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

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**HC CRIMINAL APPEAL NO. 27 OF 2021**

***(Appeal from the Criminal Corruption Case No. 3 of 2019 in the District Court of Ukerewe at Nansio (Nyahega, RM) dated 15th of December, 2020.)***

**SABATO NYABAMBA MASHAURI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*21st June, & 12th July, 2021*

**ISMAIL, J.**

The appellant, the former Village Executive Officer, was convicted and sentenced of two counts with which he was charged. In the first count, the allegation was that between 27th September, and 6th November, 2019, at Busunda village in Ukerewe District, Mwanza Region, the appellant corruptly solicited the sum of one hundred and fifty thousand from a Mr. Paschal Luhasa, as an inducement for not taking legal action against the said Paschal Luhasa, then accused of involving himself in odd fortune telling. The appellant did that in his capacity as the Village Executive Officer for Busunda

Village, and the alleged offence was contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act No. 11 of 2007. In the second count, the appellant was accused of corruptly receiving the sum of one hundred thousand shillings from Paschal Luhasa, as an inducement for not taking action against him. The second count was an offence that is contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act No. 11 of 2007.

The contention, as gathered from the facts of the case, is that the appellant, then serving as the Village Executive Officer for Busunda village, summoned Paschal Ruhasa (PW1) and enquired about whether he is involved in odd fortune telling activities to which he answered in the negative. It is further alleged that the appellant threatened him with imprisonment, unless he agrees to part with TZS. 150,000/-. Unhappy with the appellant's conduct, PW1 enlisted the service of the village chairman who advised him to report the matter to the Prevention and Combating of Corruption Bureau (PCCB), which he did. After lodging a complaint, the latter (through DW1) gave PW1 a sum of TZS. 100,000/- that was meant to be a trap money to settle an advance sum which was allegedly sought by the appellant. The trap money was in the denomination of 10,000 shillings, and had their serial numbers recorded. The trap laid against the appellant

succeeded in netting the him, and, upon search, was found in the possession of the said sum. The search was witnessed by PW4 and PW5 both of whom testified to the effect that the appellant was found with trap money whose serial numbers had been recorded in a form.

The appellant denied the charges levelled against him. He and two other witnesses, who testified in defence, contended that PW1 had been informed of the requirements needed for being enrolled in the roll of traditional healers. One of the conditions was payment of fees, in the sum of TZS. 150,000/-. This sum was to be paid to an association in which DW2 and DW3 were in a leadership role. The appellant submitted that the charges against him were trumped up. At the end of the trial proceedings, the trial magistrate was convinced that a case had been made out against the appellant. The magistrate went ahead and convicted the appellant of both counts. He was then sentenced to payment of fine to the tune of TZS. 500,000/- for each of the counts, or face a jail term of three years for each count.

The trial court's decision has utterly bemused the appellant, hence his decision to prefer the instant appeal. The petition that instituted the instant appeal has three grounds, reproduced in verbatim as follows:

1. *That, the trial magistrate erred in law and fact by convicting the accused/appellant basing on the prosecution evidence while they failed to prove their case to the required standard in criminal cases which is beyond reasonable doubt.*

2. *That, the trial magistrate erred in law and fact by failing to properly evaluate, consider and give weighty (sic) to the evidence adduced by the defence side.*

3. *That, the trial magistrate erred in law and fact by convicting the appellant basing on the prosecution evidence which was not watertight and contradicts itself.*

At the hearing, the appellant was represented by Mr. Sijaona Revocatus, learned counsel, whilst the respondent was represented by Ms. Ghati Mathayo, learned State Attorney. At the instance of the parties, disposal of the matter was ordered to be through written submissions, the filing of which conformed to the schedule drawn by the Court.

The first arrow in the battle was thrown by Mr. Revocatus, who chose to argue the grounds of appeal in a combined fashion. While quoting the provisions of section 15 (1) (a) of the Prevention and Combating of Corruption Act, 2007 (PCCBA), the learned counsel submitted that proof of the offence under the said provision entails proving the existence of several elements. These are: ***one,*** that the appellant did corruptly by himself or in

conjunction with any other person solicited money from PW1; ***two,*** that the said appellant obtained for himself or any other person; ***three,*** any advantage as an inducement to, or reward for; and, ***four,*** anything in relation to his principal's affairs or business.

Arguing that these elements were not proved, Mr. Revocatus relied on ***Aziz Salehe & Another v. Republic***, CAT-Criminal Appeal No. 203 of 2010, quoted in ***Joseph Mwita @ Chacha v. Republic***, CAT-Criminal Appeal No. 294 of 2020 (both unreported), in which it was held that what has to be proved is the elements which constitute the offence and the person or persons who committed it and nothing else. The counsel contended that the testimony of PW1 was to the effect that the appellant threatened him with an incarceration, lest he agrees to part with the sum of TZS. 150,000/- , and that the militia men were there at the time. He argued that, the fact that none of the militia men was called upon to testify in court, casts a lot of doubts on the veracity of the testimony.

The same was said of the Ward Executive Officer in whose office PW1 was said to have been locked in. Turning on to PW2 and PW's testimony, the counsel's contention is that PW2's testimony was hearsay, while that of PW3 was to the effect that part of the solicitation was done through a mobile phone, but neither the phone numbers nor printouts of the text messages

were produced in court. He took the view that evidence of solicitation was missing in this case, as no evidence corroborated the shaky testimony of PW1 and PW3. The counsel fortified his contention by citing the decision of the Court in ***DPP v. Abdallah Zombe & 8 Others***, HC-Criminal Appeal No. 358 of 2013 (unreported), in which it was held that evidence on phone conversation is crucial in connecting the appellant with the charge.

On the receipt of the sum, Mr. Revocatus wondered how the said sum would be paid out while the prosecution had failed to prove that the appellant had powers of incarcerating PW1 on allegation of odd fortune telling. The counsel argued that the prosecution ought to have proved that the appellant's line of duty allowed him to threaten PW1, and that action would be taken if he hadn't obliged with the solicitation. It was the counsel's conclusion that the prosecution failed to prove existence of this element.

Addressing the Court on yet another element, Mr. Revocatus argued that absence of the appellant's principal to testify on the former's powers and authority meant that the prosecution's case was not proved. The counsel asserted that not even the testimony of PW3 managed to tell if the appellant had the authority or powers to order PW1's arrest and incarceration. It was the counsel's contention that evidence on this aspect was shaky. The counsel argued that the trial court ought to have conformed to the cardinal principle

in criminal law, which is to the effect that an accused's conviction should be based, not on his weakness, but on the strength of the prosecution's case. This, he argued, is consistent with the holding in ***Republic v. Leonidas***, HC-Criminal Session Case No. 1 of 2018, which quoted with approval the decision of ***Bernard v. Republic*** [1992] TLR 302. The learned counsel argued that the case against the appellant was not proved beyond reasonable doubt, adding that such doubts ought to benefit the appellant.

The respondent's rebuttal submission began by acknowledging the prosecution's duty to prove the case beyond reasonable doubt, and that the accused's only duty is to raise some reasonable doubts. Ms. Mathayo contended that all ingredients of offences charged were proved, arguing that the testimony of PW1 stood out, along with exhibit P1. She submitted further that PW2 testified that he received a complaint from PW1 on the solicitation of the funds from the appellant. She referred to the page 21 of the typed proceedings. The respondent's counsel argued that PW1's testimony was corroborated by PW4 who, along with PW5, witnessed the appellant's arrest and counted the money which was found in the appellant's possession. Ms. Mathayo argued that the track money (exhibit P2) and the form in which the notes were recorded (exhibit P3) were tendered in court and formed part of the basis for the appellant's conviction.

With respect to the alleged failure to call militia men to testify, the respondent's counsel was of the view that the militia men were not familiar with the goings on, and this explains why the appellant did not call them during the trial. Invoking section 143 of the Evidence Act, Cap. 6 R.E. 2019, the respondent's counsel argued that the law is clear that no particular number of witnesses is required to prove any fact. On the availing of the print outs of the mobile phone messages, the contention by Ms. Mathayo is that the law is clear in that, section 62 of the Evidence Act, Cap. 6 of 2019 provides that the testimony of an eye witness supersedes documentary evidence. She argued that the testimony of PW1, PW3, PW4 and PW5 is clear on the fact that it was not necessary for the said militia men to testify in that respect. The learned counsel further argued that, failure by the appellant to cross-examine the witnesses on such a point constituted an admission of the issues raised, consistent with ***Damian Ruhele v. Republic***, CAT-Criminal Appeal No. 501 of 2007 (unreported). Ms. Mathayo took the view that, since the appellant admitted that his duties involved maintaining peace and stability, and that odds fortune telling, requiring proof in that respect would amount to a misuse of section 192 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019.

With respect weight and evaluation of evidence, the counsel's contention is that the appellant did not object to the summoning of PW1, and that the trap money was found in his pocket. She argued that the appellant went ahead and appended signature on the trap money form. The counsel took the view that the testimony was well evaluated, contending that the Court is clothed with powers to analyse the entire evidence as it were a trial court.

Submitting on the alleged contradictions in the testimony, the respondent's counsel argued that such contradictions, if any, were minor and did not affect the central story in the case. She fortified her case by citing the decision in ***Luziro S/O Sichone v. Republic***, CAT-Criminal Appeal No.231 of 2010 (unreported), and ***Mukami Wankyo v. Republic*** [1990] TLR 46. Ms. Mathayo reiterated that the appeal was without any merit, praying that it be dismissed.

The appellant's rejoinder was mostly a reiteration of his submission in chief and a rebuttal of what the respondent submitted. The appellant's counsel maintained that the prosecution had not made out a case sufficient to convince the trial court that the appellant was guilty of the offences charged. He still held the contention that the sum alleged to be bribery was brought in order to pay for registration fees as a witch doctor.

From these long drawn submissions by the counsel, the broad question for resolution is whether the case against the appellant was proved beyond reasonable doubt.

As unanimously held by the counsel, in criminal cases, the burden of proving the accused's guilt is cast upon the shoulders of the prosecution, and the standard of proof is beyond reasonable doubt. As to what constitutes the standard, the decision of the Court of Appeal in ***Samson Matiga v. Republic***, CAT-Criminal Appeal No. 205 of 2007(unreported) provides the answer. It was held:

> *"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence".*

See also: ***Yusuf Abdallah Ally v. Republic*** CAT-Criminal Appeal No. 300 of 2009 (unreported).

The question that follows is whether, with respect to the first count, such testimony was adduced by the prosecution witnesses. As stated by Mr. Revocatus, the allegation of solicitation was levelled by PW1 who chose to enlist the assistance of PW3. The contention by the prosecution is that the solicitation was done through telephone conversation between PW1 and the

appellant. None of the said witnesses, tendered in court, any semblance of testimony to prove that any such conversation existed. Thus, while solicitation of corruption may be inferred, given what will be apparent soon, the fact that the alleged solicitation is said to have been done through phone conversation, absence of such proof renders the contention suspect. In my humble contention, presence of such communication is what would constitute a strong link that would prove corrupt solicitation by the appellant. Since the prosecution's testimony fell short on this aspect, it cannot be said that a strong case was made to convince a properly constituted court that the burden of proof was discharged to warrant passing a verdict of conviction against the appellant in the first count. I align myself with Mr. Sijaona's view on this, and hold that the trial court erred in entering a conviction on the count of solicitation. I hold that the appellant's conviction of this count was erroneous and I set it aside.

With respect to the second count, the appellant's main argument is that the case against him was not proved, and that the testimony on which the conviction was based was less tight and contradictory of itself.

The testimony that has been castigated by the appellant's counsel is that of PW1, PW2, PW3, PW4 and PW5. PW1 stated, in his testimony, how the appellant threatened to incarcerate him if he wasn't willing to part with

TZS. 150,000/-. He narrated how he reported the matter to PW3, who in turn gave him TZS. 100,000/- trap money which he delivered to the appellant as an advance sum. He went further to testify how the trap was set, money handed to the appellant and subsequent actions which included the appellant's arrest, search and recovery of the money. PW3 built on PW1's testimony and stated how he communicated with PW1, set the trap and handed him the trap money, waited for the delivery to the appellant and pounced on the appellant with assistance of his fellow PCCB officers. Upon search, the appellant was found to be in possession of the trap money that was counted and recorded in the trap money form, duly filled and signed by the appellant and PW4 and PW5 both of whom witnessed the search.

It is the totality of this testimony that the appellant has punched holes into, the contention being that it is deficient in some aspects, such as inability to establish if the appellant had powers to put PW1 in custody. It also includes failure to ascertain if the appellant's principal authorized him to act the way he did; and the failure to state what the inducement was for.

My scrupulous review of the matter tells me that the decision of the trial court was based on what it considered to be a credible testimony of the prosecution witnesses. As I move on to state if the trial court was correct or not on its treatment of the testimony, let me remind the parties of the

enduring principle with respect to credibility of witnesses. This was restated in by the Court of Appeal of Tanzania, in ***Ali Abdallah Rajab v. Saada Abdallah Rajab and Others*** [1994] TLR 132, wherein it was held:

> *"Where the decision of a case is wholly based on the* ***credibility of the witnesses then it is the trial court which is better placed to assess their credibility*** *than an appellate court which merely reads the transcript of the record."* (Emphasis is mine).

This means that credibility of the witnesses who testified during trial is not the domain of this Court and, unless there are extraordinary circumstances that warrant a departure from this principle, the trial court's judgment in this respect cannot be faulted. On whether the same was discrepant or contradictory, my unflustered view is that, save for the divergence on the quantum of money with which the appellant was found in excess of the trap money, the rest of the testimony was reconcilable and harmonious with one another. The said contradiction is quite trifling and, as the respondent's counsel put it, unable to affect the central story. I am fortified in my view by the splendid decision of the Court of Appeal in ***Dickson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007 (unreported), in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It held as follows:

*"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.* ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do.***" [Emphasis is added]

The testimony adduced by the prosecution has clearly demonstrated that money changed hands from PW1 to the appellant, and that this is the same money that was given by PW3 upon a tip off of what the appellant intended to do. This is the same money which was found in the appellant's possession when he was searched by PW4 and witnessed by PW5. It is this money whose serial numbers featured in exhibit P3. The appellant has argued that this money was intended to serve as a registration fee payable to regularize PW1's activities. While this argument sounds sweet in the ears, it spectacularly fails to bring the desired sense, knowing that the appellant was not involved in the registration process, as to require him to accept any payment connected to that. It is implausible, therefore, that PW1 would hand him some money for an assignment in which he is not involved.

The appellant's counsel has also argued that militia men who were allegedly involved in harassing PW1, and the appellant's principal, were not called to testify on behalf of the prosecution. The contention is that the latter's presence would ascertain if the appellant had powers which included those of arresting and incarcerating offenders, PW1 inclusive. It is true that the prosecution is under obligation to bring on all witnesses who are able to testify on material facts. This is consistent with the holding in ***Azizi Abdallah v. Republic*** [1991] TLR 71 (CA), in which it was held:

> *"... the general and well known rules is that the prosecutor 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."*

Looking at the record of proceedings, I am not convinced that the militia men and the appellant's principal are persons who would be said to be in connection with the transaction in question, as to constitute witnesses in the matter. It follows that their absence in the list of witnesses would not draw an adverse inference to or weaken the prosecution's case. I take the appellant's contention as hollow and lacking in any material sense.

In sum, I am convinced that the testimony adduced by the prosecution was strong, and it left no doubt as to the criminal liability of the appellant with respect to the offence of corruption. I take the view that the said evidence irresistibly pointed to the appellant, and not any other, as the one who committed the offence. Consequently, I find the appeal in respect of the second count of the charges barren of fruits and I dismiss it. Accordingly, I uphold the trial court's conviction and sentence in that respect.

Order accordingly.

DATED at **MWANZA** this 12th day of July, 2021.


***M.K. ISMAIL***

***JUDGE***