

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

CRIMINAL APPEAL NO. 71 OF 2021

(Arising from District Court of Biharamulo at Corruption Case No. 2/2020)

REPUBLIC APPELLANT

VERSUS

JUDITH HANS KIBONA @ JUDITH KIBONA..... RESPONDENT

JUDGMENT

Date: of Judgment: 25.3.2022

A.Y. Mwenda, J

The respondent in this appeal was arraigned before the District court of Biharamulo for offences under the Prevention and Combating Corruption Act, No. 11/2007. She faced three counts of corruptly soliciting advantage worth Tshs. 3,000,000/ and three counts of Corruptly obtaining advantage worth Tshs. 3,000,000/= Contrary to Section 15(1)(a) and 2 of the said Act.

Briefly, the facts leading to this case are that the respondent (before commission of the offences she was charged with) was a District Educational Officer for Secondary Schools in Biharamulo District. One of her duties was to make follow up of Schools Registrations when need arose. Sometimes between 20th August and 5th September 2019 the respondent's office wrote letters instructing head

masters of Mubaba, Kagango and Nyantakara Secondary Schools to contribute Tsh. 1,000,000/= each to facilitate their respective Schools' Registrations. The said registration was to take place in Dar es Salaam and Dodoma. The headmasters from the said Schools complied and each deposited Tshs. 1,000,000/= to the respondent's personal Account in NMB Bank, Account No. 31108101560. According to evidence from prosecution's side, the respondent knew that she was not required to seek contributions from schools to cater for registration exercise.

When called to defend her case, the respondent denied the allegations levelled against her by the prosecutions. She testified that when she was appointed as Secondary School Education officer in 2018 she discovered that four Secondary schools were not registered contrary to education regulations. These Secondary Schools are Nyakanazi, Kagango girls, Nyantakara and Mubaba Secondary School. She then consulted the DED and the respective headmasters on the importance of having schools registered. She said DED conceded to her proposal and as such she wrote a letter to Headmaster for Kagango Girls Secondary School instructing him to contribute Tshs 1,000,000/= to facilitate school's registration exercise. Later (she said), while out of her work station one MariaStella Makwaya (PW 8), the acting Secondary Schools Educational Officer, wrote two more letters to Mubaba and Nyantakara Secondary School also seeking contributions of Tshs. 1,000,000/= from each school. She said contributions were sought as by that time

the office of DED had no money to carter for that activity. Further to that she said the whole exercise of giving instructions to contribute money and its release had blessings from DED and that the proper procedures were followed.

At the end of the judicial day the respondent/accused was acquitted in respect of all counts. Aggrieved by the said decision the Republic lodged the present appeal with five grounds, these are:

1. *That the Honorable Court erred both in law and facts by disregarding the weight of the prosecution's evidence on the offence under the charge sheet.*
2. *That the Honorable court erred both in law and facts by ordering the institution of civil suit on the matter of corruption.*
3. *That the Honorable court erred both in law and facts by holding that the Schools had a duty to pay for the fund of registration (sic) to the accused person while the schools are not accused person's employer.*
4. *That the Honorable court erred both in law and facts by disregarding the payments paid by the accused person's employer on the same matter.*
5. *That the Honorable court erred both in law and facts by ignoring the evidence of PW. 10 that it was not proper for accused person to demands for payments to the headmasters of the schools (sic).*

Before this court the appellant was represented by Mr. Fussi, learned State Attorney while the respondent was represented by Mr. Zedy Ally, learned Advocate.

Submitting in support of grounds of appeal Mr. Fussi, learned state Attorney begun by abandoning the 2nd, 3rd, 4th and 5th grounds of appeal thereby remaining with the 1st ground.

Submitting in support to the first ground of appeal the learned State Attorney stated that before the trial court the respondent was facing charges with six counts. Three counts for soliciting advantage and three others for obtaining the same. The learned state Attorney submitted that under Section 15(1)(a) and 2 of the Prevention and Combating Corruption Act, No. 11/2007 the prosecution is required to prove the following ingredients/key words, firstly, **corruptly soliciting**, secondly, **Advantage**, thirdly, **Inducement or award** and fourthly, **Principle and agent relationship**. According to him all the ingredients above were proved by the prosecutions. He said that from the records there is no dispute that the respondent was a Secondary Schools' District Educational Officer for Biharamulo District and for that matter she was performing her duties as an agent of Biharamulo District Council. He said this fact was also proved by PW.10 who was the DED for Biharamulo District Council and to him, this shows that she was working as an agent of Biharamulo District Council. He then cited the case of **DPP**

vs Peter Kibatara, Criminal Appeal No. 4/2015 CA, (unreported) to support this argument.

The learned State Attorney further submitted that there is no doubt that the respondent wrote letters instructing the Headmasters of the said schools to contribute money. He said the said money were then received by her while knowing that she was already been paid allowance for the same activity in the past. He said trial court erred to conclude that the respondent had capacity to instruct Headmasters of the said schools to contribute money for registration while the respondent was performing her duties in the contract of services and not contract for service. He said the respondent being in the contract of service she was then acting as the agent of her employer and for that matter there was a principal and agent relationship. Again, in support to this argument the learned State Attorney cited the ***Standing order for Public Service 2009, Code L 1, 2 G8*** and ***Code of Ethics and conduct for Public Service, Tanzania part VIII.***

With regard to the second ingredient of the offence which is ***advantage*** the learned State Attorney submitted that the moneys deposited into the respondent's account were advantage and he cited Section. 3 of PCCA Cap. 329 which defines advantage. He said in the course of preparing judgment the trial court asked itself whether the moneys she received *were un due advantage* but it misdirected itself

by focusing on how money was received and the procedure which preceded it. According to him, the procedure which was followed is not an issue but the purpose for which money were collected to cater for is what matters. He said by looking at the purpose for seeking contribution as advanced by the respondent, it is clear that it was an *advantage* which falls under corruption offences as was discussed by trial magistrate.

With regard to the third ingredient which is ***inducement*** the learned State Attorney submitted that this ingredient was also proved by the prosecution side when it revealed the purpose for seeking contribution which is *registration of school*. He supported this argument by citing the case of ***Sabato Nyabamba Mashauri vs. Republic*** page 4 – 6 and ***Buyigo Yusuph Mvuyekule vs. Republic, Criminal Appeal No. 16 of 2021*** at page 5, 6 and 7.

The learned State Attorney concluded his submission faulting the trial court's order which instructed the said Secondary Schools to file civil suits against the respondent to recover the said money which were deposited into her Account. When probed by this court if the republic would see issues differently if the said money was deposited in the DED's account, the learned State Attorney was of the view that if that was the case then there would be no problem at all. He thus prayed this appeal to be allowed as prayed in their memorandum of appeal.

Responding to the submissions by the learned State Attorney, Mr. Zedy Ally, learned advocate for the respondent opposed this appeal and prayed this appeal to be dismissed. He said the charges against the respondent were not proved to the standard required.

The learned Advocate submitted that a formal procedure was followed to get contribution money. He said, even the investigator, (PW1) when cross examined submitted that the respondent was performing her duty on behalf of DED and for that matter payments which were effected were valid. The learned Advocate told this court that When DED was called to testify he said that such payments did not require his Authorization as an Accounting Officer and thus he did not see any problems with the said payments. The learned advocate added that DED testified that the respondent was performing her duties on behalf of DED and for that matter she was a principle of her own.

The learned advocate further averred that the argument by the republic that the respondent was already paid allowance to carter for the same activity is not true because the respondent testified that the registration was still pending (not complete) and the republic did not rebut that fact. He said, even witnesses from Schools which contributed money testified to the effect that the Registration of their respective was not complete. The Advocate added that the republic did not

bother to call witnesses to prove that by the time letters were being authored the registrations of the said Schools were complete.

The learned advocate did not end up there as he said there was no need of having DED's consent before writing the said letters that is why other witnesses said the documentation were complete which led to endorsement and thereby effecting payments. He also said, the republic failed to cite any Law to show that the said transaction required only the DED's permission. He then faulted the prosecutions for citing *standing orders for the Public Service 2009* and *Code of Ethics and Conduct for the Public Services, Tanzania* because they are irrelevant to the present case as the respondent was never subjected to any disciplinary proceedings.

The learned advocate insisted that the money collected by the respondent was used for registration and there was no evidence adduced to the contrary. On the argument by learned State Attorney that the trial Court ordered filing a civil suit against the respondent to recover money in question the learned advocate said that statement was an orbiter and not an order of the court.

Another point which the learned Advocate for the respondent advanced is that among the three letters which are said to authored by respondent requesting money from schools, it is only one which was prepared by her and the rest were prepared by one Mariastella Makwaya (PW8).According to the learned advocate,

PW.8 testified that in the course of preparing the said two letters DED was being engaged. According to the learned Advocate this shows that the whole process was a normal official undertaking. He then concluded his submission by praying that this appeal be dismissed as the republic failed to prove its case beyond reasonable doubt.

In Rejoinder by Mr. Fussi, learned State Attorney submitted that the arguments by the respondent's advocate that the respondent requested money from schools because the registration of schools was still pending is baseless. He added that even though the said moneys were needed then the respondent ought to have followed a formal procedure similar to the one she adopted in the previous payments and not seeking contributions from Schools. He said failure to follow the formal procedure is an offence under Section 15(1) (a) and (2) of PPCA, Cap 329. He then concluded by repeating to his previous prayer seeking this court to allow this appeal.

Going through the records and having summarized the rival submissions by the learned counsels for the republic and for the respondent the following facts are not in dispute. **One**, that the respondent was a Secondary Schools Educational officer for Muleba District. **Two**, that her office wrote three letters to headmasters of three Secondary Schools in Muleba District namely Kagango Girls Secondary School, Nyantakara and Mubaba Secondary Schools (one letter written by the

respondent and two letters written and signed by PW 8, Maraiastella Makwaya), instructing each School to contribute Tshs. 1,000,000/= Only for registration of the said Schools. **Three**, that the said Schools complied to the said instruction and each contributed Tshs.1,000,000/=only which were then deposited in the respondent's personal Account in NMB Bank.

With these facts at hand, it is the duty of this Court to determine this appeal and to do so the issue for determination is whether the prosecution side proved its case to the Standard required which is beyond reasonable doubt.

This court is mindful of the cardinal principle that in criminal cases, the onus of proof lies on the prosecution side and the standard of which is beyond reasonable doubt. In the case *of Swaburdin Mansuli V. Republic, Criminal Appeal No. 06/2021 HC (unreported)* this Court while citing the case of *Said Hemed V. Republic, [1987] TLR 117* held inter alia that:

"...it is elementary rule of the Law that the burden of proof in criminal cases is on the prosecution's side and the standard is beyond reasonable doubt." [emphasis added]

Also see Section **3(2) of the Evidence Act, [Cap 6 R.E 2019]; Mohamed Matula V. Republic [1995] TLR 3 and Horombo Elikaria V. Republic, Criminal Appeal No. 50/2005(unreported)**

In the present appeal, the respondent was before the trial Court charged with six counts, three being for corruptly soliciting and the remaining three for obtaining advantage; all contrary to Section 15(1) (a) and (2) of the Prevention and Combating Corruption Act, No. 11 of 2007. For ease of reference this court found it pertinent to reproduce this section as follows:

15.-(1) "Any person who corruptly by himself or in conjunction with any other person-

(a) solicits, accepts or obtains, or attempts to obtain, from any person for himself or any other person, any advantage as an inducement to, or reward for, or otherwise on account of, any agent, whether or not such agent is the same person as such first mentioned person and whether the agent has or has no authority to do, or forbearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, or

(b) N/A

(2) A person who is convicted of an offence under this section, shall be liable to a fine of not less than five hundred thousand shillings but not more than one million shillings or to imprisonment for a term of not less than three years but not more than five years or to both.” [Emphasis added].

From the foregoing section, there are three key words which must be proved by the prosecution’s side in order to discharge its onus of proof under it.

The said key words/ ingredients are one, ***corruptly solicit and obtain***, two, ***any advantage as an inducement to or reward for***, and three ***to do, or forbearing to do anything in relation to his principal’s affairs or business.***

During submission in support of the ground of appeal, the learned State Attorney stated that all the ingredients were proved by the prosecution. On his part he listed four which this Court think they ought to be three.

With regard to the first ingredient which is ***corruptly soliciting*** the learned State Attorney was of view that this ingredient was proved through letters which were authored to instruct Schools to contribute money for registration. He was of the view that the act of instructing schools to contribute the said money while knowing

the said activity had been undertaken and paid for entail that she corruptly solicited. With due respect to the submissions by the learned State Attorney this court differs with his positions/reasoning. The record is clear that the respondent authored only one letter among the three which were tendered as exhibit IQ, 2 and 3. The remaining two were authored by PW.8 one Mariasinta Makwaya who acknowledged to do so in consultations with DED. On her part, the respondent testified that what triggered them to prepared the said letters was because the DED's office had no money to carter for that activity, the activity which was still pending. This contention was not rebutted by prosecution side by bringing evidence. It is pertinent to note that the duty of the accused person is to only raise reasonable defence/doubt and not to prove his/her innocence. In the case of **Marando Suleiman Marando V. Serikali ya Mapinduzi Zanzibar [1998] TLR 375** the Court held that:

"The accused who needed not to prove his defence, has discharged his duty in this case by merely raising a reasonable defence and the sit remained for the prosecution to disprove that defence beyond reasonable doubt."

As I have stated earlier, the prosecutions side ought to have brought evidence in court to rebut the respondent's contention and failure to do so draws adverse

inference against the prosecution that what was contended by the respondent is true. In the case of **Nkanga Daud Nkanga V. R, Criminal Appeal No. 316/2013** it was held that:

"Under Section 143 of the Evidence Act [Cap 6 RE.2019] no amount of witnesses is required to prove a fact...But it is also a Law (Section 122 of the Evidence Act) that the court may draw adverse inference in circumstances against the prosecutions for not calling certain witnesses without showing any sufficient reasons." [emphasis added]

Again, this court considered the evidence of PW. 8 and came to a conclusion that Exhibits IQ 1, 2 and 3 were prepared in consultation of DED. This is so because two of the exhibits above were prepared by PW.8 who, during cross examination said he prepared the said letter in consultation with DED. Having gazed at PW8's evidence this Court asked itself that if what the learned state attorney submitted that the ingredient of corruptly solicit arises from the said letters, then why did the prosecution side choose to charge only the respondent leaving PW.8 who ought to be an accomplice or accessory before the fact. Was it her (PW8's) averment that she prepared the said letter following instructions by mobile phone from the

respondent? This issues was well analysed by the trial Magistrate and found out that there were no proof that she indeed received instructions. After all in the circumstances of this case, Pw.8 and Pw.10 if there was any offence committed (which is not the case) then they were witnesses with interest to save their own skin as the allegations form the prosecutions side also points accusing fingers to them. **In the case of R V. Rugemale Justinian,Criminal Sessions Case No. 88/2018** this court while citing with approval the case of Abraham **Saigara V. R (1981) LRT 268** held :

“evidence of a person with interest of his own must be approached with care and should not be acted upon unless corroborated by some other independent witness.”

That being said it is this court’s view that the first ingredient was not proved.

With regard to the second ingredient which ***any advantage as an inducement to or reward for*** this court find it pertinent infer to its definition. Mindful of its definition under Section 3 of PCCA, CAP 329 this court, for the sake of clarity went through its definition under the Black’s Law Dictionary 8th Edition, 2000 where advantage is defined as follows:

"Advantage is a benefit accepted in exchange for

***violating oath of fidelity such as that owed by
employee"***

From the foregoing definition ***advantage to do or forbearing to do*** is proven upon proof that money/favour received as in our case, is aimed at making the respondent perform an act in violation of her oath. In our case, however, the schools' registration was an activity the monies were intended to carter for and it was Council's planned activity.

The learned State Attorney was of the view that the act of the respondent to receive contributed money through her personal account while knowing that she was previously been paid for allowance to carter for same activity then that suffice an advantage. With due respect, this court is of the view that that stance is not true. As we stated above the respondent did not refuse receiving money through her personal account. She however said the said money were used for registration, the activity which was still pending. It is important to note here that her defence was not disproved by the prosecution side and interestingly her evidence was also supported by other prosecutions witnesses who said the registration process was still pending.

With regard to the third ingredient of the offence levelled against the respondent which is three ***anything in relation to his principal's affairs or business*** this court is of the view that the respondent was an agent of her employer. However

this ingredient cannot by itself prove the offence charged against the respondent because the two previous ingredients were not proved.

In the upshot, the prosecution failed to prove offences under section 15(1)(a) and (2). of PCCA, CAP 329 to the standard required which is beyond reasonable doubt.

This appeal is therefore dismissed for want of merits.

It is so ordered.




A. Y. Mwenda
Judge
25.03.2022

This judgment is delivered in chamber under the seal of this court in the absence of the appellant and in the presence of Mr. Zedy Ally learned counsel for the respondent.




A. Y. Mwenda
Judge
25.03.2022

