IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 5 OF 2023

(Appeal from the Judgment of The District Court of Mwanga at Mwanga dated 12th April, 2022 in Criminal Case No. 51 of 202)

JUMANNE SERERYA MATANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th September & 12th December, 2023

A.P.KILIMI, J.:

The appellant was arraigned at the District Court of Mwanga at Mwanga for an offence of corrupt transaction contrary to section15 (1)(a) and (2) of the Prevention and Combating of Corruption Act No.11 of 2007. The particulars of the offence alleged that on 1st April 2021 about 12:00hrs at a bar known as Two-in-One which is situated within Mwanga District, the accused being a sub permanent way inspector of Tanzania Railway Corporation did corruptly obtain the sum of Tshs. Thirty-five thousands (35,000/=) only from one HASHIM RASHID HEMED a casual worker working

in gang number 43 Kiruru as an inducement of not making work bitter during inspection of casual workers, a matter which relates to his principals affairs.

The appellant pleaded not guilty to the charge, subsequently the prosecution side paraded seven witnesses to prove the case. The accused stood alone in his defence. Having considered evidence of both sides, the trial court found the accused guilty of an offence charged, convicted and sentenced him to pay fine of Tshs. 500,000/= or serve one year imprisonment.

Aggrieved with the decision and order thereto, the appellant appealed before this court on both conviction and sentence on the following grounds.

1. The trial court erred in law and in fact by convicting the appellant while prosecution failed to prove their case beyond reasonable doubts.
2. The trial court erred in law and in fact due to its failure to consider the appellant's defence.
3. The trial court erred in law by admitting secondary evidence without followed the stipulated procedure.
4. The trial court erred in law and in fact by relying on exhibits whose chain of custody was not established.

When this appeal was placed before me for hearing, the appellant was represented by Deogratias Matata learned advocate and the respondent was

represented by Erick Kiwia assisted by Edith Msenga both learned State Attorneys.

The counsel for the appellant opted to start submitting on the second ground of appeal, that the trial Magistrate failed to analyses the defence evidence in the judgment. He further said the trial Magistrate only considered the prosecution evidence and left the defence untouchable which is very fatal as stated in the case of **Leonard Mwanashoka vs Republic** [2015] TZCA 294 (TANZLII). The appellant counsel further narrated that the magistrate did not consider the exhibit D1 which was letter of employment, which clearly shows the date and year of employment of the appellant, which differs from the statement of offence, thus concluded failure to consider the same prejudice justice on the appellant.

On ground three, the counsel submitted that the Magistrate erred in law by receiving secondary evidence against section 67 and 68 of Evidence Act, that is exhibit P1 which the prosecution tendered it being a certified copy and the court admitted the same without following the procedure of admitting secondary evidence specified under the law. Therefore, the appellant prayed for that exhibit be expunged from evidence.

In ground four, the counsel for the appellant submitted that there were no establishment of chain of custody on exhibits tendered. The records and the evidence were silent on whereabouts of the exhibits tendered from 31/3/2021 to 18/11/2021. The testimony of PW5 never mention where the exhibit P2 kept until the time of tendering evidence. He made reference to the case of **Paul Maduka & 4 Others vs Republic,** Criminal Appeal No 110 of 2007 CAT at Dodoma (unreported) and **Issa Hassani Uki vs Republic** [2018] TZCA 361 (TANZLII)**.** The appellant further prayed also for exhibit P2 be expunged from the record.

The counsel for appellant concluded with ground number and submitted that, the case was not proved beyond reasonable doubt. That, the prosecution failed to prove if there were phone communication between the victim and the appellant so as to show the evil motive of the appellant. To buttress his assertion, he cited the case of **Sabato Nyabamba Mashauri vs Republic** [2021] TZHC 5274 (TANZLII)

The counsel further submitted on this ground that, the appellant was charged as sub permanent way inspector but the prosecution failed to prove if the appellant was employed in that cadre. The appellant in his exhibit D1 shows that he was employed as gang man but the court did not consider the

exhibit at all. If the court could have considered the exhibit D1 could have decided different, therefore the appellant stands to the point that the case was not proved beyond reasonable doubt.

In reply State Attorneys for the respondent submitted randomly, starting from fourth ground of appeal, they disputed that the cited case of **Paul Maduka** (supra) by the counsel for the appellant is distinguishable because in that case the principle of paper trail was breached from the beginning that the money seized was not recorded its serial number and was taken to government chemist, so it was a must to establish chain of custody. But in this case prosecution tendered trap form which evidenced on the money seized with their serial numbers in each note signed by the appellant himself, the unique features were well established in the trap form, therefore no need to establish chain of custody. The counsel cited the case of **D.P.P. vs Akida Abdallah Banda** [2023] TZCA 209 (TANZLII) where the court referred its earlier case of **Joseph Leonard Manyota vs Republic** [2017] TZCA 261 (TANZLII). And conceded with the fact that the prosecution did not establish whereabout of the exhibit before tendered in court but this court should consider the circumstances set in the case of **Akida Abdallah**

(supra) cited above on a point that exhibits were identified and recorded in trap form and the real noted was tendered.

In respect to the third ground of appeal, the counsel for the respondent submitted that there is no doubt that exhibit P1 was a certified copy hence secondary evidence thus the procedure of tendering it was correct. Since the said exhibit was a public document, the proper section was section 83(b) of Tanzania Evidence Act Cap. 6 R.E.2022 "TEA" and that was accordingly followed, however the court also consider the provision of section 67(1) (e and f) of TEA therefore the issue of notice under section 67(4) of TEA do not apply. Either the exhibit was tendered by PW4 a person who certified it.

In respect to first ground the learned State Attorney argued the prosecution proved via PW1 and PW2 that through communication managed the appellant to reach the trapping place and took trapped money. The appellant never disputed nor cross examined on that matter arrested with and in his defence he conceded to reach the scene of crime through communication with PW1 and PW2. To buttress this cited the case of **Nyerere Nyagwe vs Republic, [2012] TZCA 103** (TANZLII) which provides for principle that failure to cross examine amount to admission of evidence.

Further they submitted on ground one that, for appellant to be employed as gang member does not exclude him from promotion or being elevated to the rank of sub permanent way inspector and since the appellant never cross examined on that, it means he agreed with it, therefore this ground has no merit.

Also, in this ground it was added in respect to argument that accused was not sub permanent way inspector and no letter of employment was tendered as exhibit to such effect, the learned State Attorney contended that, the trial court evaluated such evidence by referring the case of **Edwin Thobias Patel vs Republic** Criminal Appeal No 130 of 2017 and observed the appellant failure to cross examine witnesses on that waived his right of disproving prosecution evidence.

In rejoinder the counsel for the appellant submitted briefly that, if the appellant was being promoted it must be documented and it is the prosecution has duty to prove it by bringing evidence, failure to that they failed to prove. Either in ground three, at the trial court there was no any evidence to prove that exhibit P1 was a public document, hence said the respondent counsel argument is an afterthought. further the counsel for the appellant insisted through the case of **Issa Hassan Uki** (supra) that cash

money is the item that can change hand easily. In respect to failure to cross examine, the counsel submitted that, it was the prosecution's duty to bring evidence showing the position of the appellant for him to cross examine, but they did nothing. Further the counsel for appellant insisted, accused is convicted on strength of the prosecution case and not the weakness of the defence. He concluded that the prosecution failed to prove their case and pray this court to overrule the trial court decision.

Before analysis of the evidence tendered at the trial court, considerations of grounds of appeal in this matter and submissions by both counsels above, I am mindful this being the first appellate court has a duty to re-evaluate the evidence the first trial court in an objective manner and arrive at its own findings of fact, if necessary. Thus, it is in the form of a rehearing. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO,** (supra) that-

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject*

it to critical scrutiny and arrive at its independent decision."

I have considered the grounds of appeal, I found appropriate to start with the ground number four which is in respect to the chain of custody. I am mindful of the stance in **Paul Maduka** (supra) but as rightly submitted by the respondent's learned State Attorney**,** in this case prosecution tendered trap form which evidenced on how the money were seized with their serial numbers in each note signed by the appellant himself, the unique features were well established in the trap form, in my view, I subscribe with respond observation that no need to establish chain of custody in the circumstances of this case. I wish to seek the guidance of the case of **Joseph Leonard Manyota vs Republic (supra),** the court had this to say;

"It is important to point out however, that notwithstanding what we have just stated, it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the cases say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tempered with. Where the

circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case"

According to the evidence adduced in respect to the said money which was documented in a trap form in the presence of witnesses, I am settled as correctly argued by the respondent side no need to furthering on chain of custody. I thus find this ground has no merit and dismissed forthwith.

I now tune on to the first and second ground of appeal, however according to the nature of this grounds I find appropriate to argue them simultaneously because both aim to prove the evidence adduced to the required standard but one for prosecution and other for defence.

I wish to start by saying, the position of the law is very clear that, the prosecution has a duty to prove what has been stated in the charge sheet. In the case of **Mathias Samwel vs Republic,** Criminal Appeal no. 271 of 2009 CAT (unreported) it was observed inter alia that;

> *"……. the prosecution is obliged to prove that offence was committed by the accused by giving cogent evidence and proof to that effect"*

Nevertheless, according to section 132 of Criminal Procedure Act Cap. 20 R.E.2022 provides that;

> *" Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

Bestowing to the wording of the above provisions, it is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but also such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Therefore, the prosecution has to prove that the accused committed the *actus reus* of the offence charged with the necessary *mens rea* according to the particulars stated. Thus, from this provision it is settled law also that where the definition of the offence charged specifies factual circumstances without

which the offence cannot be committed, they must be included in the particulars of the offence and must be proved in order to hold the alleged offence has been committed.

The wording of the offence charged as said above to the appellant plainly particularizes important elements of the offence and for purpose of clarity I find necessary to reproduce hereunder as follows;

> *"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"*
>
> [Emphasis added]

In view of above law, in this matter at hand, for ease of reference, I wish to reproduce the offence the appellant was charged with its particulars of the offence to be proved;

> *"STATEMENT OF THE OFFENCE;*
>
> *CORRUPT TRANSACTION contrary to section 15 (1)(a) and (2) of the Prevention and Combating of Corruption Act No.11 of 2007.*
>
> *THE PARTICULARS OF THE OFFENCE*
>
> *JUMANNE SERERYA MATANGA on 1st April 2021 about 12:00hrs at Two-in-One bar, which is within Mwanga District the accused* ***being a sub permanent way inspector of Tanzania Railway Corporation*** *did corruptly obtain the sum of Tshs. thirty-five thousands (35,000/=) only from one HASHIM RASHID HEMED a casual worker working in gang number 43 Kiruru as an inducement of not making work bitter during inspection of casual workers, a matter which relates to* ***his principals affairs****."*
>
> [Emphasis supplied]

However, as said above, I have a duty bound to make a proper evaluation of the entire evidence in order to satisfy on whether or not the

conviction of the appellant was justified or was right. (See **Prince Charles Junior v Republic,** Criminal Appeal No. 250 of 2014 CAT (unreported).

I have scanned the entire prosecution evidence, nowhere it was evidenced by documentation that the accused possess the said title above, I know the prosecution tried to rely on oral evidence, despite the rule that Government is moved on papers having consider Tanzania Railway Corporation "TRC" is owned by Tanzania Government, still the oral evidence relied leaves questions unanswered and doubts. For example, PW3 who the respondent argued above that proved orally that the appellant was having the said position, at page 14 in examination in chief PW3 had this to say;

> *"Yes, I know the accused person as my assistant (SPWI). The accused person his working station, start from Mgagao to Tingatinga. The duty of the accused is to inspect railway and record it for revocation, to supervise the railway (matengenezo) on his working place, he supervises Genge 40-45."*

Also, other witnesses testified how they knew the appellant as an employee of TRC, but nobody was specific and proved the title the appellant charged with as to the particulars of the offence above. In view of the above

evidence, despite of being vague, I am settled that no evidence proved that the appellant was working under the capacity of a sub permanent way inspector of TRC as alleged.

The respondent's counsel in this appeal maintained as the trial court observed that since the appellant did not dispute in his cross examination means he conceded of having that post. In my view, according to the circumstances of this case, the fact that the said position was very essential, thus it was necessary to be proved as an element of the offence, in my opinion it was inevitable to be proved by the prosecution to the required standard in criminal case.

I am saying the above because, usually in criminal the burden of proof lies on the prosecution, and the standard of proof required for the prosecution is beyond reasonable doubt. From this standard an accused person cannot be convicted based on his inability to defend himself, or any weaknesses in his defence taking regard the duty of accused is only to raise doubt. (See cases of **Joseph John Makune vs Republic** [1986] TLR 44**; Simon Kilowoko vs Republic** [1989] TLR 159; **Samwel Silinga vs Republic** [1993] TLR149 and **Mohamed Said Mtu Li A vs Republic** [1995] TLR 3.)

With respect, the trial court succumbed on the same arena by relying on failure to cross by the appellant, while this title was required to be proved because as I said above, in my view, it was among the necessary element in the charge sheet as said above, I am therefore of the considered opinion by doing so, the trial court as an umpire was shifting the burden of prove from the prosecution to the defence which is contrary to the principles of the law. This means the appellant was convicted basing on his defence weakness contrary to the law. The Court in **Christian s/o Kale and Rwekaza s/o Benard vs Republic** (1992) TLR 302 the court observed that:

> *"an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution* "

However, be it as it may above, I wish to add in this ground that the defense evidence was not considered at all, especially exhibit D1, and for clarity I wish to reproduce second paragraph at page 10 of the typed Judgment hereunder as follows;

> *"The accused on his defence argued that, he was not employed as sub permanent way*

inspector as ***he was charged and the charge is fabricated against him, as he cannot assign anything to a worker, it's my considered views accused has time to cross examine his leader who testified as PW4 regarding his job title but he fails to do so,*** *See the case of Edwin Thobias Patel vs Republic Criminal Appeal No. 130 of 2017."*

[Emphasis is mine]

I have also entirely scanned the trial court Judgment nowhere the trial court mentioned exhibit DI or discussed or analyzed its weight in respect to the appellant defence. Having the above in mind, I have considered opinion exhibit D1 which is an employment letter of the appellant which was tendered to support the job title/position he was doing was not entertained at all.

The next question follows, what is the effect of trial court not entertaining defence evidence. It is a trite law that the judgment must show how the evidence has been evaluated with reasons. Thus, the same must contain the point or points for determination, the decision thereon and the reasons for the decision, dated and signed. This can be reflected from

section 312 of CAP 20 [R.E.2002] on the mode and content of the judgment which provides as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination****, the decision thereon and the* ***reasons for the decision,*** *and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*
>
> [Emphasis is mine]

According to the record of this matter at the trial, **first,** the points of determination was not raised, may be if could have been raised the alleged position of the appellant to commit offence could have raised and proved, **second,** the Judgment does not show the point of evaluating defence evidence in respect to exhibit D1 tendered by the appellant and later giving reasons on the judgment how it was settled on it. This has caused me to hold that the trial court did not consider the defence evidence and evaluate

it in order to determine its credibility and cogency. I wish to cement my observation by the decision of the court in **Jeremiah Shemweta versus Republic** [1985] TLR 228*,* when the court observed that: -

> *"By merely making plain references to the evidence adduced* ***without even showing how the said evidence is acceptable as true or correct,*** *the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires* ***a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon****".*
>
> [Emphasis is mine]

Also, I am inspired by my brother Mambi, J in the case of **Shaban s/o Adam Mwajulu and Another vs Republic** [2020] TZHC 20 (TANZLII) when referred the a persuasive case of **OGIGIE vs OBIYAN (1997) 10 NWLR (pt.524)** at page 179 among others the Nigerian court held that:

"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".

To insist more on the above, the court of this land in **Leonard Mwanashoka vs Republic** [2015] TZCA 294 (TANZLII) cited with approval its earlier decision in **Yasini s/o Mwakapala vs the Republic** Criminal Appeal No. 13 Of 2012 (unreported) and warned that considering the defence was not about summarizing when had this to say:

"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

From the above analysis of the evidence and law, I am of considered view the trial court did not consider defence evidence in its totally, but merely considered failure to refute by the appellant as said above, which indeed is

against the principle in criminal law, that the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See **Christina s/o Kale and Rwekaza s/o Benard vs Republic** TLR [1992] at p.302.

On the premises and from what I have endeavored to discuss above, I am of the firm view that the guiltiness of the appellant was not proved beyond reasonable doubt, thus I am satisfied that the evidence by the prosecution were not strong enough to convict the appellant, thus these grounds have merit and sustained. Furthermore, I find that the determination of these grounds of appeal is sufficient to dispose of the appeal and find no need to consider and determine the remaining one ground of appeal.

In the circumstances, conviction of the appellant is hereby quashed also sentence and orders thereto are set aside. Thus, appeal is allowed. Since the appellant was out of prison after he paid fine no released order from prison to be issued.

It is so ordered.

DATED at **MOSHI** this day of 12th December, 2023.

X

JUDGE
Signed by: A. P. KILIMI

A.P. KILIMI

JUDGE

Court: - Judgment delivered in Chamber today on 12th day of December, 2023 in the presence of Ms. Wanda Msafiri State Attorney for the Respondent, also appellant present.

Sgd: H. G. Mhenga
Ag. Deputy Registrar
12/12/2023

Court: - Right of Appeal duly explained.

Sgd: H. G. Mhenga
Ag. Deputy Registrar
12/12/2023