

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 264 OF 2020

(Originating from Criminal Case No. 68 of 2019 of the District Court of Ilala at Ilala)

CHARLES ALBERTO KAPONGOAPPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA, J.

The Appellant Charles Albert Kapongo was charged with and convicted of the offence of corrupt transactions contrary to section 15(1) (a) and (2) of the Prevention and combating of corruption Act No. 11 of 2007.

It was alleged by the prosecution that on 15th January 2019 at the offices of the Tanzania Revenue Authority (TRA) located at Gerezani area in Ilala District within the city not and Region of Dar es Salaam, the Appellant being an employee of the said TRA as an Assistant Tax Officer did corruptly obtain USD 4200.00 equivalent to Tanzania shillings 10,000,000/= from one Naibu Magala an employee of Hakhaa Business Accounting consultants as an inducement to reduce an earlier issued tax assessment ought to be paid by Laox company Ltd from Tsh 45,571,664/= to Tshs 8,000,000/=, the matter which was in relation to his principal affairs. The Appellant pleaded not guilty and was convicted accordingly. He was aggrieved and has appealed to this court on the following grounds.

1. That trial court erred in law and in facts when it committed substantive irregularities thereby causing miscarriage of justices and gave injustices to the Appellant in that case without considering the evidence adduced by the defence witness ie DW1, DW2 and DW3.
2. The trial court erred in law and fact for entering conviction of the accused without firstly ascertaining in itself to whether the claim of custody was properly maintained by the prosecution.
3. That the trial court erred in law and in fact for sentencing the Appellant to three years in jail and ordering him to pay fine at the same time.

At the hearing of this appeal the appellant was represented by Mr. Wabeya, learned advocate and the Respondent republic was represented by Ms. Florida, learned state Attorney. The appeal was argued by way of written submissions. The Respondent/ republic supported in appeal.

Submitting in support of ground one and fine of the appeal, counsel for the Appellant contended that the purported actual complainant one Naibu Magala and the Commissioner General of TRA one Charles Kichere were material witnesses for the prosecution but for no appellant reason they were not called to testify. The learned counsel submitted further that because the case was initiated against the Appellant based on the compliant lodged to PCCB by Naibu Magala, the trial court ought to have drawn adverse inference against the prosecution for its failure to call such material witness(es).

Responding to the submissions by the Appellant's counsel, on the failure by the prosecution to call Naibu Magala, the person from whom the Appellant was accused of receiving bribe, the learned State Attorney, submitted that actually the said witness was summoned but he did not appear to testify because he did not appear to testify because he could not be found as a result of which his statement was admitted in evidence under section 34B of the Evidence Act.

On my part I agree with the learned State Attorney that it is the law that in any Criminal trial where direct oral evidence of a relevant fact would be admissible a written statement may be admissible if the maker is dead or unfit by reason of bodily or mental conditions to attend as a witness.....or if all reasonable steps have been taken to procure his attendance but he cannot be found. However, for Criminal justice to work well the prosecution must possess a fair and limited discretion in all aspect of the trial process. If such discretion is not properly and limitedly exercised it may result into abuse of process. The prosecution/ Republic cannot adopt a purely adversarial role towards the defence; given its constitutional role and special function is ensuring that justice is done. It is desirable that the prosecution vigorously seeks to pursue a legitimate result to the best of its ability.

In my view, and pursuant to the prosecution's obligation to ensure that justice is served, it has no discretion to call or not to call a key witness of a case.

In the case at hand Naibu Magala was a key witness. The reasons given for his unavailability were not sufficient to warrant the trial court to receive and rely on his statement. In my view, mere endorsement by

a street chairman in a witness summons that the witness is no longer living for staying in his area is not sufficient evidence that the witness could not be found more efforts to trace him ought to have been demonstrated. According to the law under section 34B (1) and (2) (a) of the Evidence Act "***all reasonable***" steps have to be taken before it can be said that the witness cannot be found. In a case like this all reasonable steps "ought to have included steps taken to trace in the witness in his working place(s) home of domicile, residences etc. It would also include affidavits from employer (s) and relatives, where necessary; where a witness is not found and his statement is received, the weight to be attached to the evidence therein, should be less than the weight attached to the evidence of a witness who testified orally and stood cross – examination.

Regarding merits of the case, parties are in agreement that the prosecutions evidence was contradictory and did not prove the charge beyond reasonable doubt. Both counsel are in agreement that there were discrepancies on the evidence of PW1 and the evidence found in exhibit P5. Where ^{as} in the written statement of Naibu Magala (Exhibit P5) he stated that he told PW1 that the Appellant has asked for a bribe of Tshs 10,000,000/= in order to reduce the earlier issued tax assessment, in his evidence PW1 didn't mention that Naibu Magala told him that the Appellant asked for an inducement of Tshs 10,000,000/= on those basis it is the Appellant's contention which contention is fully supported by the Respondent (prosecution) that the Prosecution didn't prove its case beyond reasonable doubt.

Beyond reasonable doubt is the legal burden of proof required to sustain a conviction in a Criminal case. In those cases the prosecution

bears the burden of proving that the accused is guilty beyond ~~are~~^{any} reasonable doubts. This means that the prosecution must convince the court that there is no other reasonable explanation that can come from the evidence presented at the trial.

Now, where the prosecution itself (on second^{thought}) ~~through~~ says they did not prove their case, ordinarily court cannot hold otherwise. In the present case the Respondent Republic who were the complainant says they did not manage to prove ~~its~~^{their} case beyond reasonable doubt, an impartial court cannot say it did.

That said, I allow the appeal quash^{the} conviction and set aside the sentence meted. I order that the Appellant Charles Albert Kapongo be released from prison unless he is lawful held for any other cause.

Order accordingly.



A handwritten signature in black ink, appearing to read "A.R. Mruma".

A.R. Mruma

Judge

28/2/2022