

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

CRIMINAL APPEAL NO. 6 OF 2022

(Originating from Criminal Appeal Case No. 01 of 2021 in the District Court of Ilemela at Ilemela)

CHARLES EUSEDIUS ARAJIGA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

13th June & 3rd August, 2022

Kahyoza, J.:

Charles Eusedius Arajiga, (Charles) the appellant was arraigned before the Ilemela District Court with two counts for the offence of corruption transaction contrary to 15 (1) of the Prevention and Combating of Corruption Act, No. 11/2007. The trial court convicted Charles with the offence in both counts and sentenced him to pay a fine of Tzs. 500,000/= or serve a custodial sentence of three (3) years in default.

Aggrieved, Charles appealed to this court contending that prosecution did not prove the offence beyond reasonable doubt, that the decision was

against the weight of evidence on records was and prevailing laws, that the case was framed up, that, the trial magistrate disregarded his defence and that, the trial court did not evaluate the evidence properly.

The grounds of appeal raise the following issues:

- (a) Whether the prosecution proved the case beyond reasonable doubt;
- (b) Whether the trial court considered the defence; and
- (c) Whether the trial court evaluated properly the evidence.

It is trite law that when an appellant raises a general ground of appeal and specific ones, an appellate court is justified to consider only the general ground of appeal to determine the appeal. The Court of Appeal pronounced that position of the law in **Rutoyo Richard vs R.**, (Cr. Appeal No.114 of 2017), published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that: -

"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."

I am entitled in this case to answer only one issue that is whether the prosecution proved the appellant guilty beyond reasonable doubt.

A back ground of case is that; Charles, a fisheries officer on diverse dates in February 2021 solicited Tzs. 80,000/= as an inducement not to impede people conducting fishing business from doing their fishing business at Sabasaba market, an act which was in relation to his principal's affairs. It was alleged that Tausi Mussa Waziri (PW2) and Maria Joseph Mashamba (PW4) were dealing in fish at Sabasaba Market and the appellant was employed to ensure people dealing in fish business comply with laws. The prosecution alleged further that Charles solicited from Tausi Mussa Waziri (PW2) and Maria Joseph Mashamba (PW4) and received Tzs. 80,000/= from Tausi Mussa Waziri (PW2).

The appellant does not dispute that he was arrested on 20/02/2021 at Sabasaba fish Market and that he was found with Tzs. 80,000/=.

The prosecution story was that Tausi Mussa Waziri (PW2) and her colleges were used to bribe the appellant. They contributed money and gave the same to the appellant. Whenever, they ignored to give money to the appellant, he seized their consignment of fish and sold them. Tausi Mussa Waziri (PW2) and her colleges got fed up with Charles' act of consistently

demanding money. Tausi Mussa Waziri (PW2) complained to the Counselor of Ilemela ward, Hon. Wilbard Kilenzi (PW6). Wilbard Kilenzi (PW6) advised them to report to PCCB. Tausi Mussa Waziri (PW2) reported. On 20/02/2021 PCCB and Tausi Mussa Waziri (PW2) laid a trap. Tausi Mussa Waziri (PW2) gave Tzs. 80,000/= as a bribe to Charles. Charles, the appellant, was arrested. Tausi Mussa Waziri (PW2) deposed that they used to give Charles Tzs. 100,000/= weekly. Later, they negotiated the rate and Charles agreed to receive Tzs. 80,000/= instead Tzs. 100,000/= weekly.

The appellant deposed that Mama Omary (PW2) received money from Mama Mussa and put it into his pocket. Soon after Mama Omary put money into his pocket, PCCB officers arrested him. He narrated that he went to the scene of the crime following a telephone call from Mama Musa, Mama Mussa was sent by her husband Mr. Alex (Baba Bonge) to repay the loan. The appellant alleged that Mr. Alex borrowed Tzs. 5,000,000/= from him and repaid Tzs. 4,000,000/= failed pay Tzs. 1,000,000/=. The appellant stated Mr. Alex had promised to pay Tzs. 80,000/= as interest.

The appeal was heard orally. Mr. Mashauri advocate appeared for Charles and Ms. Tibilengwa, the Principal State Attorney appeared for the respondent

Did the prosecution prove the appellant guilty beyond reasonable?

It is an established principle of law of evidence that, the prosecution has a duty to prove an accused person guilty and to do so beyond reasonable doubt. See section 3 of the **Evidence Act**, [Cap. 6 R.E. 2022]. In the present case, the appellant was charged under Section 15(1) (a) of the Prevention and Combating of Corruption Act, [Cap. 329 2019 now 2022], (the PCCA), which states that-

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 for bearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, or

(b) N/A....

From the wording of the going paragraph of subsection (1) of section 15, of PCCA, the prosecution had a duty to prove that the appellant solicited or received or that he solicited and received advantage, in this case Tzs.

80,000/= as an inducement to do or forbear. The prosecution alleged that Charles received Tzs. 80,000/= as an inducement to refrain from seizing fish from Tausi Mussa Waziri (PW2) and her colleague. I found it proved beyond all reasonable doubt, that after his arrested the appellant took out Tzs. 80,000/= from his pocket among other things. It is also not disputed that Charles, the appellant was arrested immediately after receiving Tzs. 80,000/= from Tausi Mussa Waziri (PW2) or Mama Omary as per the appellant's evidence.

The appellant did admit in his testimony that he received money from Mama Omary. The appellant's version was that Mama Omary put money to his pocket. Tausi Mussa Waziri (PW2) and Dadi (PW1), one of the arresting officers, witnessed the appellant pocketing money. In addition, Tausi Mussa Waziri (PW2), Dadi (PW1), and Erasto Anthony Buliba (PW5) witnessed the appellant surrendering money from his pocket. Also, Erasto Anthony Buliba (PW5) compared numbers of the 10 thousand denomination notes and 5 thousand denomination notes found with Charles and the number previously recorded by Dadi (Pw1) to find out if they tallied. He deposed that the numbers tallied. Charles' version was that he received money from Mama Omary as payment of the loan advanced to "Baba Bonge" (Alex).

The issue this court must consider is whether the appellant received money as bribe or repayment of a loan.

The appellant's advocate submitted that the prosecution's did not prove the case beyond reasonable doubt as Tausi Mussa Waziri (PW2) and Mariam Joseph Mashamba (PW4) did not prove that they were dealing in fish business. They had no business license. He submitted that appellant, Tausi Mussa Waziri (PW2) and Mariam (PW4) had no business relationship. He argued that a magistrate cannot demand corruption from a person who had no case before him.

Ms. Tibilengwa, Principal State Attorney, opposed the contention that Tausi Mussa Waziri (PW2) and Mariam (PW4) were not trading in fish. She submitted that Tausi Mussa Waziri (PW2) and Mariam (PW4) deposed that they were trading fish. They bought fish from lake shore and took them to Sabasaba Market.

Having considered rival submissions, I find it established that Tausi Mussa Waziri (PW2) and Mariam (PW4) were dealing in fish. They bought fish from Lake Shore and took them to Sabasaba Market. The fact Tausi Mussa Waziri (PW2) and Mariam (Pw4) had no business license does not mean they were not buying and selling fish.

Tausi Mussa Waziri (PW2) and Mariam (PW4) deposed that they were giving money to the appellant so that the appellant may forbear to prevent them from conducting business or seizing their consignment. The appellant may have taken an act of Tausi Mussa Waziri (PW2) and Mariam (PW4) conducting business without trading license as an opportunity to persistently demanding money from them. I have no reason to question the credibility of Tausi Mussa Waziri (PW2) or Mariam (PW4). Tausi Mussa Waziri (PW2) deposed that she was tired of the appellant's act of demand bribe from them weekly. She decided to complain to Kilenzi (PW6). Kilenzi (PW6) was a private advocate and a chancellor of Ilemela Ward, who confirmed that he received complaint from Tausi Mussa Waziri (PW2) that the appellant was demanding bribe from them. Kilenzi (PW6) advised her to complain to PCCB.

There is yet another piece of evidence from Alex Nestory (PW3) who deposed that, his wife Monica was among women buying fish and selling them at Sabasaba market. He deposed that appellant used to arrest his wife and impound their consignment. He added that after the appellant arrested his wife, he went to the appellant to rescue her. He concessionary found the appellant with fish seized from his wife and her colleague.

I find that the prosecution proved that, Tausi Mussa Waziri (PW2) and Mariam (PW4) were fishmongers, though they had no business license and that the appellant was the fisheries officer. Thus, the latter was in the position to obtain an *advantage as an inducement* to do or refrain from doing from Tausi Mussa Waziri (PW2) and Mariam (PW4).

The appellant's advocate submitted that there was another doubt based on the evidence from Dadi (PW1) that he investigated, arrested and interrogated. He contended that the case was framed up, why would one person do all that.

The respondent's State Attorney replied that the complaint that Dadi (PW1) received a complaint, investigated and testified did not make his evidence unreliable. She argued that the law does not prohibit an investigator to testify.

It is true that Dadi (PW1) received a complaint from Tausi Mussa Waziri (PW2), laid a trap (investigated), wrote the appellant's cautioned statement and testified. The court used to discourage and bar an investigator to write a cautioned statement. That position has since changed. See the case of **Flano Alphonse Masalu and 4 Others v R.**, Criminal Appeal No. 366/2018, where the Court of Appeal held that-

"Perhaps, we should go back to **Tabu Nyanda @ Katwiga v. Republic**, Criminal Appeal No. 220 of 2004 (unreported), a previous decision of the Court where we had denounced the practice of a police officer assuming multiple roles in the investigation, interrogation and interpreting to the appellant what had been recorded in his cautioned statement. In that case, however, relying on the decision of the erstwhile Court of Appeal for Eastern Africa in **R. v. Sadiki Kiyoyo & Three Others** (1943) 10 EACA 1033 on a similar issue, the Court held that:

*this case, we fully subscribe to the principle enunciated in Sadik Kiyoyo that it is understandable for the same investigating officer to resume the role of interrogating an accused person and also to act as an interpreter. However, in this case as there is no evidence on record to show that the involvement of Det, Sgt. Pius Magambo (PW1 in the trial within a trial) prejudiced the appellant in anyway, we are satisfied that the cautioned statement, Exh. P .3 was correctly recorded.... We should emphasise that in Tabu Nyanda (supra), the Court stressed that there **ought to be proof of prejudice against the appellant-***

We would observe that the stance in Tabu Nyanda (supra) is equally applicable in the instant appeal. Neither the first appellant himself nor Mr. Nkoko offered an iota of evidence on how he (the first appellant) was prejudiced.

Above all, we agree with Mr. Katuga that following the

amendment of section 58 of the CPA by section 15 of the Written Laws (Miscellaneous Amendments) Act, Act No. 2011, by inserting new subsections (4), (5) and (6) immediately after subsection (3), PW11, as a police investigator, was competent to record the cautioned statement when he did so on 30th December, 2015."

In addition, I see no reason to conclude that the case was framed up. It was on record from the appellant's evidence that he received money from Mama Omary who received money from Mama Mussa and that despite being a *dies non*, he was at Sabasaba market. He added that he went to Sabasaba market following a telephone call from "Mama Bonge" and received money. The fact that the appellant's act of going to the scene of the crime on a *dies non* supported the prosecution's case that he went to receive bribe.

It is also not disputed that Tausi Mussa Waziri (PW2) and Mariam (PW4) met the appellant at Fly Pack bar in February, 2021, where the appellant was waiting to be paid Tzs. 100,000/=. Mariam (PW4) was not cross-examined regarding the issue of meeting with the appellant at the hotel. It is trite law in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony. See **Daniel Ruhere v. R.**, Criminal Appeal No. 501/2007,

Nyerere Nyauge v. R., Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R.**, Criminal Appeal No. 327/2013. The Court of Appeal held in **George Maili Kemboge v. R.**, that-

"as a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Given the evidence discussed above, I am not able to buy a contention that the case against Charles, the appellant was framed up.

The appellant's advocate added that the evidence of Erasto (PW5) weakened the prosecution's case. He submitted that during examination in chief, Erasto (PW5) deposed that he witnessed the appellant receiving bribes while during cross-examination, he stated that he was not at the scene of the crime.

To say the least, I see no contradiction in the evidence of Erasto (PW5). Erasto (PW5) stated during examination in chief and Cross-examination that he was not at the scene of the crime. He was in his office at Sabasaba sokoni. He heard people shouting that there was police officer at the market. He decided to go to the scene. On his way to the scene of the crime, he met an officer from the PCCB who introduced to him that he

was looking for a leader. He told that officer that, he was one of the leaders as he was an accountant. He went and witnessed the appellant surrendering money. He tallied numbers of ten and five denomination notes found with the appellant against the numbers recorded in the PCCB Form.

Erasto (PW5) testimony was that-

"I remember on that day I was in the office, I was doing a certain work. I heard people saying there are police officer at the market. So I went to the scene. On my way, I met with the while (SIC) my am nearby a septic tank. That person saluted me and asked me that there was a work he wanted me to help him".

Given the above evidence, I do not find that Erasto (PW5) gave contradictory evidence.

The appellant's advocate complained further that Mariam (PW4)'s testimony raised a reasonable doubt. He argued that Mariam (Pw4) lied that took part in the process of setting up a trap. He contended that Tausi Mussa Waziri (PW2) and Mariam (PW4) set a trap why then did Mariam (PW4) escape upon seeing the appellant approaching.

It is on record that Mariam (PW4), gave Tausi Mussa Waziri (PW2) Tzs. 25,000/= as part of Tzs. 80,000/= on the day the appellant was arrested being payment the appellant solicited to abstain from seizing their fish from

them. She stated after she gave Tausi Mussa Waziri (PW2) that amount of money, she went ahead with her business. She deposed that Tausi Mussa Waziri (PW2) did not involve her when she decided to complain to PCCB.

I did not find evidence on record that Mariam (PW4) run away upon seeing the appellant. Even if, it is true that Mariam (Pw4) escaped, she may have run away because she was not involved in laying the trap. Mariam (PW4)'s evidence during examination in chief was that-

"Your honour, Tausi did not involve me, when she was reporting to PCCB officer.

Also during cross-examination, she maintained her position that she was not involved". She stated-

"I have never reported any incident to the PCCB officer but there was a problem since we economically suffered"

In the end, I found that Mariam (PW4) was a credible witness. I am not convinced that she weakened the prosecution's case.

The appellant's advocate argued further that, Kilenzi (PW6) was not a credible witness. He referred to Kilenzi (PW6) as a woman and that "she" told the court that she did not know the appellant.

The respondent's State Attorney replied that Kilenzi (PW5) and (PW7) witnessed the appellant surrendering trap money.

I will not discuss submissions regarding Kilenzi (PW6). Both parties' representative misdirected themselves regarding the status of Kilenzi (PW6) and the content of his evidence. Kilenzi (PW6) was an advocate and a chancellor of Ilemela Ward. Kilenzi (PW6) is a man and not a woman. Kilenzi (PW6)'s evidence was that Tausi Mussa Waziri (PW2) complained to him that the appellant was demanding bribe from them. He advised Tausi Mussa Waziri (PW2) to complain to PCCB. I do not find any reason to impeach his credibility. He is a credible witness.

The appellant's advocate complained further that the prosecution's evidence was fully of contradictions. He submitted that Tausi Mussa Waziri (PW2) and Mariam (PW4) deposed that they reported to PCCB that they were giving Tzs. 70,000/= or 100,000/= or 80,000/= weekly to the appellant. Apart from that, they reported to Kilenzi (PW6) that they gave the appellant Tzs. 300,000/=.

The respondent's state Attorney submitted that Tzs. 300,000/= was not trap money.

I will not dwell on this issue. The record is clear that from Tausi Mussa Waziri (PW2) and Mariam (PW4)'s evidence that they were paying the appellant a certain agreed amount. If they failed to pay the appellant seized

their consignment of fish and demanded money to release the consignment. It was in the testimony of Mariam (PW4) that once the appellant seized her fish for failure to pay him weekly bribe. Mariam (PW4) deposed that-

"The accused person several times seized my fish cargo the cargo was amounting to 300,000/= ... what I know I used to give an accused person money, I remember I gave him money including the Tzs. 300,000/=".

That evidence does not imply that Tzs. 300,000/= was paid weekly to the appellant.

In addition, I went through the evidence of Kilenzi (PW6) and found nowhere did he depose that Tausi Mussa Waziri (PW2) or Mariam (PW4) report that they were giving Tzs. 300,000/=. The complain was that they once paid Tzs. 300,000/= to the appellant who despite being paid that amount of money, he kept demanding more. Kilenzi (PW6) testimony reads;-

"So, she told me at one time, an officer demanded Tzs. 300,000/= when they gave him, but he kept on demanding when they failed to give him money when an officer took their fish and took them to Butuja shore and sold them"

I find no fundamental contradictions in the evidence of Tausi Mussa Waziri (PW2) and Mariam (PW4) which is one of the grounds to render their testimony worthless.

The appellant's advocate invited me to the decision in the case of **Magendo Paulo & others R.** [1993] TLR 220, where it was held the court may convict the accused person *"if the evidence is so strong against an accused person as to leave only a remote possibility in his favor which can easily be dismissed, the case is proved beyond reasonable doubt"*. He also cited the case of **Joseph John Makame V.R.** [1986] TLR 44, where it was held that *"a court can convict where the evidence supports a charge"*

Having discussed the issue whether the prosecution proved the appellant's guilty beyond reasonable doubt and before concluding it is time to discuss the appellant's defence. Charles complained vide his advocate that the trial court did not consider the appellant's defence. The appellant's defence was that he received money from Alex (PW3)' wife as interest for the latter's failure to repay the loan as agreed.

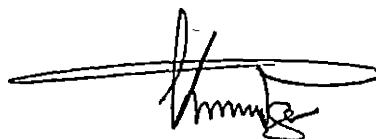
It is a principle of law that the accused has no duty to prove his innocence but just to punch holes in the prosecution's case. I passionately considered the appellant's defence to see if it created holes in the prosecution's case. Unfortunately, I do not find any. The appellant agreed that he was found with money, he received from Mama Omary, which happened to be trap money. Furthermore, the appellant did not cross-

examine Tausi Mussa Waziri (PW2) and Alex (PW3) as to the existence of loan contract. Alex (PW3) in his examination in chief denied to have borrowed money from the appellant. The appellant's advocate did not cross-examine him regarding the loan. It is trite law that failure to cross-examine implies acceptance of truth of the alleged or non-existence of the denied fact.

In the end, I find that the prosecution's evidence was too strong to the extent that the appellant's defence did not punch holes. Consequently, I find that the prosecution did prove the offence in both counts beyond reasonable doubts. I dismiss the appeal, and uphold the appellant's conviction and sentence for the offence of corrupt transactions contrary to section 15(1)(a) of the Prevention and Combating of Corruption Act, [Cap. 329 R.E. 2019, now 2022].

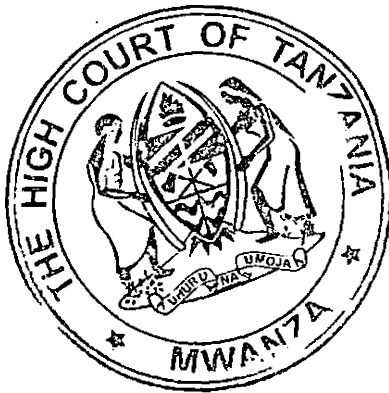
It is so ordered.

Dated at Mwanza this 3rd day of August, 2022.

A handwritten signature in black ink, appearing to read 'J.R. Kahyoza', with a long horizontal stroke extending to the left.

J.R. Kahyoza
Judge

Court: The judgment is delivered in the presence of the appellant and his advocate. The respondent's State Attorney is absent duly informed. B/C Jackline (RMA) present.



J.R. Kahyoza
Judge
03/08/2022