cases of the **DPP V. Henry Kileo & 4 others** Criminal Appeal No. 239 of 2013 (CA) at Tabora (unreported), **Adam Kitundu V. R** Criminal Appeal No. 360 of 2014 (unreported) and the case of **Salim Hussein V. R,** Criminal Appeal No. 3 of 2011 (Unreported) where Justices of the Court of Appeal stated that:-

> *"We only wish to emphasize here that under this section, the second subsequent magistrate can assume the jurisdiction to "take over and continue with the trial...and act on the evidence recorded by his predecessor" only if the first magistrate "is for any reason unable to complete the trial" at all, or within a reasonable time".* ***Such reasons must be explicitly shown in the trial court's record of proceedings.*** *"* (Emphasis is added).

To the view of this court the reason for requiring the reason for change of a judge or magistrate to be recorded is because the discretion given to a judge or magistrate under section 214 (1) of the CPA is supposed to be exercised with great care as the primary purpose of hearing the evidence of a witnesses is to permit the court to observe the demeanour and evaluate the credibility of the witnesses. In this regard, it is imperative to point out that, the trial judge or magistrate can observe and evaluate the demeanour upon seeing and hearing the witness when testifying in the witness box.

In view of the above stated position of the law, it is the finding of this court that, as rightly submitted by the learned counsel for the appellant and conceded by the learned State Attorney, as there is no reason for the change of magistrate recorded in the proceeding of the trial court as held in the above referred decision of the Court of Appeal and as is not stated if the appellant was informed as to why there was a changes of magistrate and his right for the witnesses who had already testified to be re-summoned by the successor magistrate as provided under the referred provision of the law, it is obvious that section 214(1) of the CPA was not complied with.

Now the question is what should be done when there is such a violation of the above referred provision of the law. While the learned counsel for the appellant is praying the court to use that ground to quash the conviction entered against the appellant and set aside the sentence imposed to the appellant, the learned State Attorney prayed the court to order the case to be tried de novo. The answer to the above question is provided under section 214 (2) of the Criminal Procedure Act which states as follows:-

> *"(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial."*

The above provision of the law shows there are two orders which can be made by the court where a judge or magistrate who commenced hearing of the matter failed to finalize hearing of the matter. The court my either set aside any conviction passed on evidence not wholly recorded by a magistrate who concluded hearing of the matter and passed the judgment if the court will be of the opinion that the accused was materially prejudiced or order a new trial as prayed by the learned State Attorney.

The court has found in order to be able to either set aside the conviction entered against the appellant or to order the case to be tried de novo as prayed by the learned counsel for the parties it is imperative to go to the rest of the grounds of appeal which are stating the prosecution failed to prove the charge levelled against the appellant to the standard required by the law. Since this court is sitting as the first appellate court in the appellant's case then as stated in the case of **Siza Patrice V. R**, Criminal Appeal No. 19 of 2010 and emphasized in the case of **Maramo s/o Slaa Hofu & 3 others V. R,** Criminal Appeal No. 246 of 2011 it is has a duty of re-evaluating the evidence adduced before the trial court to see which appropriate order can be made in relation to the appellant's case.

After considering the brief submission of the learned counsel for the appellant in relation to the rest of the grounds of appeal and the reply made thereof by the learned State Attorney the court has come to the finding that, the central issue which was supposed to be determined in the appellant's case was whether or not the appellants

solicited and obtained the bribe "money". According to the proceedings of the trial court the evidence adduced by the prosecution witnesses to establish the above issue is the evidence of telephone conversation made between the appellant who testified as DW1 and Sunday Allan Mokiwa who testified as PW1.

As stated by PW1, Lutiko Jackson who testified as PW7 and as indicated in the investigation report prepared by PW7 and admitted in the case as an exhibit P3, the telephone numbers which were investigated were the telephone of PW1 which was number 0754000590 and the telephones of the appellant which were number 0754979215 and 0712450456. The report (i.e Exhibit P3) and the evidence of PW1 shows there was telephone conversation which was done through the vodacom telephone number of the appellant which was number 0954979215 and recognized in the report as HTC One M2 and the telephone number of PW1 which was 0754000590 on 25th day of June, 2015 between 08:20:19 AM and 09:00:04 AM.

It was also stated there was an SMS sent to the appellant's telephone number on the same date from telephone number 0754000590 which is the number of PW1 stating that, "kaka namalizia kikao dk 5 nakupigia." The court has carefully considered the above evidence of telephone conversation between the appellant and PW1 and come to the finding that, the same has not been able to establish if the appellant was soliciting bribe money from PW1 as there is nowhere indicated so in the said telephone conversation. The court has found the appellant did not dispute to have telephone

conversation with PW1 but he said in his defence their conversation was that, PW1 was requesting him to take the money to the Engineer of the Municipal Council, one Phares Ngeleja, PW11 so that he can assist him to get a building permit. To the view of this court as the appellant said he refused to receive the money, that evidence of telephone conversation is not enough to establish the appellant solicited bribe money from PW1.

Coming to the evidence of the trap money alleged to have been given to the appellant by PW1 on 25th day of June, 2016 at JJ Safari Bar, Temeke in the presence of Irene Aloyce, PW3, the court has found that, although the said witnesses said after the appellant being given the trap money he threw the same down but the appellant said in his defence that, when PW1 wanted to give the same to him so that he can transmit the same to PW11 as his payment for the work of preparing the building permit the appellant refused to receive the same and told PW1 he cannot receive the same as he don't know the work will cost how much. The appellant said after refusing to receive the money other people who were on another table came and arrested him and fell him down.

The court has considered the above evidence and find there is a doubt if the appellant was given and received the said money because though PW1, PW3 and Matheo Maira, PW9 who participated in arresting the appellant said after the appellant being given the trap money he threw the same down the appellant denied to have received the money and said the money was in possession of PW1 and after

refusing to receive the same PW1 put the same on the table. The court has found there is a doubt in the evidence of the said witnesses after seeing they were coming from the same office which means their interest was for their trap to succeed and there is no independent witness who was called to witness the appellant receiving the trap money from PW1.

That evidence of PW1, PW3 and PW9 need to be examined closely before saying it can establish the offence levelled against the appellant. To above view of this court is bolstered by the view taken by Hon. Lugakingira, J (As he then was) in the case of **Mohamed Kalindi & Another V. R** [1986] TLR 134 where he stated that:-

> *"It was held in Peter Kasembe v. R [1967] HCD n. 338 that a police decoy, even though not an accomplice, is not a disinterested witness and his evidence must be examined closely. The court said: "Though corroboration would not be required as a matter of law, it would hardly ever be safe in practice to convict unless there was corroboration."*

The court has found that, the evidence of Libipano Said Mpili and Bomoyaye Juma Bwigala who testified as PW5 and PW6 respectively and were called as independent witnesses cannot be said it can corroborate the evidence of the witnesses from the PCCB. The reason for the above finding is that, though the mentioned witnesses said they found the appellant under arrest but they didn't tell the trial court if they found the appellant with the trap money. What PW5

told the trial court is that, they found the envelope which had the trap money on the table. To the view of this court it cannot be said under that circumstance if that is the evidence the prosecution has it can be sufficient enough to establish to the standard required by the law that the appellant solicited and received bribe money from PW1.

The court has also gone through the cautioned statement of the appellant which was admitted in the case as an exhibit P8 and find there is nowhere in the said cautioned statement the appellant confessed to have solicited and received bribe money from PW1. Therefore even the cautioned statement of the appellant cannot be used as an evidence to corroborate the evidence of the witnesses from the PCCB who laid the trap of arresting the appellant.

That being the evidence adduced by the prosecution in the course of establishing the two offences levelled against the appellant before the trial court, the court has found it cannot be said the same can prove the two offences levelled against the appellant beyond reasonable doubt as required by the law so that it can be said it is appropriate to order the case to be tried de novo. In the strength of all what has been stated hereinabove the court has found it is not only that the conviction entered against the appellant and the sentence imposed to him cannot be left to stand because of the irregularity of change of magistrates without following the requirements of the law but also it will not be appropriate to order

the case to be tried de novo under the circumstance of all what has been stated hereinabove.

In the final result the appeal is hereby allowed in its entirety, the conviction entered against the appellant is quashed and the sentence imposed to the appellant is accordingly set aside. The appellant to be refunded the sum of TZS 1,000,000/= he paid as a fine. It is so ordered.

Dated at Dar es Salaam this 21st day of May, 2018

I. ARUFANI
JUDGE
21/05/2018