

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 65 OF 2020

(Originating from Criminal Case No. 231 of 2017 Mtwara Court at Mtwara)

THE DPPAPPELLANT

VERSUS

AMEDEI ^{S/o} SERAPHIN @ MKOBA.....RESPONDENT

JUDGMENT

13 April & 19 July, 2021

DYANSOBERA, J.:

This appeal by the Director of Public Prosecutions takes exception to the judgment dated the 27th day of December, 2019 passed by the District Court of Mtwara acquitting the respondent one Amedei Seraphin Mkoba in Criminal Case No. 231 of 2017 on an offence of two counts: abuse of position contrary to Sections 31 of the Prevention and Combating of Corruption Act No.11 of 2007 (1st count) and stealing by persons in public service contrary to Sections 258 (1) (2) (a) of the Penal Code [Cap 16 R. E. 2002] (2nd count).

In the petition of appeal filed in this court on 18th May, 2020 the following sole ground of appeal has been preferred by the said appellant: -

1. That the Honourable trial Magistrate erred in Law and Facts for failure to appreciate the prosecution evidence which proved the case beyond reasonable doubt.

The time line of events giving rise to the instant appeal can be stated. The respondent was the employee of the Commission for Mediation and Arbitration (CMA), Mtwara and his duties were to mediate labour disputes and help parties resolve their disputes amicably. On the 25th day of January, 2016 a labour dispute No. CMA/MTW/LT/06/2016 between **Hassan Anafi Mdeda and 6 others v. Longway Engineering Co. Ltd** on a claim of Tshs. 9, 780, 000/= being the terminal benefits was filed at the Commission for Mediation and Arbitration, Mtwara. The respondent was the mediator. After the said labour dispute was opened, the respondent signed and issued under his hand and the seal of the Commission, a CMA Form No. F. 18 being a notice to the parties to attend the mediation hearing which was set on 28th January, 2016.

On 28.1.2016 the labour dispute was heard by the respondent in the presence of Hassan Anafi, Hassan Shaibu, Bakari D'Santos, Mussa Bonde,

Twahi Mussa, Ney Mloola and Mtiniha Ahaman, then complainants and in the presence of Mr. Mohamed Kaisi as a representative of Longway Engineering Co. Ltd.

It was the prosecution case that on the 2nd day of February, 2016 at the CMA, Mtwara Offices, in the absence of the complainants, the respondent as a mediator received Tshs. 3, 500,000/= as terminal benefits for seven employees from Mr. Zhou, the Site Manager, who was accompanied by Mr. Bruno Boniphace, a foreman, both being representatives of the employer. The allegations went further that after receiving the money, the respondent prepared and signed under common seal of the CMA F. 5 being Mediator's Certificate of Settlement showing that the parties had resolved the dispute through mediation. On the 4th day of February, 2016 at CMA Mtwara office, in the presence of the respondent as a mediator and seven complainants as employees, a sum of Tshs. 1, 250, 000/= only was handed over to the employees, namely, Twahil Juma who got Tshs. 150, 000/=, Ney Mloola (200,000/=), Bakari Disantos (150,000/=), Mtiniha Fundi (150,000/=), Anafi Fundi (200,000/=), Mussa Bonde (200,000/=) and Hassan Shaibu (200,000/=). The prosecution believed that the respondent retained Tshs. 2, 250,000/= for himself.

An investigation was mounted and it came to pass that the respondent being an employee of the CMA, in discharge of his duties, intentionally abused his position by failing to give the complainants their money as agreed in labour dispute No. CMA/MTW/LT/06/2016, thereby obtaining undue advantage of Tshs. 2, 250, 000/= which he stole.

After the investigation was completed, the respondent was arraigned before the District Court at Masasi for having committed an offence of two counts as indicated above.

After hearing eleven prosecution witnesses and two defence witnesses and after analysing the whole evidence, the trial District Court was satisfied that the respondent neither abused his office nor stole the money. It, therefore, come to a finding that the prosecution had failed to prove the case against the respondent beyond reasonable doubt and as a result, it acquitted the respondent.

At the hearing of this appeal, the appellant was represented by Mr. Gideon Magesa, learned State Attorney whereas the respondent stood on his own.

Submitting in support of the appeal, Mr. Magesa stated that the evidence at the trial was strong and sufficient to prove both counts beyond reasonable doubt. He argued that the agreed payment to the retrenched employees was Tshs. 3, 500,000/=, the amount which was handed over to

the respondent at the CMA's office by Mr. Zhou who was in company of PW 4 in the presence of witnesses and recorded in Form No. 21 (Exhibit P 5). Learned State Attorney submitted further that it was agreed that each retrenched employee was to receive Tshs. 500,000/= but they received less that amount. In elaboration, Mr. Magesa submitted that PW 5 was paid Tshs. 200, 000/=while PW 6 and PW 7 received Tshs. 150,000/= each which means that the respondent pocketed Tshs. 2, 500,000/= and that the respondent admitted to have received that amount but to have paid less the amount. This court was urged to find that the witnesses were credible and the respondent illegally obtained that amount.

On refusal by the trial court to admit a register book which had been tendered by PW 2, Mr. Magesa invited the court to invoke the case of **Daimon Trust Bank Tz Ltd v. Idris Sheikh Mohamed**, Civil Appeal No. 262 of 2017 quoted in the case of **Seif Said Hamis Kocha and others**, pages 9 and 10. On the exhibits whose contents were not read in court, this court was invited to borrow the wisdom of the Court of Appeal in the case of **Saganda Kasanzu v. R**, Criminal Appeal No. 53 of 2019. This court was also referred to the case of **Ali Mohamed Mkupa v. R**.

Mr. Magesa also challenged the trial court on the issue of the claimants having bonafide claim of right arguing that it was but a misconception. According to him, the proper issue was whether or not the respondent illegally obtained that amount.

Responding to this ground of appeal, the respondent told this court that the lower court analysed the evidence in sufficient details and came to

the finding that the case was not proved beyond reasonable doubt. He pointed out that there were some contradictions on part of the prosecution on vital details that is whether the retrenches were paid the whole amount or not and that DW 2 was clear that they were paid their money. The respondent insisted that the law mandated him to resolve the dispute within thirty days and this dispute was resolved within three weeks after the payment started on 4th and completed within one week.

Mr. Magesa maintained that the respondent committed the offence as the last payment was made after the report had been made to the PCCB. He denied there to have been any contradiction as DW 2 was clear that he was at first paid Tshs. 200,000/= and was paid Tshs. 300,000/= after he had complained at the PCCB.

Having perused the trial court's record and after careful consideration of the petition of appeal and the submissions in support and in opposition, my duty in this appeal is to decide two issues: one, whether or not the Honourable trial magistrate failed to appreciate the prosecution evidence and two, whether the available evidence sufficiently proved the charged offence beyond reasonable doubt.

With regard to the first issue, the learned trial Resident Magistrate disbelieved the prosecution witnesses, Bruno Boniphace (PW 4) in particular, and found Ney Mlowola, one of the retrenched employee and who testified as DW 2 truthful. He was of the view that payments were made in two instalments and then the complaint was settled. This finding is clear at pages

9 and 10 of the typed judgment. With that evaluation, he was satisfied that the respondent neither abused his position nor stole the money.

Can the learned Resident Magistrate be faulted in his finding? I think not. In the present case, the prosecution was duty bound to not only present substantial evidence to establish each element of the offence but also prove beyond reasonable doubt the perpetration by the respondent of the offence charged in those two counts.

As the trial court record shows, the respondent, in the first count, was charged with abuse of position. In this count, the prosecution alleged that the respondent, between 1st February, 2016 and 5th February, 2016 at Commission for Mediation and Arbitration at Mtwara Mikindani Municipality within Mtwara District in Mtwara Region, being employee of Commission for Mediation and Arbitration as a Mediator/Arbitrator, in discharge of his duties, intentionally abuse his position by failing to give the complainants their money as agreed in labour dispute No. CMA/MW/LD/06/2016 thereby obtain undue advantage of Tanzanian Shillings Two Million Two Hundred Fifty Thousand (Tshs. 2, 250,000/=) only.

According to Section 31 of the Prevention and Combatting Corruption Act,

"Any person who intentionally abuses his position in the performance or failure to perform an act, in violation of law, in the discharge of his functions or use of position for the purpose of obtaining an undue advantage for himself or for another person or entity, commits an

offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both”.

To sustain a conviction in this 1st count, the prosecution was duty bound to prove the following ingredients, namely, that the respondent, intentionally, in his position in the performance, or failure to perform an act, in violation of law, in the discharge of his functions used the positions for the purposes of obtaining an undue advantage for himself or another person or entity.

The available evidence by eleven prosecution witnesses and documentary exhibits tendered, do not show the proof of those ingredients. In other words, the prosecution miserably failed to prove intentional abuse of the respondents' position, the law which was alleged to have been violated by him and the undue advantage obtained for himself, or for another person or entity, the offence in the 1st count was not proved.

As far as the 2nd count is concerned, the same respondent was charged with stealing by persons in public service c/ss 258 (1) (2) (a) and 270 of the Penal Code [Cap. 16 R.E.2002]. The particulars of the offence alleged that the respondent, between 1st February and 5th February, 2016 at Mtwara Mikindani Municipality within Mtwara District in Mtwara Region, being employee of Commission for Mediation and Arbitration as a Mediator/Arbitrator, while discharge of his duties of mediating labour dispute No. CMA/MW/LD/06/2016 did steal Tanzanian Shillings Two Million Two Hundred Fifty Thousand (Tshs. 2, 250,000/=) only, the money entrusted to

him by virtue of his employment for the purpose of paying the same to the complainants in dispute No. CMA/MW/LD/06/2016.

Section 258 (1) (2) (a) of the Code defines theft as in the following terms: -

(1) A person who *fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*

(2) *A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say—*

(a) *an intent permanently to deprive the general or special owner of the thing of it;*

It is enacted under Section 270 of the same Code as follows: -

"270.

If the offender is a person employed in the public service and the thing stolen is the property of the Republic or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for fourteen years".

To establish this offence, the prosecution had to prove beyond reasonable doubt that the respondent committed the *actus reus* which is an unauthorised taking, keeping or using of another's property accompanied with the *mens rea* of dishonesty/and or intent to permanently deprive the owner or the person with the rightful possession of that property and its use; also, the respondent, a person employed in the public service, stole the

alleged money which was either the property of the Republic or came into his possession by virtue of his employment.

The gravamen of the offence in this second count is that the respondent was given Tshs. 3, 500,000/= to pay to the seven retrenched employees who were the complainants at the CMA but paid them Tshs. 1, 250, 000/= only and gained advantage of Tshs. 2, 250,000/=, the amount he stole and which was intended to be paid to the employee. This is according to Amani Anthony Rukoijo, the investigation officer of the PCCB who testified at the trial as PW 2. In his evidence at p. 13 of the trial court's typed proceedings, PW 2 told the trial court that on 20.9.2016 in the course of his investigation, he recorded the respondent's cautioned statement. Indeed, PW 2 tendered this statement in court. It was admitted in evidence and marked as exhibit P 1. Submitting in support of the appeal, Mr. Gideon Magesa, learned State Attorney told this court that the respondent pocketed Tshs. 2, 250,000/=. To fortify his argument, he contended that PW 2, the PCCB investigation officer who recorded the respondent's cautioned statement gave a lengthy evidence but in short, the respondent admitted to have received Tshs. 3, 500,000/= and admitted to have paid Tshs. 1, 250,000/=. With due respect to both PW 2 and learned State Attorney, there is nowhere the respondent admitted to have received Tshs. 3, 500,000/= and admitted to have paid Tshs. 1, 250,000/=. According to the cautioned statement relied on by PW 2 and learned State Attorney, and which was admitted in Court as exhibit P 1, no such admission was made. For clarity, I reproduce an excerpt pertinent to this issue as follows: -

Swali: Malipo kama yalivyoanishwa hapo juu yalipokelewa na vibarua kwa kutumia utaratibu gani?

Jibu: vibarua walipokea fedha tajwa kutoka kwa Mwakilishi wa Mwajiri (LONGWAY ENGINEERING)

Swali: je wewe AMEDEI MKOBA ulipokea fedha kiasi cha Tshs. 3,500,000/= kutoka kwa Kampuni ya LONGWAY ENGINEERING Ltd kama fedha za malipo ya mapunjo ya vibarua saba (7), na kuwalipa vibarua wote saba jumla ya Tshs. 1, 250,000/ na hivyo kujipatia faida ya Tshs. 2, 250,000/=?

Jibu: Sijawahi kupokea fedha zozote kutoka kwa kampuni ya LONGWAY ENGINEERING Ltd

Thus, the statement recorded by Amani Anthony Rukoijo on 20th September, 2016 from 10:55 AM to 1: PM (exhibit P 1) does not show the respondent admitting the receipt and payment of the amount alleged by the prosecution.

Indeed, Exhibit D 2 when clearly states '*Pande zote zimekubaliana kumaliza mgogoro kama ifuatavyo:*

Mlalamikiwa amekubali kuwalipa walalamikaji ili kumaliza mgogoro kama ifuatavyo:

- | | |
|----------------------------|------------------------|
| <i>1. Twahili Juma</i> | <i>Tshs. 500,000/=</i> |
| <i>2. Bakari D' Santos</i> | <i>Tshs. 500,000/=</i> |
| <i>3. Musa Bonde</i> | <i>Tshs. 500,000/=</i> |
| <i>4. Ney Mnola</i> | <i>Tshs. 500,000/=</i> |
| <i>5. Musa Mtiniha</i> | <i>Tshs. 500,000/=</i> |

6. *Hassan Anafi Mdeda* Tshs. 500,000/=

7. *Hanafi Hassan* Tshs. 500,000/=

It is indicated in this document that payments were made before the respondent on 4th February, 2016. All seven retrenched employees signed. This evidence exculpates the respondent from the culpability.

With the available evidence, I am satisfied that the finding of the learned trial Resident Magistrate that the case against the respondent was not proved beyond reasonable doubt cannot be faulted. The appellant's complaint that there was failure on part of the Resident Magistrate to appreciate the evidence which proved the case beyond reasonable doubt lacks and legal and evidential backing.

In consequence, I dismiss the appeal and endorse the trial court's finding of the respondent's acquittal.



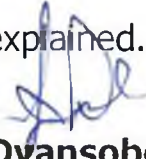

W. P. Dyansobera

Judge

19. 7.2021

This judgment is delivered under my hand and the seal of this Court this 19th day of July, 2021 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney for the appellant and in the presence of the respondent.

Rights of appeal to the Court of Appeal explained.



W.P. Dyansobera

Judge

