

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPEAL No. 14 OF 2021

*(Originating from District Court of Kilosa at Kilosa in
Criminal Case No. 73 of 2020)*

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

Versus

FRANK JOSEPH KHENAN.....RESPONDENT

JUDGMENT

17th March, - 17th May, 2021

J. A. DE - MELLO J;

Offence of corrupt transactions contrary to **section 15 (1) (a)**, and, **(2)** of the **Prevention and Combating Corruption Act Cap. 329 R.E 2019**, was levied against the Respondent in **Criminal Case No. 73 of 2020**, finding himself acquitted. Aggrieved, the Appellant has lodged this Appeal on the following grounds;

- 1. That, the learned trial Magistrate misdirected herself in law and facts by holding that the prosecution evidence did not prove the case beyond reasonable doubt.**

- 2. That, the learned trial Magistrate erred in law and fact in holding that, the respondent did not have ill motive when obtaining money sent by PW1.**
- 3. That, the learned trial Magistrate erred in law and fact in not according weight to exhibit "P6" which was admitted without objection.**
- 4. That, the learned trial Magistrate erred in law and fact in not according any weight to exhibits P1, P2, P3, P4 and P5 without assigning any reasons**
- 5. That, the learned trial Magistrate failed to properly evaluate the prosecution's evidence and hence arrived at wrong conclusion.**

The gist of this Appeal, has its background from Mikumi within **Kilosa District in Morogoro**, whereby the Respondent being an employee by the Judiciary of Tanzania as a Resident Magistrate, was accused of illegally soliciting and, obtaining money to the tune of **TShs. 100,000/=** through his mobile phone no. **0755 103 464** for himself, from one Dr. Esily John Mwankenja, as an inducement to decide in his favour. Following Trial, the Respondent was acquitted and, hence this Appeal. **Lillian Itemba**, learned State Counsel fended the Republic for the said Appeal whereas; **Mkilya Daudi**, learned Advocate,

represented the Respondent. The Appeal was argued orally, upon which Counsel Itemba commenced her submissions by condensing the , 1st and, 2nd ground, while dropping the 3rd ground where3by, the 4th and, 5th, independently. It was her submissions that, despite what the proceedings reflected in page 11 that, **PW1, Dr. Mwankenja** testified to have been summoned by the Magistrate allegedly to inform him that, one Leticia the wife of the late Geoffrey Iyumbe and, a former employee of PW1, was appointed as administratrix to, one to collect money owed by him. PW1, it was further alleged, requested two weeks to be able to furnish evidence showing that nothing is owing and, pending against him. However, on the **26th November, 2019, PW1** went to the Court in the company of his Secretary **PW2**, registering that, the only pending debt was the deceased's one-month salary amounting to **TShs. 1,200,000/=** as shown in **page 12** of the proceedings. As this was registered, it was further alleged that the said Magistrate ordered that secretary and his clerk to exit, remaining with **PW1** alone. What followed between the two, was for the Respondent to inform **PW1** about contempt case for avoiding appearance for long, as he demanded **TShs. 400,000/=** to do away with charge. **PW1** found himself arrested but, bailed by **PW2**. On **22nd January, 2020, PW1** reported the matter to **PCCB** and, was given **TSh. 100,000/=** as a 'trap money' which was

sent via mobile number 0759 136 060 in the name of the respondent, **Frank Khenan**. Exhibit P4, the print out for the said transaction was tendered and, admitted which sufficed for proof, Counsel emphasized. The Respondent did not dispute to have received the said money, as evidenced on his reply on the 12th February, 2020, from a text message reading "OK". On the 20th February, 2020, the PCCB Officer interrogated the Respondent which lead returning of the cash to **PW1**, on **24th February, 2020**. With regard to the second ground, **Counsel Itemba** expounded on the Principal element which the Respondent had with the Judiciary, as his employer as defined by **section 3** of the Act (supra) to mean, the **employer** or **authority** and, to such environment the Respondent was the employee of the judiciary whose allegiance is solely with judiciary, as it was held in the case of **DPP vs. Peter Kibatata, Criminal Appeal No. 4 of 2015, page 11 paragraph 2**. Conceding to this fact, no regards was given to exhibit and, without reasons, admitted, namely exhibit P3, summons to PW1, P4 M-Pesa statement, P5 proceedings for contempt case, all cogent to convict the Respondent, but, not Notwithstanding confusion on section 15 (1) of the Act supra, between soliciting and obtaining, the Trial Magistrate failed to evaluate evidence, much as both were duly proven, beyond reasonable doubt praying for the appeal to sail through.

Responding to the submissions above, it is in that same sequence that, **Counsel Mkilya**, stated that, nothing was wrong with the Trial in arriving to the findings, considering proper analysis and, evaluation of evidence adduced, hence satisfied to have been proven beyond reasonable doubt. The Court took judicial note of **Probate cause No. 4 of 2018** and, **Criminal Case No. 275 of 2019** both of which had the wife of the deceased, employee of PW1, as a Petitioner and Plaintiff. However, this Leticia the wife of the deceased and, the administrator was never summoned to appear in the District Court, much as she is the one who allegedly lodged the contempt case, following non appearance of **PW1**. This rendered the case not proved by standards set. On **26th November, 2019**, **PW1** appeared and, promised to submit proof that nothing is owed to him but, disappeared and, in turn sent his secretary **PW2** to submit to Court, **TShs. 1,200,000/=** contrary to the order of the Court for submission of documents for proof of **TShs. 7,000,000/=**, as claimed by **Leticia**. That, it was that, non appearance and, default which lead to the arrest on **20th January, 2020**, which **PW1** admits this through **Police Central Morogoro**, and, well captured in the proceedings. Summons were for appearance on **24th January, 2020**, testifying to appear in person on **22nd January, 2020**, and reported to have been solicited to part with **TShs. 400,000/=**

on **26th November, 2019**, showing that, the alleged corrupt soliciting was reported after the summons were issued as seen on **page 7** of the judgment. The allegations in as far as **exhibits P1** and, **P4** for the deposit of **TShs. 100,000/=** and, without proof are fabrication and speculative, unless and until when proof for trap money is furnished. **Exhibit P4** misses the alleged communication for soliciting with a view of obtaining money, rendering the response of the Respondent **"OK"** if at all, in absence of the messages for soliciting, becomes a mere speculation. Similarly, is the alleged vacation of **PW2** from the Respondent's office in absence of collaboration, becomes hearsay, as shown in **page 36** of the proceedings that, the Respondent did heed to all, not even proof for receipt of **TShs. 1.2** million as alleged by **PW2** who never reported where she submitted the cash. Strangely, **PW6** the investigator, failed to interrogated the wife who instituted both Probate and Criminal Case, amidst **PW2** testimony to have reported to **PCCB** office on **15th January, 2020**, as opposed to **22nd January, 2020**. On grounds 4 and, 5, on the allegation that, the exhibits were not considered, Counsel observes to be an afterthought and, with no legs to stand, considering the fact that, the Trial Magistrate captured them all namely; 'trap money, seizure form, print out form' which were established not cogent to assist the Magistrate in arriving to a decision in favour of the Appellant.

The judgment, he emphasize, has all what it takes for having incorporated all the prerequisite requirements. Rejoining State Counsel, reiterates her earlier stance adding that, record is binding and, speaks louds of itself. Whether or not Leticia was summoned, is immaterial based on the fact that, what was instituted was the criminal case for solicitation and, obtaining money by the Respondent and, nothing with regard to Probate matter. **PW1** the employer for her late husband was competent, trustworthy, hence credible.

This is a first Appeal and, which opens room for scrutiny without limitations. This said, I will commence by narrating the chronological of events which reveals that, on the **26th November, 2019, PW1** appeared in the Primary Court, the day alleged that soliciting was made. On **24th December, 2019** arrest warrant was issued for **PW1** as seen in the proceedings of **24th December, 2019** vide **Criminal case No. 275 of 2019** which was tendered and, marked as **exhibit P5**. On the **10th January, 2020 PW1** admits to have received been given summons to appear before the Trial Court, but absconded as seen in **page 13** of the District Court proceedings, when the matter came on **20th January, 2020**, following order issued on **29th December, 2019**. Yet still and, in his absence, the matter was scheduled for hearing on **24th January, 2020** (see the proceedings of 20th January, 2020 vide Criminal case No. 275 of

2019 labeled as **exhibit P5**). It was then alleged that, on the **22nd January, 2020 PW1** reported the matter to **"TAKUKURU" (PCCB)** in as far as record from **page 13** of the District Court Proceedings) suggesting it to be the same day that, cash money was given and, sent to the Respondent's mobile number 0755103464 through 0759136060, acknowledged by a text message "OK" (see page 13 of the District Court Proceedings). That, the said money was then reverted back to **PW1, on 24th February, 2020** (see page 13 of the District Court Proceedings).

What one gathers from all the above, is communication solely between the Magistrate, the Respondent herein and, **PW1** the victim. This is evidenced from solicited **TShs. 400,000/=** as shown in page 27 of the District Court proceedings, trap money and, filled the form, sent to respondent mobile number 0755103464 through 0759136060, **exhibit P1** headed **"FOMU YA FEDHA ZA MTEGO"**. This brings, us to a conclusion that, the entire case is based purely on circumstantial evidence, facts which are associated or connected with facts in issue, such that, they form chain of events either proving or disproving the fact in issue as stipulated under **section 7 and 18** of the **Evidence Act, Cap. 6, R.E 2019. Sir Udo Udoma C.J in R vs. Sadrum Merali, Uganda High Court, Cr. A. No. 220 of 1963** held that;

"...it has been said that circumstantial evidence is very often the best evidence. It is the best of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with accuracy mathematics".

Independently and, cumulatively, the whole case is built on hearsay and, partly documentary evidence. This is evidenced from **PW2's** testimony as to how she exited from the Magistrate room with the clerk, it being purely hearsay not corroborated even by this clerk. One would expect what that text was all about for the Respondent to text **"OK"**. What the conversation was, responding to message for the Respondent to respond **'OK'** as alleged? Moreover and, from what the caution statement admitted as **exhibit P6** without confession therein if any, as required by law. Looking at **exhibit P1** (trap money form) and, not signed by a witnesses as required, renders it defective hence fatal but, worse even, considering it was after arrest order that the matter was reported on **22nd January, 2020**, long after the alleged solicitation on the **26th November, 2019**. This raises eyebrows as to why this long delay.

The Prosecution carries that burden for proof as drawn from **section 110 (1)** of the **Law of Evidence** supra) states that; **"Whoever desires any court to give judgment as to any**

legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

In criminal cases and, by the virtue of section **3 (2) (a)** of the **Evidence Act, Cap. 6 R.E 2002** a fact is said to be proved when; **“in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists”.**

So long as doubt is shed however little, the standard of proof in criminal matters that, of beyond reasonable doubt has not been achieved. In such circumstantial evidence, all doubts must be eliminated to the satisfaction of the Court that the facts stated real exist. This has been discussed in various and, several cases like this one of **Said Hemed vs. Republic (1987) TLR, 117 CAT**. I find no need to entertain other grounds of appeal as it is vivid that, the case was not proved beyond reasonable doubt in that instant alone. This Appeal lacks merits and, hereby dismissed.

It is so ordered.




J. A. DE-MELLO

JUDGE

17th May, 2021