IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 8 OF 2021

(Arising from Criminal Case No. 5 of 2019 of the District Court of Shinyanga at Shinyanga)

BENJAMIN CHARLES MHANGWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th May & 4th June, 2021

MKWIZU J:

Appellant, Benjamin Charles Mhangwa, a Magistrate at Kishapu Primary court was charged with the offence of soliciting a sum of Tanzanian Shillings Three Hundred Thousand (300,000/=) from Juma Katson Mbugi as an inducement to secure conviction to the complainant in Criminal case No 06 of 2019 which was pending at Kishapu District Court before Hon. Wilberforce Luhwago , a Resident Magistrate contrary to section 15 (1) (a) & (2) of the Prevention and Combating of Corruption Act [Cap. 329 R. E. 2019] . It was alleged that, the transaction took place on diverse dates

between 23rd September, 2019 to 25th September, 2019 within Kishapu District in Shinyanga Region.

To substantiate it's case, prosecution called seven (7) witnesses. PW6, Juma Mbugi is a key witness. His testimony is that, he had three cases, a criminal case before Hon Wilberforce Luhwago in Kishapu District court in which his daughter was a victim of rape and two others cases at Kishapu Primary court, one before the appellant and another case before Malisa RM. According to the evidence on the records, at the time of the commission of the offence subject of this case, his case that was before appellant was already concluded.

On 23/9/2019 while at Kishapu primary court premises, he was informed by one of the court assessors that he was to remain and meet the appellant. They met and appellant asked from him Tsh 300,000/= which would be used to persuade Honourable Luhwago a Resident Magistrate at Kishapu District court to enter conviction in a rape case to which PW6 was a complainant. Thereafter, the communication with the appellant was through a mobile phone with Numbers 0756529089 and that appellant kept on insisting on the alleged transaction. Because of inability to get the said amount, PW6 reported the matter to PCCB on 25/9/2019 and on 27/9/2019 a trap was set

by the PCCB officers and a trap money worth Tsh 200,000/= was prepared for the appellant. The PCCB officers first verified the complaint by requiring PW6 to have a phone conversation with the appellant informing him about the available 200,000/. The conversations were done in the presence of the PCCB officers. They agreed to meet in Kishapu Town where they would conclude the deal.

PW6 said, he was instructed by the PCCB officer to put off his jacket immediately after the trap money is received by the appellant as an alert to the PCCB officers for the arrest of the accused person. The trap went as agreed, however, the trap money was not at the end received by the appellant. According to PW6's evidence, appellant did not receive the said money as agreed. He through mobile number 0756 529089, directed him to handle the money to DW2 (2nd accused at the trial court) after he had again, through the same mobile phone, requested DW2 to receive the same after his refusal alleging that magistrate do not receive corruption money. After that, deposed PW6, he alerted the PCCB officers who were following him behind leading to the arrest of the 2nd accused immediately thereat. PW1's testimony also supports this evidence.

PW1, is one Philipo Ibrahim Miyala, a PCCB investigation officer. He participated on the setting up the trap with his colleague one Adam Muyechi. He said, they first interrogated the complainant, Juma Katson Mbugi (PW6) who informed them on what and how he was approached by the appellant. To satisfy themselves on the correctness of the informers' statements, PW1 said, they instructed PW6 to call the appellant via mobile phone in a loud speaker telling him that he had managed to obtain 200,000/= only out of the 300,000/= required. PW6 did as directed and the duo agreed to meet in Kishapu Town where appellant would be given the money.

PW1 said, he prepared the 200,000/= trap money, filled the trap money Form and handled them to PW6 after PW6 had signed the trap form. After the signal by PW6 that he had handled the money, PW1 said, assisted by Adam Muyechi, they rushed to the scene and managed to arrest 2nd accused person after he was pointed to them by PW6. Initially, stated PW1, 2nd accused refused to have received any money from PW6. His admission came after the arrival of the police and WEO's intervention.

PW2 and PW5 witnessed the surrendering of the trap money by the 2nd accused. They also participate in verifying the numbers of the trap money.

PW3 is one Mwanjaa Ally. She witnessed the arrest of the appellant. PW3 witnessed DW2 whispering to the PCCB officer before announcement to the public that 2nd accused had confessed to have been given the trap money. She also witnessed the verification of the trap money by PW2 and PW5.

PW4 is a PCCB officer. He received the complaint from PW6 at Kishapu PCCB offices. He issued RB Number and communicated the complaint to PCCB Shinyanga offices and on 13/7/2020 he recorded DW2's cautioned statement.

Appellant denied the accusations. He refuted to have communicated with PW6. And denied the ownership of the mobile numbers 0756 529089 alleged to have been used by him to communicate with PW6. He, in fact prayed for an acquittal. On his part, DW2 confessed to have obtain the corrupt money 200,000 /= from PW6 but alleged to have received the same on behalf of the appellant.

After a full trial, appellant was found guilty and was sentenced to three (3) years and six months imprisonment and pay 1000,000/= fine. The appellant is aggrieved. He has filed this appeal on four main grounds as follows:

1. *The district Court of Shinyanga had no jurisdiction to try and convict the appellant for an offence which was alleged to have been committed at Kishapu District and the charge was filed in the Resident Magistrate's Court of Shinyanga.*

   ***In the altenative, but without prejudice to the above**, the appellant further state as follows*

2. *That, the Hon. Trial Magistrate erred in law and in fact to rely on the evidence of co-accused to convict an appellant, the evidence which was not a confession and the same was uncollaborated.*

3. *That, the Hon. Trial Magistrate erred in law and in fact when he made a finding that the case against the appellant was proved beyond reasonable doubt as required by law.*

4. *That, the Hon. Trial Magistrate erred in law when he ordered excessive sentence of both custodial sentence and a fine at the same time while the appellant was a first offender.*

At the hearing of the appeal, the appellant had the services of Mr. Deya Outa advocate whereas the respondent /Republic was represented by Mr. Enosh Gabriel Kigoryo, learned State Attorney assisted by Mr. Sengoka Mndambi also learned State Attorney from PCCB.

Submitting on the 1st ground of appeal, Mr. Outa argued that, the Shinyanga District Court had no jurisdiction to determine the offences which were committed in Kishapu District. He said, though to the substituted charge sheet dated 14/7/2020 was filed at the Shinyanga RMS Court and registered as Criminal Case No. 5 of 2019, proceedings were all conducted at the RMs court of Shinyanga but the copy of the judgment was issued by the District Court of Shinyanga. Referring to section 4 (1) of the MCA CAP 11 R:E 2019 read together with section 180 of the CPA Cap 20 RE 2019, stressed Mr. Outa , the Shinyanga District Court is not the locality within which the offence was committed and therefore conviction, sentence and subsequent orders given by the District Court of Shinyanga were a nullity for lacking jurisdiction. He invited the court to quash the said decision and all subsequent orders and order for trial denoval.

On the 2nd and 3rd grounds which he opted to submit together, Mr. Outa said, the offences against the appellant were not proved beyond reasonable doubts. Citing to the court the decision in **Nathaniel Alphonce Mapunda and Another V.R.** (2006) TLR, 395, he said, having pleaded not guilty to

the charge, prosecution was required to prove the offence beyond reasonable doubts.

Mr. Outa submitted further that, prosecution's evidence on the record is purely circumstantial evidence. PW6 evidence is to the effect that, his communication with the appellant were initiated by a court assessor at Kishapu primary court who informed him that he was needed by the appellant. It was Mr. Outa's argument that, it was on that connection that PW6 and appellant met resulting into the inducement for the alleged 300,000 bribe aimed at helping PW6 secure conviction in a rape case that was before Luhwago Resident Magistrate in Kishapu District Court. According to Mr. Outa, the evidence by PW6 revealed that, communication between PW6 and appellant was also done via mobile phone Nos. 0756529089, before and after the matter was reported to the PCCB. It was Mr. Outa's submissions that, the communication was also done through the same mobile number when, according to the prosecution evidence, appellant introduced PW6 to DW2 (Vicent Bahati Makolo) and instructed him to handle the bribe money just few minutes before the arrest of both the appellant and DW2, recipient of the said bribe money.

As to why, they believe that the prosecution did not prove the offence to the required standard Mr. Outa said, the record is to the effect that the trap money was found with 2nd accused, Vicent Bahati Makolo. 2nd accused was arrested at the scene while Appellant was arrested somewhere else not mentioned and therefore , prosecution were required to prove that truly it was the appellant who instructed the 2nd accused to receive the trap money on his behalf. To bolster his submission, Mr. Outa cited the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha,** Civil Appeal No. 45/2017 (unreported).

Mr. Outa mentioned two categories of evidence, which in his view, would have helped the prosecution to prove that Appellant gave instructions to 2nd accused to receive the alleged bribe money on his behalf. ***Firstly***, he said, is the mobile phone communication evidence. On this, stated Mr. Outa, the prosecution was required to tender in evidence the print out of the communications done through mobile numbers 0756 529089 .The print out would have proved to the court that the number was owned by the appellant and that appellant communicated with PW6 and DW2 with the specific timing of the relevant communications. The print out would have highlighted that, shortly after PCCB have handled the trap money to PW6, PW6

communicated with the Appellant and Appellant communicated with the 2nd accused person. But no such evidence was tendered in court. To Mr. Outa, prosecution failed to prove whether the mentioned mobile number belongs to the appellant and whether, appellant communicated with PW2 or DW2 in this case.

Secondly, he argued, is a court assessor who linked the Appellant with PW6. The court assessor's evidence, stated Mr. Outa, would have proved that indeed there was communication between the Appellant and PW6.He said, the witness was not called and no explanation by the prosecution as to why he was not brought in court. Appellant counsel suggested that, prosecution is under a duty to bring such witness who are important and within reach, failure of which and without any explanation, an adverse inference should be drawn. The decision of the Court of Appeal in **Azizi Abdala V. Republic**, (1991) TLR 71 was cited to the court on this point.

Mr. Outa insisted that, it was 2nd accused who should have explained how he came about with the bribe money because, he initially denied to have received money or anything from PW6 until the intervention by the police

and WEO he was physically found with the trap money and ***lastly***, that in his confession there was no mention of the appellant as responsible person.

Appellant's counsel went further submitting that,2nd accused being a co-accused, his evidence needed corroboration from other piece of evidence. which is lacking in the prosecution evidence. In an elaborative manner, Mr. Outa said, for evidence to corroborate another evidence it should be able to stand alone. He referred the court to Azizi **Abdala's** case (Supra). He insisted that the records lack such evidence.

Mr. Outa also challenged the arrest of the appellant. On this he said, the agreement between the PCCB officers and PW6 was that the trap money would be handled to the appellant who had from the beginning demanded the same. And he would be arrested after a signal by PW6 signifying that appellant has received the said money. Unfortunately, stated Mr. Outa, the trap money was handled to DW2 and PW6 signaled to the PCCB officers that he has accomplished the deal without any communication on the change of circumstances to the PCCB officers who right away rushed to the scene where they managed to arrest DW2 (2nd accused at the trial court).It was Mr. Outa's contended that, prosecution's evidence coupled with that of DW2

do not disclose as to why, where and how the appellant was arrested the doubt which should be resolved in appellant's favour. He cited to the court the case of **Ally Bakari and Another V. Republic**, (1992) TLR, 10.

Regarding the 4th ground of appeal, Mr. Outa submitted that, the trial court erred in imposing a maximum sentence without justification. Appellant was sentenced with a maximum sentence provided for by the law regardless of the fact that he is a first offender. While acknowledging the position of the law that an appellate court cannot interfere with the sentence imposed by the trial court without justification, he said, in this case, apart from excessiveness of the sentence, the trial court's judgment indicated at page 3 that appellant was charged with two counts, but it failed to go further to specify as to whether the conviction entered was on both counts or not and sentence is not certain as to which count between the two it relates. This, stated Mr. Outa, was an error, the conviction was required to be entered in one or each of the counts and so the sentence. He cited the case of **Jumanne Ramadhani V. Republic**, (1992) TLR, 40 in page 42 to bolster his argument.

In his conclusion, Mr. Outa revisited his earlier on submissions on the way forward in the event the court finds the trial a nullity in the 1st ground. He said, though he had suggested re trial as an appropriate remedy, but due to the pointed-out weaknesses of the prosecution evidence, retrial would not be a justified order as to do so would be to allow the prosecution to fill in the gaps. He cited to the court the decision in **Idd Abdalla @ Adam V. Republic,** Criminal Appeal No. 202/2014 CAT – Mwanza (unreported) and prayed for the appeal to be allowed.

Opposing the appeal, Mr. Kigoryo, leaned State Attorney submitted that 1st ground of appeal is baseless. He said, the error on the title of the judgment that it was delivered by the District Court is a typographical error curable under section 388 of the CPA, Cap 20 RE 2019. He suggested that, having agreed that the charge was filed at the RMs Court and that the trial was conducted in the Resident Magistrate court, and having no claim by the appellant that he was prejudiced anyhow by such an error, this court should find that the error is minor and therefore curable.

On the 2nd and 3rd ground of appeal, that the case was not proved, the learned State Attorney submitted that, the prosecution proved the case

beyond reasonable doubts. In the 1st count, stated Mr. Kigoryo, appellant was charged with the offence of soliciting bribe to the sum of 300,000/=. PW6 knew the appellant after having a case before him at Kishapu Primary Court. Through a court assessor, appellant met PW6 and solicited from him 300,000/= to help him secure conviction in a rape case which was at Kishapu District Court. PW6 reported the matter to PW4, the trap was set and appellant was arrested. There is no reason in the records as why PW6 could have framed up such allegations against the appellant, stressed the State Attorney. Citing the case of **Goodluck Kyando V. Republic** (2006) TLR, 363, Mr Kigoryo argued that, each witness has a right to be believed by the court unless there are reasonable grounds for not believed a witness.

Submitting on the defence evidence, the learned State Attorney said, DW2's evidence, was pointing a finger to the appellant. He receives the trap money in a parcel and he never knew PW6 before the incident. Mr. Kigoryo concluded that PW6's evidence coupled with that of DW2, proved the offence to the required standards.

While agreeing that the evidence of a co accused needs corroboration under section 33 of the Evidence Act, Mr. Kigoryo was quick to add that, in this

case, DW2's evidence was corroborated by that of PW6 to the effect that, the money received by DW2 was received on behalf of the appellant.

On evidence in relation to the arrest of the appellant, Mr. Kigoryo submitted that, 2nd accused was arrested first after being pointed to by PW6 to be the person who received the trap money. To find where the appellant was arrested, he said, the court should take into consideration and evaluate the whole of the prosecution evidence.

Regarding the issues of non-tendering of the print out of the mobile communication between PW6 and the appellant, Mr. Kigoryo stated that its absence is not fatal as there is no denial by the appellant that he had met PW6.

On failure by the prosecution to call the court assessor as a witness, Mr. Kigoryo was of the view that, the court assessor was not a necessary witness for the prosecution. His absence could not in any way affect the case. He insisted that prosecution's evidence taken into its totality plus that of DW2 proved that appellant did commit the offence. This being the 1st appellate court, stated Mr. Kigoryo, should re-evaluate the evidence and to find whether prosecution evidence proved the matter beyond reasonable doubts.

On the fourth ground of appeal, Mr. Kigoryo submitted that, should the court agree that the charge against the appellant was proved beyond reasonable doubts, it should find that the sentence by the trial court was also right. He said, the trial court committed an error by stating at page 3 of it's judgment, that appellant was charged with two counts contrary to the details of the charge sheet which shows that appellant was charged with one offence contained in the 1st count c/s section 15 (1) (a). According to Mr. Kigoryo, 2nd count relates to the 2nd accused who was acquitted. As to what count the appellant was convicted of, the learned State Attorney said, on the 13th page of the judgment the appellant was convicted on one count though not specifically so mentioned. He invited the court to find that appellant was convicted on the 1st count especially after taking into account accused's plea at page 9 of the proceedings.

On the excessiveness of the sentence, he argued, the sentence was fair. It was not excessive. It was a middle sentence. Mr. Kigoryo said, section 15 (2) of the PCCA provides a penalty of a fine not less than 500,000/= but not exceeding 1,000,000 and a custodial sentence of not more than 5 years or both. The appellant was sentenced to pay fine of 1,000,000/= and to serve

$3^1/_2$ years custodial sentence. The sentence was not a maximum sentence and therefore fair. He cited the cases of **Edward Mange V.R.** Criminal Appeal No. 51/2014, and **Fatuma Nurdin V.R,** Criminal Appeal No. 418/2013 (All unreported). He in conclusion invited the court to uphold the trial court's decision and dismiss the appeal.

In rejoinder, Mr. Outa reiterated his submissions in chief and added that the judgment was delivered by the District Court and not Resident Magistrate Court. Section 388 CPA is applicable where the convicting court has jurisdiction. In our case, stated Mr. Outa, Appellant was convicted and incarcerated by a court without jurisdiction.

On 2nd and 3rd ground of appeal, Mr. Outa submitted that, prosecution failed not only to show that appellant was arrested at the scene, but also failed completely to bring into the records the person who arrested the appellant.

On the applicability of section 33 of the Evidence Act, Mr. Outa said, the section is used only where the co-accused confesses the offence and not otherwise. In this particular case, 2nd accused was contesting the offence, thus, his statement was not a confession as he was distancing himself from

the offence. His evidence, stressed Mr. Outa cannot stand to ground appellant's conviction. He cited the case of **Ndalahwa Shilanga and Another V.R** Criminal Appeal No. 247 of 2008 (Mwanza Unreported) to bolster his argument.

Rejoining on ground No. 4, Mr. Outa complained of the State Attorney refusal to admit the obvious. He said, looking at the charge sheet and the judgment two problems are observed one, that trial Magistrate erred in law for not saying specifically which count appellant is convicted of. Secondly that the sentence was not specifically directed to any of the counts. The above errors stressed appellant's counsel, gives this court power to interfere. He prayed that the appeal be allowed and appellant be set free.

I have thoroughly examined the appeal, the records of the trial court proceedings and the parties submissions. The issue for determinations are mainly three,

(i) ***whether the impugned judgment was given by the Distrct Court of Shinyanga without jurisdiction***

(ii) ***whether the prosecution proved the case beyond reasonable doubt, and lastly***

(iii) ***whether the sentence is excessive.***

I will answer one issue after the other and by so doing I will have tackled all the grounds of appeal.

On its title, the judgment by the trial court dated 17th December, 2020 is shown to have been delivered by the District court of Shinyanga at Shinyanga. It is not in dispute however that, the charge was filed at the Resident Magistrate Court of Shinyanga at Shinyanga and the trial was conducted before the Resident Magistrate Court of Shinyanga. The divergence between the parties is on the legality of the judgment which according to the appellant's counsel was delivered without jurisdiction by the District court of Shinyanga, contrary to section 4 (1) of the MCA, Cap 11 R E 2019 ready together with section 180 of the CPA, Cap 20 RE 2019. On his party, the learned State Attorney is of the view that, such indication is just a typographical error which is curable under section 388 of the CPA.

It is evident at page 1 of the trial court's proceedings that the charge was filed at the Resident Magistrate court of Shinyanga, the trial was held in that same court and the trial was from the beginning to the end presided over by Hon. P.G. Mushi Resident Magistrate who ultimately prepared and delivered

the tested judgment. There is no signs of a change of venue at any time during trial.

Would such a proceeding result into a judgement by a different Court? Basically, a judgment is a reasoned account of the evidence, the law and the decisions of guilt or innocence in a case by the trial court. This cannot, by any standard be arrived at by a court other than the trial court. Going by the sequence of events, I find the argument by the leaned State Attorney more convincing. The District Court could not come with a decision from a trial held at the Resident Magistrate court. That being the case, I am of the considered view that the indication on the title of the decision, that the judgment was delivered by the District court of Shinyanga is a mere typographical error.

What should be the remedy? Section 388 of the CPC gives restriction on the reversal or alteration of a decision given by a competent court on account of any error, omission or irregularity unless the court is satisfied that such an error has occasioned a miscarriage of justice. The section says:

> ***388***.*-(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on*

account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable

My evaluation of the entire proceedings do not find any miscarriage of justice to the appellant caused by the pointed-out error. Even the appellants' counsel has pointed to none. I am therefore satisfied that the error occasioned no failure of justice. That being the position and having concluded that the error is minor, I find the same curable under the section 388 of the CPA.

Next for consideration is whether the prosecution proved the case beyond reasonable doubts. I will answer this issue while minded of the principle that this is a first appeal where the court is duty bound to re-evaluate the evidence, and if warranted, come into its own conclusion. This principle was emphasized by the Court of Appeal in the case of **Faki Said Mtanda V The Republic**, Criminal appeal No 249 of 2014 (unreported) where it was stated that:

> *"**We are aware of a salutary principle of law that a first appeal is in the form of a re-hearing**. Therefore, **the first appellate court, ought to have re-evaluated the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact**. (See D. R. PANDYA VS REPUBLIC, (1957) EA 336 and 6 IDOl SHABAN @ AMASI VS REPUBLIC, Criminal Appeal No. 2006 (unreported). In addition, and in the interest of justice, the compliance with the salutary rule by the first appellate court is very crucial as it would remedy the occasions of disappearance of the trial Court proceedings and enable the Court to discern what had transpired at the trial. **We thus urge the High Court at the hearing and determination of first appeals to comply with the Salutary Rule** as expounded in the case of PANDYA VS REPUBLIC (Supra) and 1001 SHABANI @ AMASI VS REPUBLIC (Supra)" (emphasis added).*

I will on the same disposition give proper weight to the credibility of witnesses, the presumption of innocence principle, the right of the accused to the benefit of doubt and restricted duty of an appellate court in disturbing the finding of fact arrived at by the trial court which had the advantage of observing the witnesses: See the case of **Okeno Vs Republic** *[1972] EA 32.*

I have curiously evaluated the evidence on the records including that of the defence. The appellant was charged with soliciting bribe. The evidence of solicitation was given by PW6, the complainant in the trial court. However, though there was a mention of the appellant's mobile phone alleged to have been used to communicate with PW6 and the 2nd accused, neither the ownership of the mentioned mobile phone nor the communications between the two were proved before the court. As rightly submitted by the appellant counsel , having alleged that appellant had a series of communication with PW6 on the alleged solicitation , that the same phone was used by the appellant to instruct the 2nd accused to receive the alleged money shortly before the arrest of the accused person, and appellant having denied the allegations, evidence was required from the prosecutions to establish to the court that it was the appellant who committed the alleged offence and no one else.

The evidence on the ownership of the alleged mobile phone number and its communication would have cleared doubt as to whether it was the appellant who was communicating with PW6 all along, it was him who instructed PW6 to handle over the trap money to the 2nd accused and whether it was the same person under whose instruction, 2nd accused received the alleged trap

money. Like the learned appellant counsel, I am of the view that, the prosecution have total failed to link the appellant with mobile Nos. 0756529089 and the trap money allegedly received by the 2nd accused's on behalf of the appellant.

Connected to the above, is the complaint by the appellant that prosecution failed to call an important witness, court assessor. On his party, the learned State Attorney viewed the mentioned court assessor as inconsequential witness. I do not agree to the learned State Attorney's assessment. In the 1st count, appellant is charged with the offence of soliciting bribe of Tsh 3000,000/= from the PW6. As stated earlier, the duo met after a message from the appellant through the court assessor to PW6. Other communications were done through the mobile phone whose ownership and communication details were not disclosed before the court.

Having failed to bring into the court records the communication details of the mobile number allegedly used by the appellant, prosecution was at least required to bring the court assessor to establish whether appellant was in touch with PW6. Prosecution did not bother. In the case of **Azizi Abdalla v Republic** [1991] T.L.R. 71 the court of appeal said:

"The general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"

Court assessor mentioned by PW6 was such an important witness who would have linked the appellant with the solicitation accusations. None calling of this witness who, without doubt was within reach, and without explanation entitles this court to draw adverse inference to the prosecution as I hereby do.

Another doubt on the prosecution evidence is the denial by the 2nd accused that he had received the trap money after his arrest until when the police and WEO intervened. In his testimonies, PW1, Philipo S/o Ibrahim, a PCCB officer who participated in a trap and arrest of the 2nd accused said at page 16 of the records (last paragraph):

"We then ordered the owner of that furniture shop one Vicent s/o Bahati Makolo to show the trape (sic) money Tsh 200,000/=and he refused to have received any amount from one

Juma s/o Kaston ...after sometimes police officers came and in assistance of WEO, 2nd accused showed and produced the trape money Tsh. 200,000/= and accepted to have received such trape money"

It is the prosecution evidence that 2nd accused had received the money on behalf of the appellant, it is also alleged that 2nd accused had no knowledge of a kind of a parcel he received from PW6, and that it was his first time to meet PW6. If that is true and correct position of facts, it was expected that 2nd accused would have accepted receiving the parcel right away with explanation that it was not his and that he was not aware of what it contained. The records is clear that, the arrest of the 2nd accused was done immediately after he had received the alleged money, and during cross examination, at page 40 of the trial court records, PW6 said he had remained with the 2nd accused inside his house for about 10 minutes. I have asked myself a question why it took such long time for PW6 to handle the money to the 2nd accused a person they do not know each other and to whom he was instructed just to leave the parcel. This is due to the fact that PW3, an independent witness, informed the court that after his arrest, 2nd accused denied to have receive money from PW6. And after the arrival of the police,

2nd accused did not amenably admit to have receive the said money, he instead whispered to the PCCB officer who then made it openly known to the public that 2nd accused admitted to have receive the said money. PW3 was recorded at page 26 and 27 of the proceedings, thus:

> *"I saw 2nd accused sitting down at his shop / furniture shop I heard a statement " you just say" " just say" as that 2nd accused called one father who was PCCB and whispered at him as the result that PCCB officer pronounced to the entire public that 2nd accused had confessed to have been given such amount of money the PCCB officer went together with "Kitongoji" chairman and another man to the house of 2nd accused in accompany of other people four(4) of them, after a while I saw these people coming with money..."*

The prosecution evidence in a quoted part above is silent on what exactly 2nd accused said to the PCCB officer before the announcement to the public that DW2 has confessed to have received the alleged bribe money. Even assuming that DW2 did admit to have received the alleged trap money, still his initial admission at the scene missed necessary information whether appellant was involved or not.

Another issue connected to the above is that, PCCB officers had instructed PW6 (informer) to put off the jacket after he had handled the money to the appellant. PW6 did as instructed and pointed to the 2nd accused as a person to whom he handled the trap money .PW1's evidence at page 16, par 2 & 3 says and I quote:

> *"After sometimes the informer came out of that shop and that he had put of the jacket as we had agreed to be a symbol that he had handled then Tsh 200,000/= the trape money to the intended accused (1st accused) one Benjamin s/o Charles.*
>
> *We then rushed to that shop and that the informer showed/pointed at me the owner of that shop one Vicent Bahati Makolo (2nd accused) whom the informer told me that he had handle the trap money Tsh 200,000/=. I had introduced myself to the 2nd accused whom I told him to be under arrest in an offence of receiving bribery. My fellow investigator one adams/o Muyechi came and we arrested him accordingly and thereafter people started gathering therein the shop"*

As hinted above, both PW1 and his fellow ran into arresting 2nd accused. Nothing on the records explain where, how and who arrested the 1st accused, now appellant. PW3 gave evidence for the prosecution. She witnessed the arrest of the appellant, near her home in unmentioned location. In his

defence, appellant said he was arrested by four people on 25/9/2019 when he was coming from Munze area in Kishapu District where he had gone for lunch. DW2 confirmed in his defence at page 57, during cross examination that he was arrested in the absence of the appellant and that appellant was brought later by other PCCB officers who were not at the scene. Paragraph 3 of page 57reads:

> *"When amount of money was brought, Mr, Benjamin (1st accused) was not there and when I was arrested Mr, benjamine (1st accused) was not there. He was brought later on by PCCB officers apart from the PCCB who arrested me"*

Unfortunately, the arresting officers were not brought as witnesses and therefore it remained on the prosecution's own mind on why, how and where the appellant was arrested as PW3's evidence could not come clearly on this aspect.

It is a trite law that, in a criminal case like the one at hand, the onus of proof is on the prosecution to prove the offence beyond reasonable doubt. This burden never shifts, what is required of the appellant/ accused is to raise reasonable doubts on the prosecution case. In **Mohamed Matula v. Republic** [1995] TLR 3, the Court of Appeal said:

In a criminal case like this one the burden is always on the prosecution; it never shifts and no duty is cast on the appellant to establish his innocence.

In convicting the appellant, trial court relied on the appellant denial of knowing the complainant, PW6. It observed that, appellant as a magistrate, is expected to remember persons who had once appeared before him at least by hints of names and therefore his denial that he had never seen or communicated with PW6 is nonsense. It found the evidence by the prosecution without doubt that appellant did induce PW6 for 300,000/= and had later agreed to and received 200,000/=from PW6. At page 11 of the trial court's judgement, this is what the trial magistrate said;

"From the above valuation of the evidence as adduced by the prosecution witnesses, it is suggested and undoubted that DW1 induced to be given sum of Tsh 300,000/= but later agreed to ***and obtained Tsh 200,000/= from PW6****. This inducement was done by Dw1 to PW6 on promise that DW1 would secure conviction in a rape case involving PW6's daughter. "(emphasis added)*

I think, this was a misinterpretation of the evidence on the records. I have tried to see how this conclusion was arrived at. Apart from the rejection of

the appellant's defence as noted above, no serious evaluation and assessment of evidence was done by the trial court before arriving into the appellant's conviction. In **Leonard Mwanashoka vs Republic** Criminal Appeal No. 226 of 2014 (unreported), the Court observed that:

> *"It is one thing to summarized the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

In this case, no thorough evaluation of evidence was done by the trial court. Had the trial court engaged into a proper evaluation of the evidence presented before it, it would have found that, no evidence was brought proving that appellant was involved in the commission of the offence or that he received the alleged trap money, 200,000/=as concluded. This was an error that led to a wrong conclusion.

Another issue is that of corroboration. It was submitted by both counsels that DW2's evidence needed corroboration. While the Appellant counsel suggests that no corroborative evidence by the prosecution, the learned

State Attorney said, corroboration is found in PW6's evidence. It should be noted here that, DW2 was the appellant's co accused who all along was throwing the blames on the appellant. In his defence, 2nd accused who testified as DW2 said, he received the trap money on behalf of the appellant. Being a co accused, his evidence needed corroboration under section 33 of the evidence Act.

The court in Ndalahwa **Shilanga's** case (supra) had time to discuss on what a corroborative evidence is. Quoting the English case in **R V. Baskerville** (1916) 2KB 658 at 667, the Court of Appeal observed that:

> *"It must be –"independent testimony which affect the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him that is which confirms, in some material particular not only the evidence that the crime was committed but also that the prisoner committed it"*

The learned State Attorney has invited the court to find corroboration from PW6's evidence. With due respect to the learned State Attorney, PW6 evidence is deficiency on how appellant participated in the commission of the crime. Apart from the allegation that he had induced PW6 for Tsh

300,000/= bribe, there is no single evidence adduced connecting him with the alleged offence. Generally, PW6 is a witness whose evidence needed corroboration before it could be accepted and acted upon. The evidence which requires corroboration could not itself corroborate another evidence.

Nonetheless, this court has once said that where an accused person gives evidence on oath in a joint trial implicating another accused (even if not a confession), whether or not he implicates himself, it may be used against that other accused, because that evidence is on the same footing as that of any other witness, though as a matter of prudence it must be approached with caution. This was so decided in the case of **Ibrahim Daniel Shayo v R**. Criminal Appeal No. 10 of 1990 (DSM High Court Registry) unreported, Mapigano, J. (as he then was).

I have weighted DW2's evidence in this case. It is not safe in my view, to bank on such evidence. As hinted herein above, he received the bribe money and denied to have so done until later when police interfered. Again, though, according to the prosecution evidence, DW2 admitted to have received the alleged trap money on 27/9/2019 his cautioned statement (exhibit P3) regarding the same incident and admission was recorded by PW4 on

13/7/2020 almost 10 months after the incident. By this evidence, I find DW2 a witness with an interest to save because if the appellant was to be acquitted, he was to explain on why he received the bribe money from PW6. Even assuming that corroboration is found on PW6's evidence as suggested by the learned State Attorney, still there would be a problem because, DW2's evidence is deficient as explained above. In **Azizi Abdalah V Republic,** (Supra), the Court of Appeal quoted with approval the case of **DPP v HESTER** (1973), AC 290 and stated thus:

> *"... the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which is sufficient, satisfactory and credible"*

Generally, prosecution evidence together with that of the DW2, is wanting in merit. Though, cumulatively proved that the offence was committed, the evidence failed to connect the appellant with the alleged offence. It is clear from the record that appellant was not at the scene when DW2 was arrested with the trap money, he did not receive the trap money and no sufficient proof that appellant communicated at any point with PW6 or DW2. Second issue is answered in the negative.

Having concluded that prosecution failed to prove the case against the appellant, the appeal is substantially disposed of and for that reason I will not determine the last issue on sentence.

Before I pen off, it should be declared here that, this judgement was delivered after the death of the appellant. It is on the records that, appellant passed away shortly after the hearing of his appeal but before the delivery of the judgment. Initially, this court was minded to mark the appeal as abated. However, guided by the provisions of section 371A of the CPA, Cap 20 RE 2019, and having taken into account that the appeal was on both custodial and fine, this court found it appropriate under the circumstances of this case to deliver this judgment.

That said, the appeal is allowed. The appellant's conviction is quashed and the sentences both custodial and fine are set aside.

It is so ordered.

DATED at **SHINYANGA** this 4th day of **June 2021**.

E.Y. MKWIZU
JUDGE
4/06/2021