IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 159 OF 2020

BHOKE CHACHA KUBYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court of Musoma at Musoma in Criminal Case No. 1 of 2020)

JUDGMENT

20th and 25th August, 2021

KISANYA, J.:

In the Resident Magistrate's Court of Musoma, the appellant and one Bitara Mosoba Bitara (hereinafter referred to as the 2nd accused) were jointly but separately charged with the offence of corrupt transactions contrary to section 15(1) (a) of the Prevention and Combating of Corruption Act, No. 11 of 2007. After a full trial, they were convicted as charged and were sentenced to pay a fine of five hundred thousand shillings (TZS 500,000/=) or to serve custodial sentence for three (3) years in case of default.

The particulars of the offence in respect of the charge laid against the appellant were as follows:

> *"Bhoke Chacha Kubyo, on 17th November, 2018 at Tarime District Court in Mara Region, being a Resident Magistrate at Nyamwigura Primary Court, did corruptly receive Tshs.*

2,000,000 through her CRDB Account No. 0152390171500 from Bitara Mosoba who deposited such account through via CRDB Agent as a reward after delivering judgment on his favour in civil case No. 39/2018 and 40/2018, a matter which related to her Principal's affairs named the Judiciary of Tanzania."

With regard to the charge against the 2nd accused, it was alleged that on the same date and place, he corruptly gave TZS 2,000,000 to the appellant as a reward after being favored in Civil Cases No. 39/2018 and 40/2018, a matter which related to Principal's Affairs of the appellant.

The appellant and 2nd accused pleaded not guilty to the charge. In a bid to prove its case, the prosecution called eight witnesses namely, Veronica Lucas Mugendi (PW1); Gadiel Philemon Sawe (PW2); Joseph Manyanya Komba (PW3); Perpetual Hamis Matiku (PW4); Kisamvule Nyerere Mwita (PW5); Mlekwa Mang'ula Mraku (PW6); Johanes Alego Michael (PW7) and Msafiri Abdullah Mafundo (PW8).

The prosecution case was also based on seventeen (17) documentary exhibits to wit: Case file in respect of Civil Case No. 39 of 2018 (Exhibit P01); Case file in respect of Civil Case No. 40 of 2018 (Exhibit P02); Appellant's Personal file (Exhibit P04); Garnishee orders which stemmed from the decisions of Nyamwigura Primary Court Primary Court in Civil Case No. 39 of 2018 and of Civil case No. 40 of 2018 (Exhibit P05); Letter instructing NMB Bank to release withdrawal of TZS 45,000,000 from PW7's account (Exhibit P06); and letter

from PCCB Tarime (Exhibit P07). Other exhibits were, bank statement of account maintained by Johanes Arego Michael (PW7) at NMB Bank (Exhibit P08); a bank statement of account maintained by Bitara Masoba Bitara at NMB Bank (Exhibit P09); Bank Statement of account maintained by Bhoke Chacha Kubyo (appellant) at CRDB Bank (Exhibit P10); bank statement of CRDB Agent namely, Perpetual Hamis Matiku (Exhibit P11); certificate of seizure (Exhibit P12); Copy of EFD receipt (Exhibit P13); register from Teachers Service Commission-Rorya District (Exhibit P14); agreement titled *Hati ya Mkataba wa Kupokea Bidhaa* between PW7 and 2nd accused (Exhibit P15);Cautioned Statement of the appellant (Exhibit P16); Cautioned Statement of the 2nd accused (Exhibit P17).

To appreciate what led to the arrest, arraignment and conviction of the appellant, it is pertinent to narrate the background facts of this matter, albeit in brief. Pursuant to the prosecution evidence, the appellant was a resident magistrate stationed at Nyamwigura Primary Court within Tarime District from 2012 to 2019. One of her duties was to hear and determine cases.

On 22/10/2018, the 2nd accused instituted two cases against Johanes Arego Michael (PW7). These were Civil Case No. 39 of 2018 and Civil Case No. 40 of 2018 in which the 2nd accused claimed for twenty-five million shillings and twenty million shillings, respectively. He alleged that the claimed amount arose from the loan that had been advanced to PW7. Both cases were assigned to

the appellant. She heard the parties on the same date (22/10/2018). Ultimately, the judgments on admission were entered against PW7 after admitting to the 2nd accused's claims. Subsequent to that decision, the appellant issued two garnishee orders dated 22/10/2018 to freeze PW7's account No. 30402401435 maintained at NMB Bank, Tarime Branch.

It was the prosecution case that, on 16/11/2018, the appellant wrote a letter instructing the bank to permit withdrawal of TZS 45,000,000 from PW7's account. Upon withdrawing the monies, PW7 deposited 25,000,000 in the 2nd accused's account maintained at NMB Bank. On the next day (17/11/2019), the appellant's account No. 0152390171500 at CRDB Bank was credited with TZS 2,000,000. The prosecution contended that the money deposited by the 2nd accused was a reward to the appellant after delivering judgments in his favor.

In their defense, the appellant and 2nd accused denied to have been involved in the alleged corrupt transactions. To support her own sworn testimony, the appellant called three witnesses. These were Jumanne Daniel Chacha (DW2), Martinde Murango (DW3) and Simion Mwita (DW4). The appellant admitted that she presided over Civil Cases No. 39 and 40 of 2018. She also admitted that TZS 2,000,000 was credited in her account. However, she vehemently disputed that the said sum of money was a reward from the 2nd accused.

On his part, the 2nd accused admitted to have deposited the money in the appellant's account. He contended to have received the same from the appellant's husband (DW6) who instructed him to deposit in favour of his (2nd accused) second wife but deposited in the appellant' account by mistake. He called the Desmond Josephat Danda (DW6) who happened to be the appellant's husband to support his defense. He also called Deus Stanslaus Machange (DW7) who works for him.

The trial court believed that the prosecution had proved its case and thus, convicted and sentenced the appellant and 2nd accused as indicated herein. In their joint appeal to this Court, the appellant and 2nd accused sought to fault the trial court's findings on conviction and sentence upon the following grounds of appeal: -

1. *That, the learned trial magistrate erred in both law and facts by entering conviction and sentence whereas the prosecution side did not prove the case beyond reasonable doubt.*
2. *That, the learned trial magistrate erred in law by admitting cautioned statement as confession whereas it was not recorded and tendered by proper person.*
3. *That, the learned trial magistrate erred in law and fact by entering conviction and sentence whereas there was no actus reus and mens rea.*
4. *That, the right to be heard was not fully provided since the tendered exhibits were not read in court and were not given the right to re-examining our witnesses.*
5. *That the act of prosecutor to institute the case in Musoma Resident*

Magistrate Court and change of magistrate without any knowledge from us amounted to forum shopping that act is not allowed in law.

6. *That, the learned trial magistrate erred in law and facts by entering conviction and sentence since there were variances among witnesses and charge sheet and evidence.*

When this appeal was called on for hearing on 21/05/2021, the appellant appeared in person while, Ms. Agma Haule, learned State Attorney, appeared for the respondent. The second accused defaulted to appear. Therefore, his appeal was dismissed for want of prosecution under section 383 of the Criminal Procedure Act [Cap. 20, R.E.2019].

In the course of composing judgment, I noticed that the accused persons were not accorded the right to cross-examine each other and the witnesses called by the adverse party. Therefore, I was inclined to recall the parties to address me on the matter. This time the respondent was represented by Mr. Nimrod Byamungu, learned State Attorney.

Submitting in support of the appeal, the appellant argued that the prosecution did not prove its case beyond all reasonable doubts. Her argument was premised on the fact that, Exhibits P01 to P14 were not read over after being admitted in evidence thereby denying her to understand the content thereto for purposes of cross-examining the prosecution witnesses. Relying on the decision of the Court of Appeal in **Erneo Kidilo and Another vs R**, Criminal Appeal No. 206 of 2017, CAT, the appellant urged the Court to expunge

Exhibits P01 to P14.

The appellant went on to fault the trial court for failing to consider her defence and exhibits that she could not hear the case subject to the offence at hand on the dates stated by the prosecution because she was on annual and maternity leave. Referring the Court to the case of **Daniel Severene and 20 Others vs R**, Criminal Appeal No. 431 of 2018, the appellant argued that the trial court was required to consider her defence.

The appellant submitted further that the prosecution did not prove that the money deposited in her account was a reward because the victim of the offence was not called to testify. She argued further that while, PW7 was named by PW8 as the victim of crime, PW7 stated on oath that she knew nothing about the corruption of TZS. 2,000,000 deposited by the 2nd accused in her account.

It was submitted further by the appellant that the cautioned statement was recorded by unauthorized officer. She relied on section 8(1) (2)(5) of the PCCA which provides that a person who performs duties under that Act must be authorized by the Director General.

On the issue raised by the Court, the appellant submitted that she was denied the right to cross-examine the 2nd accused who gave evidence which implicated her. She substantiated that the 2nd accused stated to have deposited money in her account while her evidence was that she did not receive money from the second accused. Ultimately, the appellant implored me to quash the

conviction and set aside the sentence.

Responding to the appeal, Ms Agma submitted that the prosecution case was proved beyond all reasonable doubts. On the second ground of appeal that the cautioned statement was recorded by unauthorized officer, the learned State Attorney submitted the said cautioned statement was recorded by PW8 who is an investigator working with the PCCB. She went on to contend that an investigator of the PCCB has powers to record the cautioned statement.

As regards the third ground that there was no *actus reus* and *mens rea*, Ms Agma submitted that the persons who gave and received corruption were charged with the offence of corrupt transaction. She submitted further that the *actus reus* was proved by PW3, PW4 and PW5 who testified that the appellant's account was credited with TZS 2,000,000 deposited by Bitara who happened to be the 2nd accused. The learned state Attorney went on to contend that the *mens rea* was the appellant's failure to report about the money deposited in her account.

With regard to the fourth ground, Ms Agma conceded that, Exhibits P01 to P14 were not read over in court. She submitted that the proper recourse is to expunge them from the record. However, she went on to submit that the evidence of the witnesses who tendered the said exhibits remains intact and did prove the case against the appellant. She fortified her submission by citing the case of **Issa Hassan Uki vs R**, Criminal Appeal No. 129 of 2017, CAT at

Mtwara. The learned state Attorney contended that all prosecution witnesses were credible. She then asked the Court to believe them as held in **Goodluck Kyando vs R** (2006] TLR 365.

Submitting on the fifth ground, the learned State Attorney argued that the transfer of the case from one magistrate to another was done in accordance with the law.

Responding to the sixth ground, Ms. Agma submitted that there was no variance between the charge and evidence adduced by the prosecution. She was of the firm view that the charge was proved beyond reasonable doubt.

With regard to the issue raised by the Court, Mr. Byamungu readily conceded that the trial was not fair because the appellant was denied the right to cross examine the 2nd accused (DW5) and DW6 who testified to have deposited money in the appellant's account. He was of the view that the said irregularity caused miscarriage of justice. On the way forward, the learned State Attorney moved the Court to make an order for retrial. He cited the case of **Gift Mariki and 2 Others vs R,** Criminal Appeal No. 289 of 2015, CAT at Arusha (unreported) where similar recourse was taken by the Court of Appeal in akin situation.

Rejoining, the appellant argued that this was not a fit case for the Court to order retrial because the prosecution did not prove its case. She also submitted that none of the witnesses who deposed that the money credited in

her account was related to corrupt transaction. The appellant contended that the cautioned statement was not recorded by a police officer as provided for under section 57 of the CPA. She reiterated his submission that there was no evidence that the 2nd accused was the one who deposited the money in her account. Lastly, she was of the view that, in the absence of Exhibits P01 to P14 the remaining evidence was not sufficient to prove the case laid against her.

I have carefully reviewed the record of the trial court and the submission by the parties. In determining whether this appeal is meritorious or otherwise, I will address the issues raised in the petition of appeal and during the hearing of the appeal.

I prefer to start with the issue of failure by the trial court to accord the appellant and 2nd accused, a right to cross-examine each other and cross-examine their respective witnesses. This right is based on the right to a fair trial which is one of the principles of natural justice enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). Some of the objectives of cross-examination include testing veracity of the witness, shaking credit of the witness or discovering his position in life. This is pursuant to section 155 of the Evidence Act [Cap. 6. R.E. 2019) which reads:

> ***When a witness is cross-examined, he may, in additional to the questions herein before referred to, be asked my question which held-***
>
> *(a)* ***to test his veracity;***

(b) to discover who he is and what is his position in life; or

*(c) **to shake his** credict, by injuring his character;*

although the answer to such questions might tend to directly or indirectly to incriminate him, or might-expose or tend directly to expose him to a penalty or..... "(Emphasis added)"

The law is settled that an accused person is entitled to cross-examine a co accused who gives evidence that is adverse to him. This position was underscored by the Court of Appeal in the case of **Gift Mariki** (supra) referred to by Mr. Byamungu. In that case, the Court of Appeal cited with approval the decision of the defunct Court of Appeal for Eastern Africa in **Mattaka and Others v. R** [1971] E.A 495 pp.502-503 where it was held that:-

*"It well established that **where accused person gives evidence that is adverse to a co-accused, the co-accused has a right to cross- examinatio**n (See, **Ndania Karuki v,R, (1945) 12 EA.CA 84** and **Edward Msengi v,R**, (1956) 23 EA.CA. 553)"*

It was also held in the same case of **Mattaka and Others** (supra) that:

"It is well established that where an accused person gives evidence, that evidence may be taken into consideration against a co-accused, just like any other evidence, Evidence which is inconsistent with that of the co-accused may be just as injurious to his case as evidence which expressly seeks to implicate him, should we think, give rise to a right of cross-examination"

As rightly argued by both parties, the appellant and 2nd accused were not

given a chance to cross-examine each other and also cross-examine the witnesses called by the adverse party. However, upon thorough review of the record, I find nothing suggesting that the 2nd accused and DW6 gave evidence which implicated the appellant in this case.

The crux of the matter is TZS 2,000,000 deposited in the appellant's account. I agree with both parties, the appellant contended in her evidence on oath that the prosecution had not proved that the money was deposited by the 2nd accused. She also denied to have received any reward from the second accused. On the other hand, the second accused testified he was businessman dealing with electronic money transactions. He admitted to have deposited the money on instruction of DW6 who left the money with him for that purpose. This evidence was supported by DW6. The 2nd accused went on to account that he used another CRDB's Agent because that he had no enough fund (float) to finalize the transaction. In the end, he refused to have rewarded the appellant.

In my view, the evidence adduced by DW5 and DW6 did not implicate the appellant. They gave evidence which was in line with the appellant's statement in her cautioned statement (Exhibit PE16) which is reproduced hereunder:

> *"SWALI: Je fedha hii kiasi cha TZS, 2,000,000 iliyoingizwa kwenye akaunti yako siku ya tarehe 17/11/2018 na ndugu BITARA ilikuwa ya nini.*
> *JIBU: Fedha hii kiasi cha TZS, 2,000,000 ilitokana na mauzo ya*

mahindi na nyanya ambapo kiasi hiki cha fedha Tshs 2,000,000/ nilimpa mume wangu ndugu DESMOND JOSEPH DANDA ili aniwekee kwenye akaunti yenye namba 0152390171500 lakini DESMOND JOSEPH DANDA alimpa ndugu BITARA aweke fedha hizo kwenye akaunti yangu yenye namba hizo zilizotajwa hapo juu kwa sababu ndugu BITARA ni mfanyabiashara ya huduma za kifedha ikiwemo FAHARI HUDIMA (CRDB Wakala na M-PESA. Bitara alipewa fedha hiyo aiingize kwenye akaunti yangu kwa sababu mume wangu DESMONDI JOSEPH DANDA alikuwa amesafiri kuelekea KISII. Pia alimuachia kwa sababu benki zinachelewa kufunguliwa. Hivyo, kumpa BITARA kumwekea fedha hiyo ilikuwa muhimu kuliko kusubiri hadi benki zifunguliwe hangewahi safari yake. Pia mume wangu DESMOND JOSEPH DANDA mnamo tarehe 05/11/2018 aliniwekea fedha kiasi cha TZS, 2,300,000/=. Pia nimewahi kufanya miamala mbalimbali na ndugu BIRATA ya kutoa na kuweka fedha kwa njia ya FAJARI HUDUMA, M-PESA pia huwa ananinulia umeme."

Therefore, it is clear the evidence adduced by second accused and DW6 did not prejudice the appellant. They did not give evidence which incriminated the appellant. For that reasons, I am satisfied that, the said omission did not cause miscarriage of justice for this Court to hold the trial a nullity.

Reverting back to the grounds of appeal, I will start with the 2nd ground which raises the issue whether the person who recorded and tendered the cautioned statements (Exhibits P16 and P7) was not competent. As rightly submitted by Ms. Agma Exhibits P16 and 17 were recorded by PW8 who introduced himself as officer working with the PCCB. PW8 stated, among others,

that he was assigned to investigate the case at hand. In the course of exercising that duty, he had the power of a police officer of or above the rank of Assistant Superintendent of Police as provided for under section 8(2) (b) of the PCCA. Therefore, PW8 was authorized to record cautioned statement under relevant provision of the PCCA. He was also competent person to tender the same. Thus, the second ground fails for want of merit.

Next for consideration is the fifth ground that the institution of the case in Musoma Resident Magistrate Court and change of magistrate without the appellant's knowledge were illegal. In terms of sections 41 and 42 of the Magistrate Courts Act (Cap. 11, R.E. 2019), the court of a resident magistrate has jurisdiction in all proceedings in respect of which jurisdiction is conferred on it or a district court presided over by a resident magistrate in the exercise of its original jurisdiction. The offence at hand is triable by the court of a resident magistrate or district court. Since it was committed in Tarime District within Mara Region, the District Court of Tarime and Resident Magistrate Court of Musoma had concurrent jurisdiction to try the same. The prosecution found it appropriate to institute the case in the Court of Resident Magistrate of Musoma which admitted the said offence.

As regards the second limb of this ground, the law does not bar the case to the change hands from one magistrate to another. The settled law requires the reason for the transfer of the case from one magistrate to another to be

recorded. See for instance, the case of **Abdi Masoud Iboma and 3 others vs. Republic**, Criminal Appeal No.116 of 2015, (unreported) where it was held that:

> *"The provision requires that reasons be laid bare to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacked authority and jurisdiction to proceed with the trial and consequently all such proceedings before him were nullity."*

It is on record that this case was initially assigned to Hon. Swai SRM However, before the preliminary hearing could commence, the case was transferred to Hon. E.R. Marley-RM. Although, the case was not partly heard, he complied with the provision of section 214 of the CPA by stating the reasons for transfer. He went further to ask the appellant and 2nd accused on whether they had any objection against him. Both accused person indicated that they had no objection against the succeeding magistrate to preside over the case.

From the foresaid findings, I am of the firm view that the fifth ground is unfounded.

With regard to the fourth ground on the procedure of admitting the exhibits, the appellant and the learned State Attorney were at one that the documentary exhibits (Exhibit P1 to P14) were not read over after they were admitted in evidence. They therefore implored me to expunge the said exhibits from the record.

The principle of law as stated in **Robinson Mwanjisi and Three Others vs R.** [2003] T.L.R. 218 is that in order to the documentary evidence to be acted upon, it must pass three stages namely, clearance, admission and reading out in court. These stages were also stated in **Lack Kilingani vs R**, Criminal Appeal No. 404 of 2015 (unreported) when the Court of Appeal held:

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful The Court in, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence"*

It is also settled law that the omission to read over documents admitting them in evidence leads to unfair trial to the accused because he is denied to understand the contents thereto for purposes of making a proper defense. Apart from the cases of **Erneo Kidilo** (supra) and **Issa Hassani Uki** (supra) cited by the appellant and the learned State Attorney, respectively, this position was stated in **Lack s/o Kilingani** (supra), **Kassim Salum v. R**, Criminal Appeal No. 186 of 2018 (unreported) and **Kurubone Bagirigwa and Three Others vs R.**, Criminal Appeal No. 132 of 2015 (unreported).

In the instant case, although Exhibits P01, P02, PO3, P04, P05, P06, P07, P8, P09, P10, P11, P12, P13 and P14 were admitted without objection from the

appellant and 2nd accused, the trial court did not read over the contents of the said exhibits. Therefore the omission was fatal and occasioned a miscarriage of justice to the appellant who could not make a proper defense. Guided by the settled law in the above cited cases, Exhibits P01, P02, P03, P04,P05, P06, P07, P8, P09, P10, P11, P12, P13 and P14 are hereby expunged from the court's record.

In view of the foresaid, I have earnestly considered whether the remaining oral direct evidence of the eight prosecution witnesses proved the offence of corrupt transaction laid against the appellant. On this, I have noted that the prosecution managed to prove that the appellant presided over Civil Cases No. 39 of 2019 and Civil Case No. 40 of 2018 lodged by the 2nd accused at Nyamwigura Primary Court. This fact was not disputed by the appellant in her sworn evidence. She called the court clerks (DW2 and DW3) and one of the assessors (DW4) who sat with her during the hearing the said cases. It is also common ground that both cases were, on 22/10/2018 decided in favor of the 2nd accused.

The prosecution proved further that on 17/12/2018, the appellant's account was credited with two million shilling deposited by the 2nd accused. Such evidence is reflected in the cautioned statements by the appellant and 2nd accused (Exhibits P16 and 17) and the evidence adduced by DW5 and DW6. It was also corroborated by PW4 and PW5 whose evidence was to the effect that

the said amount was deposited by one, Bitara.

The crucial issue is whether the money deposited in the appellant's was a corrupt transaction. The trial court decided that issue in affirmative. Its decision was based on circumstantial evidence. This is reflected at page 11 of the typed judgment when the learned trial magistrate held that:

> *"...circumstantially it remains with no doubt at all there was only one transaction deposited into the 1st account CRDB-Bank account that day to the tune of 2,000,000/=Tshs and it suffices to say it is clear in the eye of law and on the evidence adduced herein Court and I herein (sic) with doubt at all finds 1st accused person one Bhoke Chacha Kubyo guilty as charged..."*

I agree with the trial court that the case against the appellant hinged on the circumstantial evidence. There is a chain of authorities of this Court and the Court of Appeal elaborating on the principle governing the circumstantial evidence. It is trite law that an accused can only be convicted basing on the circumstantial evidence if all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. In **Mark Kasimiri vs R**, Criminal Appeal No. 37 of 2017, (unreported), the Court of Appeal elaborated on the following principles governing circumstance evidence: -

> *i. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively*

should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See ***JUSTINE JULIUS AND OTHERS VS REPUBLIC*** *, Criminal Appeal No. 155 of 2005 (unreported)).*

ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See,* ***SIMON MSOKE VS REPUBLIC, (1958) EA 715A and JOHN MAGULA NDONGO VS REPUBIC****, Criminal Appeal No. 18 of 2004 (unreported)].*

iii. *N/A*

iv. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected, [see* ***SAMSON DANIEL VS REPUBLIC*** *(1934) E.A.C.A. 154].*

v. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, [See* ***SHABANI MPUNZU @ ELISHA MPUNZU VS REPUBLIC,*** *Criminal Appeal No 12 of 2002(unreported)].*

vi. *That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See* ***ALLY BAKARI VS REPUBLIC (1992) TLR,***

***10 and ANETH KAPAZYA VS REPUBLIC**, Criminal Appeal No. 69 of 2012 (unreported).*

In our case, the trial court considered that, the 2nd accused deposited the money in the appellant's account one day after receiving TZS 25,000,000 related to the cases presided over by the appellant. Having expunged Exhibits P01 to P14, there remain the no evidence to prove that the appellant worked on the matter on 16/11/2018. Further, in terms of Exhibits P16 tendered by the prosecution, the appellant contented that the money was deposited by her husband (DW6) through the 2nd accused. Such evidence is reflected in 2nd accused's cautioned statement (Exhibit P17). It was also stated in Exhibits P16 and P17 that the 2nd accused was an agent dealing with mobile money and banks' transactions. Both Exhibits P15 and P16 reveal further that, the 2nd accused was an agent of CRDB Bank. The prosecution did not give evidence to disapprove that the 2nd accused was not dealing with the said business of financial transactions. The then CRDB Manager (PW3) and the investigator of this case (PW8) were not led on that matter.

That being the case, the appellant and/or his husband were not barred from receiving the services from the 2nd accused simply because the appellant had presided over and decided the cases in favor of the latter (2nd accused). Now, Exhibit P17 shows that DW6 left the money with the 2nd accused and instructed him deposit the same in the appellant's account. As stated earlier, the 2nd accused accounted that he decided to use another CRDB Agent after

realizing that he had no sufficient fund (float) to effect the transaction. Again, no evidence was adduced by the prosecution to disapprove the fact that the 2nd accused had no sufficient fund.

In view of the foresaid, I am of the considered view the facts did not irresistibly point to the guilt of the appellant. In other words, the circumstantial evidence was not proved beyond reasonable doubts. Had the learned trial magistrate considered the facts relied upon by the prosecution, he would not have decided that the appellant and the 2nd accused had no other business than the cases presided over by the former.

It follows that the trial court's consideration on the coincidences which led to deposit of the money in the appellant's account was a suspicion. The law is settled that, suspicion, however grave, is not a basis for a conviction in a criminal trial. See the case of **MT. 60330 PTE Nassoro Mohamed Ally vs R**, Criminal Appeal No. 73 OF 2002, CAT at DSM (unreported). Therefore, the appellant ought to have been given the benefit of doubt and acquitted.

In the final analysis, I allow the appeal, quash the conviction and set aside the sentence passed by the trial court.

DATED at MUSOMA this 25th day of August, 2021.

E.S. Kisanya
JUDGE

Court: Court: Judgment delivered through video conference this 25th day of August, 2021 in the presence of the appellant and Mr. Nimrod Byamungu, learned State Attorney for the respondent. B/C Gideon present.

E. S. Kisanya
JUDGE
25/08/2021