IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 44 OF 2023

(Appeal from the District Court of Simanjiro in Criminal Case No. 46 of 2021)

FRANCIS FAUSTINE MATLE.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Date of last order: 17/8/2023
Date of Judgment: 17/10/2023

JUDGMENT

MAGOIGA, J.

The appellant, **FRANCIS FAUSTINE MATLE** was arraigned before the District Court of Simanjiro (trial court), for two counts; the first count was for soliciting corruption to the sum of Tshs.150,000/= contrary to section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act, [CAP 329 RE 2019], and the second count was charged with receiving corruption of Tshs.100,000/= contrary to section 15(1)(a) and (2) of the PCCA, (hereinafter referred to as the PCCA)

The facts of this appeal are not complicated. It was alleged as per charged sheet that the appellant had on 26/3/2021 at the office of Losinyai village within Simanjiro District in Manyara Region, being a Village Executive Officer of Losinyai village did corruptly solicit the sum of Tanzanian shillings one hundred fifty thousand (Tshs.150,000/=) only from Mathias Salimu Saning'o @ Sabore as an inducement for him to prepare a customary land title deed of his land located at Losinyai Village within Simanjiro District in Manyara Region a matter relates to his principal's affairs.

Further facts were that on 1/4/2021 in the office of the village of Losinyai within Simanjiro District in Manyara region, the appellant did obtain a sum of Tanzanian shillings one hundred thousand (Tshs.100,000/=) only from Mathias Salimu Saning'o @ Sabore as an inducement for him to prepare a customary land title deed of his land located at Losinyai Village within Simanjiro District in Manyara Region a matter relates to his principal's affairs.

After full trial, the trial court convicted the appellant on both counts and sentenced him to pay fine at the sum of Tshs.500,000/= on each count or in failure to pay the money, to serve three years imprisonment in each count and the sentence to run concurrently.

Aggrieved with both conviction and sentence meted out against him, the appellant preferred the instant appeal with three grounds of appeal as follows:

1. *That, the trial court erred in law and fact for convicting and sentencing the appellant while the prosecution failed to prove beyond reasonable doubt the charge against the appellant as per the evidence tendered.*
2. *That, the trial court erred in law and fact for failure to evaluate properly the evidence before it.*
3. *That, the trial court erred in law and fact for failure to observed the law in determining the matter before it.*

On the strength of the above grounds of appeal, the appellant prayed that his appeal be allowed and be set free.

When this appeal was called on for hearing, by parties' consensus the appeal was disposed of by way of written submissions. The appellant was enjoying the legal representation of Mr. Tadey Lister, learned advocate; whereas the respondent was advocated by Mr. Raphael Rwezaula ,learned State Attorney. However, following the transfer of Hon. Barthy, J to Dar es Salaam and

following my transfer to this registry, this appeal was resigned to me for its determination.

Mr. Lister in arguing the appeal chose to argue the first and second grounds of appeal jointly. In these grounds of appeal, the learned advocate strongly argued that the case against the appellant was not proved beyond reasonable doubt. According to Mr. Lister, none of the prosecution witness was able to prove before the trial court that the appellant had on 26/3/2021 solicited a bribe at the tune of Tshs.150,000/= and that PW1 and PW2 did not tell the trial court that they went to Losinyai village office on 26/3/2021. The learned advocate faulted the trial court in its findings that that PW1 and PW2 requested to be issued with village title of ownership on 26/3/2021 but the same was issued on 1/4/2021. The learned advocate was emphatic that there is no evidence to show that PW1 and PW2 ever requested for such title on 26/3/2021. To buttress his arguments, Mr. Lister referred to the decision in the case of **Director of Public Prosecutions v Yussuf Mohamed Yussuf** Criminal Appeal No. 331 of 2014 Court of Appeal of Tanzania at Zanzibar (unreported), in which the court observed that it is the duty of the prosecution to make sure that what is contained in the particulars or

statement of the offence including the dates when the offence was committed be supported by evidence and not otherwise.

According to Mr. Lister, there is no evidence which established that the appellant received a sum of Tshs.100,000/- as bribe from PW1. The learned advocate argued that, there was no evidence on how the alleged money found its way in the appellant's office since the said office is being used by many people including PW5. Mr. Lister argued that, PW4 being not an officer in charge of the police station was required to have search warrant and after having conducted search he ought to have issued certificate of seizure.

Further arguments by Mr. Lister were that failure to have search warrant, PW4 was not required to conduct search and also failure to issue seizure certificate makes the whole process illegal. He argued that in a situation where evidence was illegally obtained the trial court was required to expunge it from record as stipulated under section 169 (1) of the Criminal Procedure Act [CAP 20 RE 2022] (hereinafter referred to as the CPA).

On reply Mr. Rwezaula strongly opposed the appeal. According to Mr. Rwezaula, there was ample evidence to establish that the appellant solicited a sum of Tshs.150,000/= as bribe and did obtain a sum of Tshs.100,000/=

as an inducement to prepare the village land ownership title. The learned Attorney contended that as PW1 and PW2 testified on solicitation to have taken place on 7/12/2021 and not 26/3/2021 this court should take that discrepancy to have been caused by lapse in memory on account of passage of time or slip of the tongue.

According to the learned Attorney, not every contradiction or discrepancy on witness account will be fatal to the case as minor contradictions or discrepancies on details is due to normal errors of observation lapse of memory on account of passage of time. The learned Attorney referred this court to the case of **Sano Sadick & another v The Republic** Criminal Appeal No. 263 of 2021 Court of Appeal of Tanzania, the court while quoting with approval the decision in the case of **Chukwundi Denis Okechucku**, observed thus:

> *"... in our view that discrepancies were inconsequential they did not go to the root of the case. the actual point was made by the testimonies of the witnesses on that aspect was to the effect that, the substance believed to be narcotic drugs were recovered in the house where the first appellant and his co-appellants were found on the material*

night, and after being seized, they were sent to the police station together with the appellants"

The learned Attorney argued that contradictions can be avoided as long as they do not prejudice the prosecution case and when happened the contradictions did not go to the root of the case. The learned Attorney referred this court to the case of **Mohamed Said Matula v The Republic** [1995] TLR 3 which insisted that much as the contradiction do no go to the root of the case, then, are not fatal.

Further argument by learned Attorney were that there was sufficient evidence to prove that the appellant was found in possession of the trap money Tshs.100,000/=in his office as per the testimonies of PW1, PW2, PW3, PW4 and PW5 read together with exhibits P1, P2, P3 and P4. And, that the appellant signed exhibit P2 the seizure certificate acknowledging that the money was seized from him and during the trial the appellant never challenged his involvement in signing the said exhibit. The learned Attorney distinguished the case of DPP Vs. Yusuf Mohamed Yusuf (supra).

As to the receiving the corrupt money, the Attorney argued that much as the appellant signed seizure form acknowledged that the money was retrieved

from him and never challenged the involvement in signing exhibit P2. To support his stance referred this court to the decision in the case of **Nabibakhsh Pirbakhsh Bibarde & another v The Republic** Criminal Appeal No. 663 of 2020 Court of Appeal of Tanzania in which the court observed that a person signing a certificate of seizure means that the said person acknowledges that the property was found in his possession.

On that account, therefore, pointed out the learned Attorney that the appellant's act of signing the seizure certificate meant he accepted the trap money was found in his possession.

As to the alleged search exercise, the learned Attorney contended that search may be conducted by any arresting officer without search warrant during emergencies as provided for under section 42(1) (a) and (b) (i) & (ii) of the CPA. And, PW4 conducted search without warrant in order to prevent the loss or destruction of anything connected to the offence.

Also was the argument of the learned Attorney that the trial court did not rely on the certificate seizure alone but considered testimonies of PW1, PW2, PW3, PW4 and PW5.

Moreover, the learned Attorney pointed out that the appellant admitted and confessed to have committed the offence in his cautioned statement that was tendered and admitted as exhibit P4. According to the learned Attorney, exhibit P4 was not objected by the appellant before the trial court as reflected on the record on pages 60 and 61. Guided by the cases of **Tuwamoi Vs. Uganda [1967] EA 51** and **Chande Zuber Ngayaga and another Vs. Republic,** Criminal Appeal No. 258 of 2020 of which it was held that, it is settled principle that an accused person who confesses to a crime is the best witness.

On the totality of the above reasons, the learned Attorney, therefore, urged this court to dismiss the appeal for lack of merits.

In rejoinder submission, Mr. Lister essentially reiterated his earlier submission in chief.

Having gone through the parties' rival submissions in respect of the first and second grounds of appeal, the issue for my determination is whether there was sufficient evidence to ground the appellant's conviction.

In determining the appeal at hand, this being the first appellate court, is a trite law that, it has a duty in form of rehearing, reappraise the evidence on record and where possible to come out with its own findings.

As I have pointed before, the appellant stood charged with two counts before the trial court. In the first count, the appellant was charged with solicitation of corruption from PW1 and PW2 a sum of Tshs.150,000/=. Mr. Lister maintained that there was no sufficient evidence to establish the first count as it was not stated as to when and where such solicitation occurred. The view which is being opposed by Mr. Rwezaula for reason that there is ample evidence on record that solicitation was done and receiving as well.

Obviously, the charge laid against the appellant alleges that such offence was committed on 26/3/2021. In his testimony, PW1 while under cross examination by the appellant's advocate claimed that the appellant solicited a sum of Tshs.150,000/= in order to issue certificate of occupancy to PW1 on 26/3/2023. The evidence of PW1 is supported by that of PW5 the PCCB officer. I have keenly gone through the record and the testimony of PW1 but I find that PW1 did not mentioned such date nor where such solicitation occurred.

On the other hand, PW1 testified before the trial court that he at all material time in accompany with PW2 when the appellant solicited for the said amount of money. Nevertheless, in his testimony, PW2 told the trial court that the appellant solicited the amount of Tshs.150,000/= on 31/3/2021 while at his office. On the other hand, PW1 told the trial the court that on 31/3/2021 he was at PCCB's offices. He never said that he went to the appellant's office on 31/3/2021. Looking at the evidence adduced by the PW1 and PW2 there are contradictions as to when and where the appellant solicited for Tshs.150,000/=.

While the learned Attorney contended that such contradictions are minor as they did not go to the root of the case, with due respect to him, I am of the settled view that, such contradictions are fundamental and go to the roots of the case because legally the prosecution had a burden to prove beyond reasonable doubt that the appellant solicited bribe on the date mentioned in the charged sheet. In the instant matter there is no sufficient evidence establishing that the appellant solicited Tshs.150,000/= from PW1 on 26.03.2021. Much as the date of solicitation was subject of the charge sheet, the prosecution had legal duty to prove it. In this case no such proof was there. While PW1 said under cross examination told the trial court that, he

was with PW2 on 26.03.2021 when the money was solicited but PW2 testified nothing on such a date. At page 30 of the typed proceedings, PW2 said they went to the VEO's (meaning the appellant's office) on 31/03/2021 and on the same date they went to PCCB and the following day trap was prepared which led to the arrest of the appellant. This contraction is very fatal and goes to the root of the first count that solicitation was done on 26.03.2021.

It should be noted that in criminal cases, even without citing case law, where any serious contradiction or doubt is observed it has to be resolved in favour of the accused person.

The trial court, I can safely say, did not analyze the evidence on record properly, otherwise, it could have arrived at different conclusion. The differences in dates as testified by PW1 and PW2 in this appeal, created contradictions which have to be resolved in favour of the accused person.

Therefore, in the circumstances, as correctly argued by Mr. Lister, I find merits in the 1st and 2nd grounds of appeal that the prosecution utterly failed to prove the date and place of solicitation but which was the subject of the charge sheet. The 1st and 2nd grounds of appeal are jointly allowed.

Having found that the solicitation was not proved, I could have stopped here and conclude that much as solicitation has failed, then, receiving as to fail as well. But, much as the second ground is another a distinct offence will look at it with legal eye if was proved. As to the second count, the learned Attorney was of the view that, there was ample evidence to establish that the appellant received Tshs.100,000/= as corruption from PW1. He maintained that there is seizure certificate which was signed by the appellant which signifies that Tshs.100,000/= was seized from him. More so, he pointed out that there was cautioned statement in which the appellant admitted to have received Tshs.100,000/= from PW1.

I have keenly examined the record of the trial court, according to the evidence adduced by PW1, he claimed that he went to PCCB offices where he was issued with Tshs.100,000/= to give the appellant money solicited. PW1 tendered in court the trap money as well as the trap form as exhibit P1 collectively.

I have gone through the record of the trial court, I find a lot to be desired, in particular, if the money truly was handed over to the appellant and what happened thereafter in the presence of PW1 and PW2. The evidence is ample that the money was found in the box instead of the person of the appellant.

PW1 and PW2 testified that, while inside the office of the appellant, PCCB officers came in and arrested the appellant without any sign that the money has moved from PW1 to the appellant. This conduct was not at all considered the by the trial court. Ordinarily, one would expect PW1 or PW2 to come out and signaled the PCCB officers to pave way for arrest of the appellant. But in this appeal, PCCB officers stormed into office without any signal and ended up into arrest and search for money which was in the box. On similar situation, there was no explanation as to how the amount of Tshs.100,000/= moved from the appellant to the box because evidence shows that PW1 and PW2 were at all material time with the appellant but never testified that when the appellant was given the money, he hides the money in the box.

As to the seizure certificate which was admitted as exhibit P2, I have keenly gone through it, first of all it is not related with seizure of Tshs.100,000/= as claimed by the learned Attorney but relates to certificate of occupancy issued to PW1 by the Losinyai village council. Therefore, the appellant signed exhibit P2 contrary to the submission by the learned Attorney. Hence exhibit P2 does not link the appellant with the second count.

As to the cautioned statement which was admitted as exhibit P4, the learned Attorney forcefully argued that the appellant admitted to have received a

sum of Tshs.100,000/= as bribe. The learned advocate for the appellant denied any admission in the cautioned statement

With due respect to the learned Attorney, after having carefully gone through exhibit P4, there is nowhere the appellant admitted to have received or found with Tshs.100,000/= as bribe from PW1. But of interest in exhibit P4 was written on 06.04.2021 to a person who was arrested on 01.04.2021. No explanation was offered and this shows that exhibit P4 was written in clear abrogation of the law. Sections 50 of the Criminal Procedure Act, [Cap 20 R.E. 2019] set time limit within which to record the accused statement. In this appeal, this was not complied with, hence, exhibit P4 was obtained in clear abrogation of the law. By the order of this court, same is hereby expunged from record for being obtained out of prescribed time in recording and interviewing accused person.

As to search which was conducted in the appellant's office, Mr. Lister was emphatic that the same was done illegally as there was no search warrant prior obtained. On the other hand, Mr. Rwezaula was of the view that the said search was done under emergence hence it was not possible to obtain a search warrant.

This point will not detain me much, given my findings above on the way the money exchanged hands. Normal search is governed by section 38 (1) of the CPA. However, in terms of section 42(1) of the CPA search may be carried without warrant under emergence situation. Hence, the searching exercise for having no search warrant was legal and proper.

Another point worth of consideration was the manner the trial magistrate considered and treated the evidence of the appellant. At page 7 of the typed judgement, there was a sweeping statement by the trial Resident magistrate that I have considered the defense evidence and its exhibits but the reason given for its rejection was that corruption was requested on 26.03.2021 and given on 01.04.2021. But the gist of the defense case was not on that. But the gist of defence case was PW1 and PW2 fabricated who are blood and near relatives of the chairman, a fact which was not disputed due to the contents of defense exhibits. Had the trial magistrate directed himself to the contents of defense exhibits and the way the whole issue was handled and unfolded, in my considered opinion, the chances of fabrication were here high than not. PW1, PW2 and PW4 did not deny that are not related and that in the previous and conflict between the appellant and PW4 which led to suspension of PW4 from duties.

Consequently, the conviction and sentence and meted out against the appellant was against the evidence on record and as such the second count too was not proved and the trial court failed to analyze evidence on record.

Consequently, the conviction and sentence passed against the appellant are quashed and set aside.

In the final analysis I find the first, second and third grounds of appeal to be meritorious and are accordingly allowed.

I proceed to quash and set aside the conviction and sentence meted out against the appellant on both counts. I have noted that the appellant paid the fine at the sum of Tshs.1,000,000/= as evidenced by exchequer receipt No. 25481402 in lieu of the prison terms. I order the said amount be refunded to the appellant.

It is so ordered.

Dated at Babati this 17th day of October ,2023

S. M. MAGOIGA

JUDGE

17/10/2023