IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 59 OF 2023

(Appeal from Criminal Case No. 1 of 2022 in the Resident Court of Singida at Singida)

YUSUPH ATHUMANI HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Judgment: 05/01/2024

A.J. MAMBI, J.

In the Resident Magistrate Court of Singida at Singida the appellant, **YUSUPH ATHUMANI HAMISI** was jointly charged with H.3053 PC Adam Jacob Muna and F. 7175 D/CPL Athumani Kusaya Makoba with the first two counts of Corrupt Transactions c/s 15 (1)(a) and (2) of the Prevention and Combating of Corruption Act No. 11/2007. In first two counts the appellant and his co-accused were alleged to have on 05/02/2022 at Iglanson Village within Ikungi District in Singida Region corruptly solicited Tsh 10,000,000/= from one Lupondeja. It was further alleged that the appellant and his co-accused Magulu Wangómbe and Jilala Lupondeja and thereafter obtained Tsh

5,000,000/= from one Jilala Magulu Puli as an inducement not to take legal actions against Lupondeja Magulu Wangómbe and Jilala Lupondeja for allegedly causing death of one Gindu Mwangu @ Ngeme. In the 3rd, 4th, 5th and 6th count of Corrupt Transactions c/s 15(1)(a) and (2) of Prevention and Combating of Corruption Act No. 11/2007 the prosecution charged the appellant himself with those offences. In the 3rd and 4th count it was alleged that the appellant on 06/02/2022 at Iglansoni Village within Ikungi District and Singida Region corruptly solicited and obtained Tsh 200,000/= from one Jilala Magulu Puli as an inducement to obtain police bail for one Lupondeja Magulu Wangómbe and Jilala Lupondeja who were detained at Ikungi Police Station for allegedly causing the death of one Gindu Mwangu @ Ngeme. In the 5th and 6th count it was alleged that the appellant on 07/02/2022 at Iglansoni Village within Ikungi District and Singida Region corruptly solicited and obtained one goat from one Lupondeja Magulu Wangómbe and Jilala Lupondeja in order that the allegation of murder of one Gindu Mwangu @ Ngeme against them could be settled by the Officer Commanding-District Investigation Crime (OC-CID)-Ikungi District.

Having pleaded not guilty to all offences the matter went into trial and finally the trial court acquitted the 2nd accused on the 1st and 2nd counts while convicting the 1st accused with those two counts. The trial court further

convicted the appellant with the 3rd, 4th, 5th and 6th counts and sentenced him to pay a fine of Tsh 500,000/= for each count or in default to serve a three-year jail term for each count.

Dissatisfied, the appellant has appealed before this Court basing on three grounds of appeal to wit: -

1. *That, the trial court erred in law and fact to convict the appellant on a fatally defective charge based on the wrong and/or non-existent law.*
2. *That, the trial court erred in law and fact to convict the appellant while the offences against the appellant were not proved beyond reasonable doubt.*
3. *That, the trial court erred in law and in fact to convict the appellant basing on weak and contradictory evidence adduced by the prosecution witnesses.*

This matter was disposed off by way of written submissions whereby the appellant had the legal services of Mr. P. Luambano-Learned Advocate and the respondent Republic was represented by Mr. Mwakifuna-Learned State Attorney.

In the course of his submissions Mr. Luambano for the appellant introduced a new ground of appeal that the appellant was not afforded a right to

mitigate before his sentence. The learned counsel argued that that was in contravention of s. 236 and 237 of the Criminal Procedure Act [Cap 20 R: E 2019] (the CPA). It the counsel's view that that amounted to denial of the appellant right to fair hearing which was contrary to Article 13(6) of the Constitution. Reference was also made to the decision of the court in **Ngasa Robert vs R**, Criminal Appeal No. 118 of 2021-HC Shinyanga.

With regard to the first ground of appeal, Mr. Luambano contended that according to the charge sheet the offence was committed on 05/02/2022, at this time, he submitted the law that was applicable was the Prevention and Combating of Corruption Act [Cap. 329 R: E 2019] and not the Prevention and Combating of Corruption Act No. 11/2007 as per the General Law Revision Notice GN. No. 140 of 28/02/2020. The learned counsel submitted that since the appellant was wrongly charged, convicted and sentenced on the non-existed law it cannot be said that he was fairly tried it was the learned counsel prayer that this appeal be allowed by quashing the conviction and set aside the sentence. Reference was made on the decision of the court in **Obadia Daniel and Another vs R**, Criminal Appeal No. 442/2016-CAT Arusha and **Issa Omary Magwire and 4Others vs R**, Criminal Appeal No. 72 of 2021-HC Mtwara.

With regard to the 2nd and 3rd ground of appeal, Mr. Luambano submitted that the prosecution failed to prove its case beyond reasonable doubt since PW2 stated in his evidence that the Tsh 200,000/= was used as a transport fair to Ikungi Police Station by Masanja Petro Jilala and his son and the appellant. This evidence, in Mr. Luambano's view, shows that the said money was not for solicitation or inducement but rather as a transport fair for following his brother and son at Ikungi Police Station.

Furthermore, Mr. Luambano contended that during cros-examination, PW1 stated that his son brought a goat to the appellant which was required to the Police Station but the prosecution failed to procure the said son to testify before the court. It was his submission that the prosecution failed to prove its case on how he benefited from the alleged corruption transactions.

Responding to the submissions in chief, Mr. Mwakifuna for the Republic with respect to the new ground of appeal, contended that s. 237 and 238 of the CPA provides that the court may take evidence before sentence. He was of the view that, to invoke those provisions of the law the intention to help the court especially where the law does not is provide for a minimum sentence as the evidence will help in the determination of sentence. The learned State Attorney submitted that since in the instant case the appellant was charged with s. 15(1)(a) and (2) of the Prevention and Combating of Corruption Act

No. 11 of 2007 which provides for the minimum sentence of a fine of Tsh 500,000/= or three years imprisonment. It was Mr. Mwakifuna's view that even if the appellant was not availed with an opportunity to mitigate, he was not prejudiced since the sentenced that was imposed by the trial court was not above the minimum sentence provided by the law. Reference was made to the decision of the court in **Juma Mniko Muhere vs R**, Criminal Appeal No. 211 of 2014-CAT Mwanza.

With regard to the first ground of appeal, Mr. Mwakifuna conceded to the fact that the charge was preferred under the wrong law as the appellant was required to be charged on the Prevention and Combating of Corruption Act, [Cap 329 R: E 2019]. However, the learned State Attorney contended that the said defect was curable under s. 388 of the CPA since the wording and the punishment provided in s.15 (1)(a) and (2) of the Prevention and Combating of Corruption Act No. 11/2007 are the same as in Prevention and Combating of Corruption Act, [Cap 329 R: E 2019]. Reference was made to the decision of the court in **Ernest Jackson @ Mwandikaupesi and Another R**, Criminal Appeal No. 408/2019-CAT Dsm.

With regard to the 2nd and 3rd grounds of appeal the learned State Attorney contended that the prosecution adduced strong evidence that proved its case beyond reasonable doubt. He averred that the appellant did not deny in his

evidence that he received a goat from PW1's son. That on account of money, the appellant too did not deny to have demanded and received Tsh 200,000/=. Mr. Mwakifuna argued that the trial court rightly doubted on the claims that Tsh 200,000/= was too high for fair that was claimed by the appellant. He finalized there was no contradiction in the evidence of the prosecution that went to the root of the case and thus the prosecution proved its case beyond reasonable doubt.

In his rejoinder Mr. Luambano reiterated his submissions in chief.

Having gone through the records, grounds of appeal and the submissions of the parties, I find two main issues for determination, first, whether the there are any irregularity or illegality in the proceedings of the trial court and second, whether the trial court assessed properly the evidence before it alternatively whether the prosecution proved its case to the standard required by the law in criminal cases.

With regard to the first issue, the appellant ascertained two illegalities that were committed by the trial court. The alleged irregularities were among others the conduct of the trial court to entertain a matter that was preferred by a defective charge made under non-existent law. The other irregularity

alleged by the was the failure to afford the appellant to mitigate before his sentence.

I have gone through word by word under s. 15(1)(a) and (2) of the Prevention and Combating of Corruption Act, No. 11 of 2007 in which the appellant was charged with at the trial court and s. 15(1)(a) and (2) of the Prevention and Combating of Corruption Act, [Cap 329 R: E 2019] where the appellant was required to be charged with, there is nothing distinguishing between the said provisions. Furthermore, the appellant did not state how he was prejudiced by mere being charged with by the unrevised edition of the law. In light of s. 388 of the CPA it is my view that this defective is curable. Reference is made on **Ernest Jackson*supra*** where the Court of Appeal of Tanzania cited with approval the decision of the Court of Appeal for Eastern Africa in **Matu s/o Gichumu vs R** (1951) 18 EACA 311 which in echoing and applying the decision of the English Court of Appeal in **R vs Tuttle** (1929) 45 TLR 357 held that such an irregularity is curable if the repealed section is re-enacted in identical word in the current statute such that it cannot be said that the accused has in any way been prejudiced. The court in **Tuttle case** (supra) held that;

> *'When it appears as it does that the offence under the earlier Act of 1861 was in the same word as the offence*

under the consolidation Act of 1961, it is clear that the appellant could not have been prejudiced and that no injustice could have been done to any defence which he had by this amendment"

Reference can also be made to the decision of the court in **Zakaria Martin vs. R**, Criminal Appeal No. 178 of 2008 (unreported). That being the position of the superior court of this land I find myself to be bound by that decision. In the case at hand there is no way the appellant could have been affected by being charged with the unrevised edition of the law which essentially the provision with which he was charged is the same as in the revised edition. That being the case, therefore I find that the first ground of appeal lacks merit and is hereby dismissed.

Coming to the new ground of appeal that the appellant was not afforded an opportunity to mitigate before his sentence. Looking at page 15 of the judgment of the trial court, it appears that the trial magistrate convicted the 1st accused with the 1st and 2nd count while acquitting the 2nd accused with those two counts and on another hand convicted the appellant with the 3rd, 4th, 5th and 6th counts. It is wonderful as to why having acquitted the 2nd accused with both counts the trial magistrate afforded him an opportunity to mitigate as it appears at page 16 of his judgment. That reads;

''MITIGATION

1st Accused; I am first offender I have family depend on me I pray your leniency the Tsh 5,000,000/= was already returned to the owner if we return it again the said money will be returned twice.

2nd accused; I am diabetic person I have family depending on me my mother is sick I pray your leniency"

Looking at the trial court records, there is nowhere to show the appellant mitigated before his sentence. It is my considered opinion that since the 1st appellant was afforded an opportunity to mitigate then it was the 3rd accused (the appellant) who followed the que. In other words, it is my settled opinion that it was a typing error by the trial magistrate instead of typing the 3rd accused he typed the 2nd accused.

However, even if I am to find that indeed the appellant was not afforded an opportunity to mitigate before he could be sentenced, still the position cannot be changed. This is due to the fact that the provision with which the appellant was charged and finally convicted with provides for minimum sentences which is a fine of Tsh 500,000/= or 3 years imprisonment. That being the case, even if the appellant was to mitigate still, it could not have helped to ascertain the proper sentence as the sentence has been prescribed by the law. Reference can be made on the decision of the court in **Juma**

Mniko Mhere (supra). That being the case, it is the finding of this Court that the new ground of appeal that was raised is non-meritorious.

With regard to the second issue, the appellant counsel in his submissions failed to point out the contradictions in the evidence of the prosecution at the trial court. He certainly based his submissions on the evidence of PWI who stated in cross-examination that it was PW1's son who sent a goat and Tsh 200,000/= to the appellant but the prosecution failed to bring the said PW1's son to testify. On this argument, I find that the learned counsels it is baseless since it is the discretion of the prosecution to bring all its witnesses at its disposal, the test being to prove its case beyond reasonable doubts. Arguments are makes. In other words, the law does not dictate a certain no of witnesses with which the prosecution is required to bring to testify before the court. Reference is made on section 143 of the Evidence Act [Cap 6 R: E 2019] which provides that;

> *"No particular number of witnesses shall in any case be required for the proof of any fact"*

In the present case the evidence of PW1, testified that it was the appellant who solicited him give to him a goat and indeed his son was the one who delivered it to the appellant. Again, PW2 in his evidence stated that it was the appellant who demanded from him Tsh 200,000/= and indeed he

delivered to him the said sum. The appellant in his defence appears to concede that he indeed received such sum but he negates by stating that it was meant and used for transport to Ikungi Police Station by him, PW1's son and Masanja Petro Jilala. One wonders as to why the appellant was the one that was assigned to collect such money for transport instead of PW1's son whose father was in custody? Again, if at all the said money was meant for transport why was that such huge budget while there were only three people who were required to go to Ikungi Police Station who were just coming from Iglanson Village which is just within Ikungi District? It is these unanswered questions which makes me finds that the prosecution evidence was strong and proved the case beyond reasonable doubts.

In light of the foregoing discussions, this Court finds that the prosecution proved its case beyond reasonable doubt and the trial court assessed properly the evidence before it in convicting the appellant. In the circumstance this appeal fails for want of merit and the same is dismissed in its entirety.

Order accordingly.

THE HIGH COURT TANZANIA

A.J. MAMBI

JUDGE

05/01/2024