IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 04 OF 2021

(Originating from Criminal Case No. 12 of 2019 in the District Court of Dodoma at Dodoma)

DAUDI DAVID TENGENEZA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

08/6/2022 & 03/8/2022

KAGOMBA, J

DAUDI DAVID TENGENEZA, (henceforth "the appellant") appeals to this court against the decision of the District Court of Dodoma at Dodoma (henceforth the "trial court") which convicted him for the third count, out of three counts, namely; corrupt transactions for attempting to obtain Tshs. 100,000/= from the complaint one Andrea Mazengo Ng'haka contrary to section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act, [Cap 329 RE 2019]. There were two other counts which were not proved.

It was alleged during the trial that on 30th day of October, 2019 while at Mapanga Village within Chamwino District in Dodoma Region, being an

employee of Chamwino District Council as a Village Executive Officer, the appellant, did solicit the sum of Tshs. 100,000/= from the said Andrea Mazengo Ng'haka as an inducement for forbearing to take legal action against him for the offence of moving cattle without permit to the village an act which is contrary to his principal's affairs.

The trail court found that the prosecution evidence was well corroborated in the form of circumstantial evidence and was also corroborated by the words and actions of the appellant who had put an evasive defence that failed to raise doubt on prosecution evidence. Hence, the trial court convicted the appellant and sentenced him to pay a fine to the tune of Tshs. 500,000/= or serve three years imprisonment in lieu of the fine as per section 15(2) of the Prevention and Combating of Corruption Act, [Cap 329 RE 2019]. It is this conviction and sentence that is being challenged, for which the appellant has brought forth the following grounds: -

1. That, the trial court erred in law and fact to convict and sentence the Appellant while the Respondent herein failed to prove their case beyond reasonable doubt.

2. That, the trial court erred in law and fact to convict and sentence the Appellant basing on the weakness of the defence case.

During hearing of the appeal, the appellant was represented by Mr. Robert Owino, learned advocate and the respondent was represented by Ms. Judith Mwakyusa, learned Senior State Attorney.

Arguing on the first ground of appeal, Mr. Owino submitted that what made the trial court magistrate to believe the appellant committed the offence is what the learned magistrate stated on page 8 of the typed judgment where he stated:-

> '*The evidence told in bits fit into each other on being summoned and the accused solicitated the bribe in the presence of PW5 and he testified on the same'.*

Mr. Owino went on to submit his belief that the trial court was convinced by the testimony of Alex Kilalu (PW4) who on page 37 of the typed proceedings of the trial court, stated that "*the victim arrived at Mapanga on 5/10/2019 and on 6/10/2020 the victim was called* ***officially*** *by the accused person*".

Mr. Owino argued that while the testimony of PW4 was believed by the Magistrate to the extent of basing his judgment on it, there is no such "official" calling or summons tendered in evidence. He said since the prosecution did not discharge that duty as per section 111 of the Evidence Act, [Cap 6 RE 2019], the offence was not proved beyond reasonable doubt.

Likewise, Mr. Owino sensed there is a gap in prosecution evidence by failure to prove that the appellant was called to attend a meeting with the Ward Executive Officer (WEO) and refused, as it was alleged. He argued that neither WEO nor Matewa, who the complainant mentioned in his testimony

as the person who accompanied him to the appellant's office on 6/10/2019, was called as witness. He emphasized that the prosecution's failure to call Matewa, the Mitilia and WEO without assigning reasons leaves doubt that what is said is not strongly backed by evidence. He cited the decision of Court of Appeal in AZIZ ABDALLAH V. REPUBLIC (1991) TLR 71, on the duty to call key witnesses once they are within reach and adverse inference for not calling them, to emphasize that the prosecution failed to prove the case beyond reasonable doubts. He prayed the judgment of the District Court to be quashed for the stated reason.

On the second ground of appeal, Mr. Owino submitted that as appearing on page 9 to 12 of the typed judgment, the trial court based its decision to a large extent on the weakness of the defence case. He cited as an example the statement on page 10 where the trial magistrate stated:

> *'Guided by the principles in the cited cases on the credibility of the witnesses, the court in its assessment by weighing the defence case against the prosecution the court finds that this defence is weak and stand on quicksand'.*

Mr. Owino emphasis on the duty of prosecution to prove their case beyond reasonable doubts and where there are doubts, the same should be to the advantage of the accused person. He argued that it is not lawful for the court to rely on the weakness of the defence case. He prayed the court to allow the appeal and quash the conviction.

Ms. Judith Mwakyusa for the respondent opposed the appeal. She submitted in reply that PW1 and PW3 proved that the appellant attempted to receive bribe, the offence he was convicted with. She further argued that the trial court trusted the evidence of prosecution witnesses as being credible. She cited the case of **GOODLUCK KYANDO V. REPUBLIC [2006] TLR 363**, to the effect that every witness has a right to be trusted unless the contrary is proved. She therefore prayed this court to hold the two witnesses as credible and who had proved the offence.

Ms. Mwakyusa further argued that tendering of official summons whereby the appellant is alleged to have officially called PW1 to his office, and a summons for the appellant to attend a meeting with WEO were not relevant or important matters to prove the case against the appellant. She prayed the court to disregard it.

On the failure to call key witnesses to prove the case, Mas. Mwakyusa emphasized that the testimonies of PW1 and PW3 proved the offence. She added that according to section 143 of the Evidence Act, [Cap 6 R.E 2019] there is no number of witnesses required to prove a case. She expressed the view that the two witnesses were enough, adding that their testimonies were corroborated by PW5 who saw the appellant demanding bribe.

On the second ground of appeal, the learned Senior State Attorney denied that the appellant was convicted due to weakness of his defence. She said that the conviction was based on strength of prosecution side.

She argued that the appellant did not state if he had any quarrel with PW1 and PW5. That, PW1 was a new comer in the village where the appellant was its leader. She argued that under such circumstances, there was no reason for the prosecution witnesses to fabricate evidence against the appellant.

On the argument that prosecution case left many gaps which should be decided in favour of the appellant, Ms. Mwakyusa submitted that not any doubt will fail prosecution case, but only reasonable doubts. She prayed the court to disregard that argument.

In his rejoinder Mr. Robert Owino emphasized it was important to prove that there was that "official" summons calling the complainant to meet with the appellant and for the appellant to meet with WEO.

On the provision of section 143 of the Evidence Act, Mr. Owino rejoined that he did not talk about number of witnesses, but quality of the prosecution evidence. He emphasized that for prosecution to fail to call key witness, it left behind gaps in its evidence.

On the argument that the prosecution case was strong and was corroborated by testimony of PW5 who witnessed the appellant demanding bribe, he rejoined that PW5- Gabriel Anthony was not mentioned PW 1 as a person who accompanied him to the office of the appellant. He added that PW1 mentioned only two people, namely; Matewa and VEO' militia. He

questioned the reliability of PW5 as to what time he witnessed the bribe bargaining.

On whether the conviction was based on the weakness of the defence and not strength of the prosecution case, Mr. Owino reiterated that it was clear in the judgment that conviction was based on the weakness of the defence. Regarding absence of a quarrel between the appellant and PW1, he rejoined that it was immaterial because a quarrel could be created indirectly by someone else using PW1 to fulfill his mission.

Mr. Owino wound up by praying the court to allow the appeal and quash the conviction against his client.

From the above submissions and having read the records of the trial court, there is one central issue to be determined, which is whether the prosecution proved the charge against the appellant beyond reasonable doubt.

First and foremost, the only place where the offence of soliciting bribe could be established against the appellant is at the meeting between him and the complainant on 6/10/2019. *Ipso facto*, the only people who can prove that the appellant did in fact solicit bribe from PW1, are those who were present during the meeting of the appellant and PW1 and not other witnesses.

My perusal of the proceedings in line with the duty of this court as the first appellate court, has revealed from the testimony of PW1, that on the eventful date, PW1 was called to the VEO's office and heeded the call. He states on page 18 of the typed trial court's proceedings that he went there with his relative one Matewa. That, during the said meeting where the appellant is alleged to have asked for a bribe of Tshs. 300,000= and later settled for Tshs. 100,000/=, there were only three people, namely; the appellant, VEO's militia and PW1. Matewa did not enter VEO's office where PW1 testified that the alleged solicitation of bribe took place. This said, all other evidence from PW2, PW3, PW4 and PW5 are but hearsay if tested to prove that the appellant attempted to solicit bribe of Tshs. 100,000/=.

The trial court in its judgment relied on among other testimonies, the evidence of PW5 – Gabriel Anthony who testified on page 45 of the typed proceedings of the trial court that he was there to witness all the agreement. This is a doubtful testimony in deed, as PW5 was not mentioned to be among those who accompanied the PW1 to VEO's office, let alone to witness the bargaining. On page 46 of the typed proceedings, PW5 testified that he was there in VEO's office with Andrea Mazengo, Gabriel and the accused person. To convince the court, PW5 stated that he was telling nothing but the truth. While PW1 testified that he was accompanied with his relative called Matewa and who did not enter into VEO's office, for PW5 to state that he was there and witnessed the bribe bargaining is a pure lie which should not have been swallowed by the trial court.

Unfortunately, the evidence of PW5 formed the basis of the judgment as correctly submitted by Mr. Owino. The excerpt from page 8 of the typed judgment of trial court quoted above, tells it all. I firmly believe that the learned trial magistrate erred in relying on the testimony of PW5 and PW2.

Ms. Mwakyusa submitted that the evidence adduced by PW1 and PW3 proved the offence and that PW5 corroborated their testimonies. With due respect to the learned Senior State Attorney, I don't share her views. The evidence of PW3 and PW5 who were not in attendance at the material time when the appellant is alleged to have attempted to solicit bribe can neither prove nor corroborate the allegation. The only witness who could prove the offence against the appellant is PW1, whose testimony cannot stand without corroboration in view of the fact that the appellant contested the charge.

The above state of prosecution evidence brings up the issue of negative inference argued as by Mr. Owino. Since PW1 was in a company of his relative one Matawa, who was not called to testify, the trial court was to make negative inference against the prosecution evidence. In **AZIZ ABDALLAH V. REPUBLIC** (1991) TLR 71, the Court of Appeal clearly stated on page 72 of its judgment, thus:-

> *"The general and well-known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their recollection of the transaction question, are able to testify on the material parts. If such witnesses are within reach but are not*

called, without sufficient reason being shown, the court may draw an inference adverse to the prosecution".

In the case at hand the testimony of Matawa was very key. It was not stated why he was not called to testify. All the other prosecution witnesses testified on issues not directly proving the offence. Mostly they testified on the trap that was set to net the appellant. The testimonies of PW2, PW3, PW4 and PW5 had little, if any, significance to the prosecution case.

For the above stated reasons, I find it unsafe to uphold the conviction. It is obvious that the prosecution side failed to prove the case against the appellant beyond reasonable doubt. Accordingly, the appeal is allowed as I quash the conviction and set aside the sentence.

Dated at **Dodoma** this **3rd** of **August, 2022**

ABDI S. KAGOMBA

JUDGE