IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 9 OF 2021

(Original Criminal Case Number 250 of 2019 of the District Court of Kasulu at Kasulu before G.E. Mariki - PRM)

SIYOI WILSON NICODEMUS.....1ST APPELLANT

SAID MOHAMED.....2ND APPELLANT

WILBERT LIMBE KASUKA.....3RD APPELLANT

GABRIEL IMBRAHIM GASTO.....4TH APPELLANT

PETER JAPHET BITESIGIRWE.....5TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

17/9/2021 & 25/10/2021

I.C MUGETA, J.

Dotto Wilson and Gerald Wilson are siblings. They testified as PW12 and PW13 respectively. Their evidence is to the effect that on 20/6/2019 while asleep, police officers whom they identified to be the appellants, searched their residence and impounded 6 ½ bags of Cannabis sativa (bhangs). The search was witnessed by Nimrod Moses Mlaligwa (PW1) who on that day was Acting Village Executive Officer (VEO) of Nyenge Village, Kasulu District. Dotto and Gerald, allegedly, were arrested and taken away by the appellants.

Mugeta

On the way, the appellants, allegedly, solicited Tsh 5,000,000/= as Bribe. It is the prosecution's case that at the same night, Nestory Wilson Chahaga (PW2) and Elisia Solomon (PW3) who are relatives of Wilson and Gerald raised Tshs 3,000,0000/= which they paid to the appellants. The balance Tshs 2,000,000/= was paid on the next day by Elisia Solomon after withdrawing it from M-Pesa Kiosk operated by Mussa Hamis Sengiti (PW5). The last instalment was paid in the presence of Editha Solomon (PW4). Having fulfilled the promise, Wilson and Gerald were released without criminal prosecution.

Consequently, the appellants were charged with three counts. The first count is corrupt transaction c/s 15 (1) (a) and (2) of the Prevention and Combating of Corruption Act No. 2/2007. In this count it is alleged that the appellants corruptly obtained Tshs 3,000,000/= from Elisia Solomon as an inducement to forbear taking legal action against Dotto Wilson and Gerald Wilson.

The second count is also corrupt transaction charged under the same section as above. It is alleged that on 21/6/2019 they corruptly obtained Tshs 2,000,000/= from Elisia to also forbear taking legal action against Dotto Wilson and Gerald Wilson. The 3rd count is in the alternative to both the 1st and 2nd counts. It is also about corrupt transactions c/s 15(1)(a) and (2) of

Mgeta

the Prevention and Combating of Corruption Act No. 11/2007 (the PCCA). In the Particulars of the offence it is alleged that they corruptly solicited Tshs 5,000,000/- from Dotto Wilson to forbear from taking action against Dotto Wilson and Gerald Wilson after arresting them for possessing 6 ½ bags of bhang. After trial the appellants were convicted and sentenced in the first and third counts to a fine of Tshs 500,000/= or three years imprisonment. In the second count they were sentenced to absolute discharge. All appellants were aggrieved not only by the conviction but also the sentence, hence, this appeal predicated on four grounds of appeal: -

i. *That the trial court erred in law and fact by convicting the appellants without proof to the required standard.*
ii. *That the trial Court erred in law and in fact in holding that the prosecution has proved their case beyond reasonable doubts.*
iii. *That the trial Court erred in law and fact by convicting the appellants based on contradicted (sic) evidence.*
iv. *That the trial Court erred in law and in fact basing its conviction and sentence on hearsay evidence which is not admissible and abuse to Court Process.*

Zephania Bitwale, learned advocate, represented the appellants while Shaban Masanja, learned State Attorney appeared for the Republic. As the grounds of appeal are intertwined in their import, the counsel for the appellant argued

them jointly under one complaint that the offence was not proved beyond reasonable doubts. The learned counsel complained about several issued including, firstly, that the withdraw of the money for the bribe from mobile money transactions was not proved by paper trail. Secondly, that the evidence of PW3 and PW5 was inconsistent regarding the money withdrawn through M-Pesa mobile money service. According to him while PW3 said it was Tshs 1,992,000/=, PW5 said it was Tshs 2,000,000/=. In the same vein, he argued that PW5 failed to prove that he is M-Pesa agent as he did not tender any identity card. Relying on **Ole senitabau V. R** [1987] T.L.R 47, the learned counsel submitted that the inconsistences entitled the trial court to hold that the evidence of PW3 and PW5 was unreliable. Thirdly, that the bhang was not tendered in evidence which would have established a link with bribe solicitation. Fourthly, that the trial court did not consider the defence in exhibit D1 that the appellants found the bhang abandoned along the road. He referred to **Khalid Hussein Lwambano V. R.** Criminal Appeal No. 473/2016, Court of Appeal – Iringa (Unreported) at Page 15 and submitted that failure to consider the defence evidence is fatal. Lastly, he complained that PW12 & PW13 said they face charges for possession of bhang but the charge sheet was not tendered.

Shaban Masanja, learned State Attorney for the Respondent opposed the appeal. He submitted that there is no inconsistences in the evidence of PW3 and PW5 because PW5 clarified that PW3 withdrew Tshs 1,992,000/= instead of Tshs 2,000,000/= because the balance was charged as withdrawal fees. On tendering documents to prove electronic money transaction he submitted that documentary evidence is not superior to oral evidence where the witness giving oral evidence is credible. The learned State Attorney reffered to **Abas Kondo Gede V. R** Criminal Appeal No. 472/2017, Court of Appeal – Dar es Salaam (Unreported) where it was held that oral evidence of credit without documents is sufficient. On the other front, the learned State Attorney submitted that tendering of bhang as exhibit was unnecessary because the issue before the Court was bribe not possession of bhang despite the fact that the parties are at issue on how it was obtained. The same applies to the charge sheet against PW12 and PW13 as in their evidence at page 94 and 95, PW13 testified that they face a criminal trial on charges of possession of bhang. On failure to consider the defence, he submitted that the defence in exhibit D1 was considered but it was found incapable of raising any reasonable doubts in the prosecution's case.

In rejoinder, counsel for the appellant submitted that the Abas Kondo's case (supra) has been misapplied as the holding was not intended to mean that were electronic transaction evidence is at issue, one can just narrate about it without documentary proof. The same applies to the bhang. It ought to have been tendered.

In my view parties are at issue on three points, firstly, whether the appellants arrested PW12 and PW 13 for possession of bhang. Secondly, whether upon arrest the appellants solicited bribe from PW12 and PW12 and thirdly, whether the appellants received bribe from PW12 and PW13.

The trial Court answered all the issues in the affirmative. Starting with the first issued, indeed, the bhang was not tendered in evidence by the prosecution. However, the appellants tendered exhibit D1 to prove that they surrendered bhang to the police station after coming across it abandoned in the bush when they were on patrol. The issue, therefore, is not existence of the bhang but its origin. The trial Court rejected the defence that it was found abandoned. It relied on credibility of witness principle to find that the bhang was impounded while in possession of PW12 and PW13. The trial court believed PW12 and PW13's story that they were arrested with the bhang. That story is supported by PW1 (Nimrod Moses Mlaligwa) the Acting Village

Executive Officer (VEO) who witnessed the search and the impounding of the bhang from the residence of Dotto Wilson and Gerald Wilson.

I agree with the learned trial Magistrate that the prosecution witnessed, namely, PW1, PW12 and PW13 are credible. The VEO was clear and uncontradicted on his testimony that the appellants required him to witness the search at the residence of PW12 and PW13 where the bags of bhang were impounded. E.78444 Dsgt Abdul is the duty roaster master at Kasulu Police Station. He testified that the appellants were on duty to patrol the Kasulu township on the incident night. This evidence makes the fact that the appellants searched the victim's residence highly probable. It follows, therefore, that exhibit D1 was the appellant's attempt to cover up how they came into possession of the bhang. The complaint by Counsel for the appellants that the trial Court did not accord any weight to exhibit D1 is unjustified. After considering the evidence from both sides on where the 6 ½ bags of bhang came from the trial Court held: -

> *'The evidence from defence that the sacks of cannabis sativa were arrested (sic) at Kagera Nkanda area are defeated by the adduced evidence and the above stated surrounding circumstances'.*

In short, the trial court was satisfied that the prosecution evidence and the circumstances surrounding the case proved that the bhang was impounded from PW12 and PW3 as alleged by the prosecution and not that it was found by the appellants abandoned along the road. I agree with the finding of the trial Court. The issue whether PW12 and PW13 were arrested with bhang by the appellants is answered in the affirmative.

On receiving bribe, it is my view that since the prosecution witnesses, namely, PW12 and PW13 have been found to be credible on their evidence that they were arrested with bhang, I find no reason not to believe them on their account that they were discharged by the appellants upon paying Tshs. 5,000,000/=. In my view, the evidence from PW2, PW3, PW4, PW12 and PW13 on how the bribe money was paid and received as narrated above when weighed against the general denial of the appellants that they received no bribe, one cannot avoid holding that the evidence of the prosecution is more credible. I find the complaint that the withdrawal of the bribe money from mobile money transaction was not proved as unjustified. The manner the bribe money was obtained is not a fact in issue. The issue is whether the appellant received the money by two instalments which I answer in the affirmative. Indeed, the money sent and received by mobile money transfer

differs from Tshs 2,000,000/= to Tshs 1,992,000/= as stated by PW2, PW3, and PW5. However, I hold that the difference on money withdrawn was caused by withdrawal fees as submitted by Masanja and reflected in the evidence of PW5. Regarding the complaint on paper document for withdrawing the money, I hold that oral evidence on how the witnesses got the money they paid as bribe does not need to be corroborated by paper trail on how that money was withdrawn. The issue is whether that money was paid as bribe. It is enough when the court finds a witness who says he paid bribe to be credible. The trial Court, therefore, was right to hold that the appellants received Tshs 5,000,000/= as bribe and received the same in two instalments. The charge was proved and the trial Court was right to convict the appellants in the first and second counts.

On solicitation, it was upon the prosecution to prove that the appellants solicited bribe. Once again, the trial Court believed PW12 and PW13 on their evidence that after they had been arrested, they bought back their freedom upon payment of Tshs 5,000,000/= and the appellant's solicitation. The appellants denied generally that they are unfamiliar with PW12 and PW13 and that they never met or arrested them on the incident date. However, the appellants explanation is unsatisfactory. They had more explanation to rebut

Mgeta

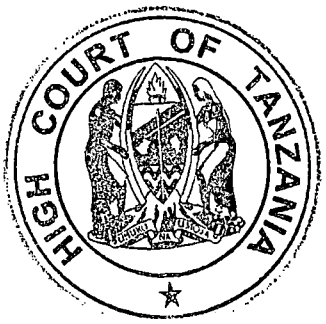
the evidence of the VEO that after the search and impounding of the bhang the appellants arrested PW12 and PW13 as suspects and left with them. Therefore, no doubt, the appellants solicited for bribe before it was paid. The solicitation charges was proved to the hilt.

The trial Court, however, fell into error to convict and sentence the appellants in the third count of solicitation because it was charged in the alternative. Both counsel for the appellant and the learned State Attorney agreed that having convicted the appellant in the first two substantive counts, the alternative count died a natural death. However, they part company on what the appellate court should do in such a situation. While the learned State Attorney is of the view that the conviction in the alternative count ought to be quashed, the counsel for the appellant is of the view that conviction in all counts ought to be quashed. He cited the case of **Derick Alphonce & Simon Seleman V. R,** Criminal Appeal No. 23/2015, Court of Appeal – Mbeya (Unreported) to buttress his argument. I agree, with the learned State Attorney. The remedy is limited to quashing the conviction in the alternative count. The principle in the case of Derick Alphonce (supra) has been misapplied to the facts of this case by counsel for the appellants. I, therefore,

quash the conviction and sentence of the appellants in the alternative third count.

On the sentence, the appellants were sentenced to absolute discharge in the second count for a reason that Tshs. 2,000,000/= paid in the second instalment was part of Tshs 5,000,000/= solicited, therefore, it was part of the transaction in the first count. I do not agree with the learned trial Magistrate. The act of receiving bribe constitutes an independent offence per each transaction even where each transaction is part of a bigger deal. Therefore, upon conviction for receiving Tshs 3,000,000/= and Tshs 2,000,000/= in the first and second counts respectively, the appellants ought to have been sentenced to the statutory punishment prescribed under the law in each count. I, therefore, set aside the sentence of absolute discharge in the second count and substitute it with a fine of Tshs 500,000/= for each accused person or three years imprisonment in default. However, since the appellants paid the equivalent sum in the alternative count whose conviction I have quashed, they need not to pay any further sum.

In the event, I find the appeal without merits. I dismiss it.



I.C MUGETA

JUDGE

25/10/2021

COURT: Judgement delivered by Video conference before Zephania Bitwale, advocate from the Appellant and Shaban Masanja for the Respondent.

Sgd: I.C MUGETA

JUDGE

25/10/2021