IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 11 OF 2023

(Original Criminal Case No. 7/2021 of the Resident Magistrate Court of Iringa before Hon. S.A. Mkasiwa, PRM.)

SELEMANI SALUM SIMBIZO	.....	**1ST APPELLANT**
VICTOR INNOCENT KASEKA	.....	**2ND APPELLANT**
	VERSUS	
REPUBLIC	.....	**RESPONDENT**

JUDGMENT

22nd May & 15th June, 2023

I.C MUGETA, J:

The appellants were arraigned before the Resident Magistrate Court of Iringa at Iringa facing two counts of corrupt transaction contrary to section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act [Cap. 329 R.E 2019]. The appellants have appealed to this court challenging both the conviction and sentence imposed on them.

The appellants appeared in person and represented by Messrs Raymond Byombalirwa and Emmanuel Mbuga, learned advocates. The respondent was represented by Winfrida E. Mpiwa, learned State Attorney.

They filed 10 grounds of appeal which boils to one major complaint that the charge was not proved beyond reasonable doubts. The Republic

supports the appeal for the reason that, indeed, the offence was not proved. For brevity, I shall not reproduce the submissions from both counsel for the appellants and the respondent. However, I shall discuss the salient feature of their arguments.

In supporting the appeal, Mr. Raymond argued that the trial court erred to convict the appellants based on the prosecution's contradictory evidence which did not prove the charge beyond reasonable doubts. He pointed out one of the contradictions being the amount of money involved in the corrupt transaction as PW1 testified the amount involved was Tshs. 20,000,000/=, PW2 testified the amount involved was Tshs. 35,000,000/= and that the information he received from the OC- CID is that the amount requested was Tshs. 30,000,000/=. Another contradiction according to the appellants' counsel is on the date when the corrupt money was paid. PW4 testified that the event occurred between 2/3/2021 and 3/3/2021, PW1 whose evidence was hearsay testified that the event occurred on 2/3/2021. Moreover, PW5 testified that the event occurred on 4/3/2021. To support his submission, he cited the case of **Michael Haishi v. Republic** [1992] TLR 92 where the Court held that where there is contradiction of evidence of the prosecution witnesses in vital details such evidence is incredible.

The learned counsel further argued that the trial court relied on hearsay evidence as PW1 testified on information he received from the complainants, Mr. Chao Zheng and Mr. Xue who told him that they had paid Ths. 20,000,000/= to the appellants. In his view, PW5's evidence is also hearsay as he testified based on information he received from PW1. He also faulted the trial court's reliance on the complainant's statement who did not appear in court to testify.

The appellants' counsel also faulted the prosecution's failure to summon material witnesses who were the complainants. He argued that the complainants' residence is in Mafinga but the prosecution did not summon them and no proof was filed in court to show that their attendance in court could not be procured. The court was bound to draw an adverse inference against the prosecution on their failure to summon them as it was the holding in **Aziz Abdallah v. Republic** [1991] TLR 71.

The learned counsel argued further that the appellants were convicted without the trap money being tendered in court. In his view, the trial court reached a decision based on mere allegations which were unsubstantiated and without holding an identification parade to identify the person who received the trap money.

Mr. Mbuga took over from Byombalirwa and submitted that the complainant's statement tendered in court was heavily relied upon by the trial court without warning itself on the danger of relying upon uncross examined evidence. He referred the court to section 229(3) of the Criminal Procedure Act, [Cap.20 R.E 2022] which provides that each witness ought to be cross examined and the case of **Pantaleo Telesphory v. Republic**, Criminal Appeal No. 515 of 2019, Court of Appeal – Mbeya (unreported) where the court held that uncross examined evidence cannot form a basis of a decision of the court.

On the issue of the failure by the trial Magistrate to consider the defence case, Mr. Mbuga contended that PW2 is the one who ordered the complainants to be remanded in custody and also ordered their release. The appellants had testified that they do not have a black motor vehicle as the evidence showed that the money was put in a black motor vehicle. The appellants further testified that they had no authority to release the complainants from custody and that all communications were made by the District Immigration Officer in the presence of the interpreter of the complainants. They also testified that they could not speak Chinese, thus, they could not have communicated with the complainants. This defence

was not considered against the prosecution's evidence. The trial court only concluded that the defence did not raise any reasonable doubts without any analysis of the evidence. To support his contention, he cited the case of **Method Kaluwa Chengula v. Republic**, Criminal Appeal No. 92 of 2021, Court of Appeal – Dodoma (unreported).

Mr. Mbuga also complained about admitting witness statements as evidence. He argued that the evidence of the complainants was admitted without any proof that efforts were made to procure their attendance in court as submitted earlier. The evidence, he contended, was thus admitted in contravention of section 34B (2) (a) of the Evidence Act, [Cap. 6 R.E 2022]. To support his contention that evidence relating to failure to trace a witness must be tendered before section 34B could apply, he cited the case of **Republic v. Baruti s/o Philipo**, Criminal Session Case No. 28 of 2020, High Court – Sumbawanga (unreported). Again, he cited the case of **Ibrahim Mohamed v. Republic**, Criminal Appeal No.176 of 2021, Court of Appeal – Dar e Salaam (unreported) which held that failure to meet the conditions under section 34B is fatal.

The learned State Attorney supported the appeal. In her view, the prosecution evidence was based on circumstantial evidence which can only

be acted upon if it irresistibly point to the guilty of the accused person. In her view, the evidence is circumstantial because no witness testified in court that the appellants received Tshs. 20,000,000/= from the complainants. She argued that the trial court relied heavily on the evidence of PW1 and exhibit P1 which did not prove the charged offence. Further, the evidence was unclear as to when the bribe was solicitated. She cited the case of **Bakari Yusuph Harid @Mkoko v. Republic**, Criminal Appeal No. 290 of 2021, Court of Appeal – Mtwara (unreported) which set the conditions for circumstantial evidence to ground conviction.

It is her contention that the prosecution evidence was weak to ground conviction as the prosecution witnesses testified on different amount of money solicitated from the appellants. This contradiction goes to the root of the case. She cited the case of **Said Matula v. Republic** [1995] TLR 3 which held that in evaluating evidence the court ought to decide if any discrepancy goes to the root of the case.

However, the learned State Attorney differed with the appellants' counsel on the issue of identification of the appellants. She argued that PW1 properly identified the appellants as reflected at page 17 of the

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proceedings. Therefore, the identification parade, in her view, was unnecessary.

Regarding lack of cross examination which allegedly violated section 229(3) of the CPA, she argued that denial of cross examination affects the right to be heard as the appellants were denied the right to test the veracity of the witness. Thus, the evidence of PW3 who tendered the witness statements was illegal and should be disregarded. After disregarding the evidence of PW3, she submitted, the only material evidence is that of PW1 which cannot ground conviction.

On why the complainant were not summoned, she submitted that the proceedings show that the prosecutor explained that the complainants were Chinese and that they were no longer working with the company, thus, she prayed their statements be admitted in evidence. In her view, section 34B (2) (a) do not require the non-availability of a witness to be proved by evidence. Thus, the complainant's statement was properly admitted only that the one who tendered it was not cross examined.

In rejoinder, Mr. Mbuga essentially reiterated his submissions in chief on the legality of exhibit P1 that it was wrong for the court to rely on the

complainant's statement in the absence of proof that his attendance in court could not be procured.

I shall determine one complaint after the other.

The first complaint is that the evidence of the prosecution has contradictions regarding the amount of bribe solicited and given. Starting with solicitation count, the only evidence on this aspect is that of PW1. PW1 said the appellants solicited bribe through him. No other witness gave direct evidence on this aspect. The rest of the witnesses' evidence is hearsay as they were not present during solicitation and receiving. These are PW2 and PW4 who referred to Tshs. 35,000,000/= and Tshs. 30,000,000/= respectively. Hearsay evidence has no probative value, therefore, it cannot contradict direct evidence.

The complaint that material witnesses were not summoned has no merits. The record shows that the complainants who are Chinese were no longer present in the country when the trial commenced. The prosecution prayed and was granted leave to use their statements under section 34B of the Evidence Act. Therefore, it cannot validly be argued that there was failure to summon material witness. The law permits the use of witness statements when that witness cannot be traced or cannot be procured

on the strength of the bribe to people who had no authority to do so which was not the case. When the evidence of PW2 is considered in the light of the defence of the appellants, that they could not have solicited bribe as they had no powers to release the detainees, I find doubts in the prosecution case as to whether the appellants asked for bribe. The first count was not proved too.

It follows, therefore, that the appellants were wrongly convicted. I accordingly quash their conviction and set aside their sentence.

I.C MUGETA

JUDGE

15/6/2023

Court: Judgment delivered in chambers in the presence of the appellants and their advocate Raymond Byombalirwa and Sophia Manjoti, State attorney for the Respondent.

Sgd. I.C. MUGETA

JUDGE

15/6/2023