

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA**

APPELLATE JURISDICTION

DC CRIMINAL APPEAL No. 25 OF 2020

(From Original Criminal Case No. 09 of 2019 of the District Court of
Tabora at Tabora)

NESTORY S/O MBUKI MICHAEL ----- APPELLANT

VERSUS

REPUBLIC ----- RESPONDENT

JUDGMENT

02/11/2020 & 12/03/2021

BAHATI, J.:

As per the Judgement of the Resident Magistrate Court of Tabora in Criminal Case No. 09/2019 delivered on 09/04/2020 the appellant herein **Nestory Mbuki Michael** was charged and convicted for the offence of Corrupt Transaction contrary to section 15 (1) (a) and (2) of the Prevention and Combating of Corruption Act No. 11/2007.

After conviction, the appellant was sentenced to serve one year imprisonment or in alternative payment of fine to the tune of five hundred thousand (Tshs 500,000/=)

Aggrieved and dissatisfied with the decision of the trial court the appellant has preferred this appeal against conviction and sentence armed with the following grounds.

1. *That, the learned trial Magistrate erred both in law and fact by convicting and sentencing the Appellant for offence of corruption, for receiving 115,000 while there was no direct evidence that he received the said money.*
2. *That, the learned trial Magistrate erred both in law and fact for convicting and sentencing the appellant for the offence of corruption while there is no proof by documentary evidence that the said Michael Shinyanga was admitted at Kitete Hospital and required blood transfusion.*
3. *That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant basing on insufficient and contradictory evidence adduced by the prosecution witness about his identity.*
4. *That, the learned trial Magistrate erred both in law and fact by convicting the appellant while there was no electronic proof that he owned the said number and thereby received the amount of Tshs 50,000 through M-Pesa.*
5. *That, the learned trial Magistrate erred both in law and fact by convicting and sentencing the Appellant while there was no documentary evidence adduced to show that he agreed to have*

received the sum of Tshs 115,000/- and remitted Tshs 50,000 and agreed to remit the remaining amount in writing.

6. That, learned trial Magistrate erred in law and fact by convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.

7. That, the learned trial Magistrate erred in law and fact by deciding the case in favor of the Republic without taking into consideration the evidence adduced by the appellant herein.

When the matter was called for hearing the learned advocate Pascal Kihamba appeared for the appellant while Tumaini Pius learned State Attorney appeared for the respondent, Republic.

It is Mr. Kihamba's submission that there was no direct evidence linking the appellant with the charged offence. It was substantiated at the trial court by PW1 and PW2 that it is the appellant who received the patient at the OPD and opened the file for him but its contrary was testified by PW3 who is the Hospital secretary that, the appellant does not work at OPD rather he works at the theater so there is no way he could have attended a patient at OPD.

That it was stated by PW2 that, he was attended by a person who was in the casual outfit while the appellant on his official duty he is required to appear on nurses' uniforms, there could be no way the appellant be on duty while on a casual outfit.

Mr. Kihamba added that this allegation could have merit if the patient's file could be brought in Court to see if it bears the appellant's handwriting there was no proof about that.

It is Mr. Kihamba's argument that during the hearing patient file was not tendered in court hence conviction was entered based on the facts of the unknown patient so the appellant was convicted without proving that there was a patient admitted at the hospital.

That all witnesses testified that, the appellant received the money from one Basil Kashamba but there was no evidence tendered before the court to prove that the number that received the money belonged to the appellant. Also, there was no evidence tendered or an expert was called from Vodacom to prove the transaction if it really existed but such allegations were left astray.

Also, PW1 testified that he obtained information that the appellant agreed in writing to have received 115,000/= from PW2 and he wrote two commitment letters before PW3 but the same was never admitted in court to prove its existence.

It is based on those reasons the Mr. Kihamba claims that the case was not proved beyond reasonable doubt as the appellant was not found with the alleged money, no printout received from Mpesa, no attendance register, no proof of documentary evidence on his handwriting, no patient file was brought in court to see whether the alleged patient was admitted at Kitete Hospital to see that his particulars were recorded by the appellant.

Opposing the appeal Mr. Tumaini Pius for the respondent submitted that the judgment of the trial Court was entirely based on circumstantial evidence and its chain has was never broken.

That the appellant resisted having received the amount of money to render blood transfusion service to a child but PW1 established to the court that after receiving information from complainant Ndege Manyama who claimed to have paid the money for his son he did an investigation and found the appellant responsible.

It is Mr. Tumaini's argument that it was proved in court that the appellant requested the money for blood transfusion, and the same was sent to him through Mpesa number 0756265202 by one Basil Mashimba.

Mr. Tumaini added that the appellant promised to return the money through PW3 and the appellant himself stated that the said TZS 65,000/= had not been paid back until the matter was brought to court.

About opening a patient file Mr. Tumaini stated that it shows that sometimes the appellant used to work at the reception and both PW2 and PW4 testified that they met the appellant at the OPD which means the appellant had access to the OPD.

Further that, the fact that there was no electronic evidence or the agreement to prove the return of the money Mr. Tumaini stated that, those facts are irrelevant as the ingredients of the offence of

corrupt transaction are receiving the money and it is evident that the appellant received the money from PW1.

In rejoinder, Mr. Kihamba reiterated his submission in chief that the appellant did not receive the money and the date which the transaction took place was not proved and it is not true that the appellant agreed to remit the said amount thus no chain links the appellant to the act.

The Court had ample time to go through the proceedings and judgment of the trial court, the issue to be determined is on whether the appeal has merit.

It is on the record that at the beginning of the trial the prosecution side informed the Court that it will provide three exhibits i.e a letter dated 13/09/2018 from the accused Nestory M. Michael, a letter dated 12/09/2018 from Nestory M. Michael and Vodacom Mpesa printout of No. 25575893907 but none of the three exhibits was brought in court to support the case.

I agree with the learned State Attorney that the prosecution depended entirely on circumstantial evidence to prove its case against the appellant.

The major issues for consideration and determination, in this case, are as follows.

- i. Whether the chain of facts that were tabled by the prosecution are linked and irresistibly points to the guilty of the accused.*

- ii. *Whether there was sufficient evidence to convict the appellant for the offence charged*

In **Simon Musoke vs Republic (1958) EA 718** it was stated thus:-

"In a case depending conclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt"

In the above-mentioned case, the East African Court of Appeal referred to the decision in the case of **Teper v. Republic (2) 1952 A.C 480**. The Privy Council at page 489 stated thus:-

"It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"

Also in **Hassan Fadhili vs Republic [1994] TLR 89**, it was held that:-

"To ground a conviction on circumstantial evidence, it must be incapable of more than one interpretation."

Taking into consideration the circumstances of this case I am of the considered view that the prosecution evidence casts a lot of doubt that its presence was sufficient to find the appellant innocent.

The prosecution story started from the OPD section where it was alleged that it is the appellant himself who opened a patient file

for the claimants but these documents were not brought in court to prove the start of a corrupt transaction by the appellant. However, even the hospital register was never presented to the court to prove that it is the appellant who opened the patient file on the alleged date.

Also, it was alleged that the appellant received some of the money through Mobile money service (MPESA) but the prosecution never bothered to fully inform the court on how the transaction was completed through MPESA and whose number was used to complete such transaction. PW3 Baby Nyimbo stated that he tried to use the number and it displayed the appellant's name Nestory Michael, the prosecution relied solely on that statement it never went ahead to prove to the court that the number belongs to the appellant.

The appellant denied in the trial court that the Phone number that is being referred by the prosecution is not his. PW2 Dege Manyama stated that he had a phone number of a person who received the money and that was 0756265062 but nowhere in the proceedings it was proved that those numbers belonged to the appellant.

For the foregoing reasons, I am inclined to agree with the appellant that the circumstances of the case do not establish a link to his guilt. Needless to say, I find the appellant's appeal with merit and I hereby allow it.

I further order that conviction and sentence metered to the appellant be quashed.

Order accordingly.



A.A. BAHATI

JUDGE

12/03/2021

Judgment delivered under my hand and seal of the court in Court, this 12th day March, 2021 in the presence of both parties.



A. A. BAHATI

JUDGE

12/03/2021

Right of Appeal fully explained.



A. A. BAHATI

JUDGE

12/03/2021