

TANZANIA / JUDGMENT

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1 January 2023

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IN THE COURT OF APPEAL OF TANZANIA AT ZANZIBAR (CO RAM: KOROSSO. J.A.. KEREFU, J.A.. And MDEMU, J.A.) CRIMINAL APPEAL NO. 68 OF 2023 THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT VERSUS PHILIPO JOSEPH NTONDA..... RESPONDENT (Appeal from the Decision of the High Court of Zanzibar sitting at Chake Chake Pemba) ( Kazi. J.Y dated the 14th day of July, 2022 in Criminal Case No. 4 of 2017 JUDGMENT OF THE COURT 29th April & 3\* May, 2024 KEREFU. J.A.: In this appeal, the Director of Public Prosecutions, the appellant herein, is seeking to reverse the decision of the High Court of Zanzibar at Chake Chake Pemba dated 14th July, 2022 in Criminal Case No. 4 of

2017. In that case, Philipo Joseph Ntonda, the respondent was charged with with two counts. On the first count, he was charged with the offence of soliciting benefit corruptly contrary to sections 36 (3) (a) and 61 of the Zanzibar Anti-Corruption and Economic Crimes Ad., No. 1 of 2012 (ZACECA) of the Laws of Zanzibar. It was alleged that on 23rd February, 2017 about 12:00 hours at Jamhuri Garden within Urban i District, Urban West Region of Unguja, the respondent corruptly solicited TZS. 2,500,000.00 from Khadija Salum Suleiman for purpose of helping her to secure an employment in the office of Wete Town Council where she was an applicant. On the second count, the respondent was charged with the offence of receiving benefit corruptly contrary to sections 36 (3), (a) and 61 of the ZACECA. It was alleged that on 28th February, 2017 at or about 14:30 hours at Misufini Chake Chake within Chake Chake District and Southern Region of Pemba, the respondent corruptly received TZS. 290,000.00 from Khadija Salum Suleiman as consideration in helping her to secure an employment in the office of Wete Town Council where she was an applicant. The respondent denied the charge laid against him and therefore, the case had to proceed to a full trial. It is noteworthy that, initially, the trial of the case was conducted before Sepetu, 3. who, after hearing the evidence of five prosecution witnesses, found the respondent not guilty on account that, a prima facie case was not made out by the appellant to require him to give his defense evidence. However, on appeal to this Court vide Criminal Appeal No. 217 of 2020/ the Court found that the learned trial Judge erred in his ruling to state that there was no case to answer against the respondent on both counts. Thus, the Court quashed the trial Judge's ruling, set aside the discharge order and substituted it with an order that the respondent had a case to answer. Consequently, the case file was remitted to the High Court

for it to continue with the trial of the respondent for him to be given his rights of mounting his defense. Following the said decision of the Court, the hearing of the case continued before Kazi, J. ■4 -. The prosecution case, as obtained from the record of the appeal, can be briefly stated as follows; that, in 2016, Khadija Saiurn Suleiman (PW3) applied for a job at Wete Municipal Council. A moment later, she was informed via a telephone call that she was shortlisted and would be called to report to Government Security Office (G.S.O.). PW3 went on to state that, on 23rd February, 2017, at about 12:00 hours, while she was at Unguja, she met with the respondent who demanded to be given TZS. 3,000,000.00 to assist her to be offered the said job. However, later, after negotiation, they agreed to the amount of TZS. 2,500,000.00. On 27th February, 2017, PW3 went to the G.S.O where she was expected to give the said money, but she did not. On the following day, while accompanied by her uncle one Mohamed Juma Makame (PW1), they went to Chake Chake at the Public Service Office where they met with the respondent who was given an envelope by PW1. Soon after he received the said envelope, the respondent was arrested by the anti-corruption team. It was the further testimony of PW3 that, at the time of arrest, the respondent dropped the envelope he was given by PW1 and stepped on it. On his part, PW1 testified that, on 23rd February, 2017 at around 12:00 hours, when he was at Chake chake, he received money from the Zanzibar Anti-Corruption and Economic Crimes Authority (ZAECA) to hand them to the respondent, a person who was helping his child PW3 to get a job. They agreed to meet at Jamhuri Garden where the respondent requested to be given TZS. 3,000,000.00. PW1 reported to ZAECA, where he was given TZS. 290,000.00, the trap money. According to PW1, after he handed over an envelope with the said money to the respondent, the people from ZAECA appeared and arrested him. Zaidi Abdi Mbwana (PW2), a vender who used to sell vouchers and sim cards at Misufini testified that, on 23rd February, 2017, at about 12:00 hours, when she was at her place of work, three people (two men and a woman) appeared and had h conversation. The woman had an envelope that she passed to one man, whereby, suddenly, some other people approached them, introduced themselves as officers from ZAECA and arrested a person who dropped the envelope that he was given by that woman. After the arrest, the money was counted and verified. According to PW2, the said money was TZS. 300,000.00 but it was recorded on a form as TZS. 290,000.00 as one currency note of TZS. 10,000.00 was missing., PW2 stated further that they were all taken to ZAECA offices for interrogation, where she was given a form to sign. Kombo Shaame Kambo (PW4), an investigation officer at ZAECA, testified that, on 28th February, 2017 at around 14:50 hours, while he was at his office together with Gharib Mussa Hassan (PW5), Mussa Hassan and Suleiman Juma they received information about a bribery incident against the respondent and the complainants were PW1 and PW3. According to PW4, PW1 was the one who was asked a bribe of TZS. 3,000,000.00 by the respondent. However,, after negotiation, it was reduced to TZS. 1,500,000.00. It was the further evidence of PW4 that, having received the said information, they prepared trap money which they recorded in a special form. They put the said money inside the grey envelope and handed it to PW1. During that time, PW3 was at the meeting area with the 5 respondent. Therefore, they went to the . scene together with PW1, where PW1 gave an envelope to the respondent and they arrested him. In his

testimony, PW5 supported the narration by PW4 and added that, PW1 and PW3, both went to ZAECA offices on 28th February, 2017 at about 14:00 hours to report the bribe incident. In identifying the trap money kept in the envelope, PW5 stated that, the envelope contained 29 bank notes of TZS. 10,000.00 each. He tendered the said money and the trap form which were collectively admitted in evidence as exhibit P1; a letter dated 24th February, 2017 addressed to the Government Security Office requesting for PW3 and another person to be vetted before being offered a job at Wete Town Council (exhibit P2) and a list of shortlisted candidates invited for interview (exhibit P3). In his defense, although, the respondent admitted that he was the former Director of Wete Town Council for a period of one year, from 19th August, 2016 to 9th August, 2017, he denied any involvement in the commission of the offence he was charged with. He clarified that, during his tenure, he did not have the powers to recruit staff for Wete Town Council as his main duties were to issue building permits, grant business licenses to business persons, supervise town cleanness and to provide secretarial services at the Council meetings. He contended that, the case against him was framed up, because they wanted him to lose his job. He thus challenged the evidence of PW1, PW2, PW3, PW4 and PW5 that they gave untrue story which was contradictory. At the end of it all, the learned trial Judge found that the prosecution failed to prove both counts against the respondent to the required standard and the respondent was acquitted. Aggrieved, the appellant lodged this appeal raising the following grounds:

1. That, the learned trial Judge erred in law by openly misleading the assessors on the gist and manner on how the legal aspect of summing up is supposed to be undertaken;
2. That, the learned trial Judge erred in law and in fact for his act of holding that the prosecution failed to prove the case to the required standard despite the strong and heavy evidence adduced by prosecution's witnesses which had incriminated the respondent;
3. That, the learned trial Judge erred in law by failure to understand properly the legal principle of inconsistency statements of witnesses as envisaged by the law; and
4. That, the learned trial Judge erred in law and fact by continuing to discuss and analyze this issue of charge/information which had been already determined and decided upon by this Court. At the hearing of the appeal, the appellant, the Director of Public Prosecutions was represented by Messrs. Seif Mohamed Khamis and 7 Said Ali Said, both learned Principal State Attorneys whereas the respondent was represented by Messrs. Rajab Abdalla Rajab and Emanuely Samwel, learned counsel. Upon taking the stage to amplify on the grounds of appeal, Mr. Khamis prayed to abandon the first ground and intimated that he would argue the second and third grounds conjointly while his colleague, Mr. Said would amplify the fourth ground. He also, at the outset and upon further reflection, prayed to abandon the appeal against the second count as he indicated that the same was not proved to the required standard. Starting with the fourth ground, Mr. Said faulted the learned trial Judge for continuing to discuss and analyze the issue of defective charge which, he said, had been already determined and decided upon by this Court. To justify his point, the learned counsel referred us to pages 200 and 207 of the record of appeal together with pages 248 to

249 of the same record, respectively. Upon being probed as to whether the Court in its decision had determined the said issue or only indicated that the same should be determined at the end of the trial, Mr. Said conceded that the said issue was not decided upon by the Court. Submitting in support of the second and third grounds, Mr. Khamis argued that the trial court wrongly acquitted the respondent on the first count while there was sufficient evidence to prove the charge against him. Specifically, in establishing that the first count against the respondent was proved to the required standard, he referred us to the evidence of PW1, PW3 and P\N5. He argued that, in her testimony, PW3 testified on how the respondent, who by then, was the Director of Wete Town Council solicited bribe from her to be assisted to secure a job at that office. He added that, during, the preliminary hearing, the respondent himself did not dispute the fact that in February, 2017, he was the Director of Wete Town Council as clearly indicated in a memorandum of undisputed matters signed by both parties found at page 12 of the record of appeal. It was his argument that, the prosecution witnesses managed to prove that, while soliciting for the said bribe, the respondent was a; public servant who acted in the ambit of agent and principal relationship. As for exhibits PI, P2 and P3, Mr. Khamis readily conceded that the said exhibits were unprocedurally admitted in evidence as their contents were not read out after their admission in evidence. He therefore urged us to expunge them from the-record. Nonetheless, he 9 was confident that, even if the said exhibits are expunged, it would not affect the strength of the prosecution's case on the first count. To support his proposition, he cited the case of Mbonekyeirwe Tobias v. Uganda, Criminal Appeal No. 0485 of 2016, Court of Appeal of Uganda at Kampala and then urged us to allow the appeal. In his response, Mr. Rajabu strongly opposed the appeal. Responding on the submission by his learned friend that the first count was sufficiently established, he argued that for the offence of soliciting bribe to be proved, the prosecution ought to have led evidence that the respondent was acting as an agent of his principal, Wete Town Council. He contended that none of the five-prosecution witnesses managed to establish that fact and neither was there any evidence on job advert, PW3's job application letter and that the respondent had powers and authority in a decision-making process concerning recruitment of employees at Wete Town Council. Based on his submission, he prayed for the entire appeal to be dismissed for lack of merit. In a brief rejoinder, Mr. Khamis reiterated their previous submission and insisted for the appeal to be allowed. On our part, having carefully considered the grounds of appeal, the submissions made by the learned counsel for the parties and 10 examined the record before us, the main issue for our consideration is whether the prosecution proved its case beyond reasonable doubt. We shall therefore determine the grounds of appeal in the same manner as submitted to us by the learned counsel for the parties. Before doing so, we wish to state that, we are not losing sight that, this being a first appeal, it is in the form of re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted, to arrive at its own conclusion. See the cases of D.R. Pandya v. Republic [1957] EA 336 and Reuben Mhangwa and Another v. Republic, Criminal Appeal No. 99 of 2007 (unreported). Starting with the fourth ground, following the concession by Mr. Said and having perused the record of

appeal, we agree with him that the Court, while considering Criminal Appeal No. 217 of 2020, did not determine and or decide on the issue of charge/information laid against the respondent. As clearly reflected at page 207 of the record of appeal, the Court only stated that "the said issue is more suited to be determined at the end of trial," As such, we find the appellant's complaint under the fourth ground unfounded. ii Likewise, for exhibits PI, P2 and. P3, we agree with Mr. Khamis that the same were unprocedurally admitted in evidence as, indeed, the record of appeal bears it out at pages 106, 107 and 108 that their contents were not read out after admission in evidence. We thus outrightly expunge them from the record. Moving to the second and third grounds, it is instructive to state, at the outset that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In *Woodmington v. DPP* [1935] AC 462, it was held *inter alia* that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. For instance, in the case of *Magendo Paul & Another v. Republic* [1993] T.L.R. 219 the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed." It is noteworthy that, the duty and standard of the prosecution to prove the case beyond reasonable doubt is universal in all criminal trials and the duty never shifts to the accused. 12 - In the instant appeal, it is evident at page 1 of the record of appeal that the respondent, under the first count was charged with the offence of soliciting benefit corruptly contrary to section 36 (3) (a) and 61 of the ZACECA. The said provisions provides that: "36. (1) This section applies with respect to benefit that is an inducement or reward for, or otherwise on account of, an agent:

- (a) doing or not doing something in relation to the affairs or business of the agent's principal; or
- (b) showing or not showing favour or disfavour to anything including to any person or proposal, in relation to the affairs or business of the agent's principal.
- (3) a person commits an offence if that person;
  - (a) corruptly receives or solicits or corruptly agrees to receive or solicit a benefit to which this section applies." It is trite law that, for the prosecution to establish the above offence, it has to prove beyond reasonable doubts two ingredients; one, the existence of principal-agent relationship between the accused as an agent and his principal; and two, that, the agent corruptly solicited a benefit in relation to his principal's business affairs. 13 Having revisited the evidence on record, we find no difficulty to agree with the submission of Mr. Rajabu that the first count against the respondent was also not proved to the required standard. That, among the five-prosecution witnesses no one managed to establish that the respondent was acting as an agent of his principal, Wete Town Council. We shall demonstrate. PW3, apart from testifying that, the respondent solicited bribe to assist her to secure job at Wete Town Council, she did not tender any job advert advertised by that office to that effect. Furthermore, PW3 did not tender her job application letter to Wete Town Council to prove that she really applied for job in that office to pave way for alleged bribe solicited. It is our

considered view that, the said documents, if produced, could have assisted the trial court to ascertain that there was job advert at Wete Town Council and PW3 was one of the potential candidates who tendered job application letters to that office. It is our further view that, since there was no any explanation as to why the said documents were not tendered in evidence, the trial court was entitled to draw an adverse inference against the prosecution.

■ Worse enough, all prosecutions witnesses apart from stating that the respondent was the Director at Wete Town Council, no one testified 14 that, he also had powers and authority in a decision-making process concerning recruitment of employees in that office or conduct of misrepresentation. We are increasingly of the view that, the evidence of PW3 and PW4 is unreliable for being tainted with contradictions on who exactly was asked bribe by the respondent and the amount involved. For instance, PW3 testified at page 92 of the record of appeal that the respondent asked her to give him TZS. 3,000,000.00 to assist her to be offered a job but later, after negotiation, they agreed to the amount of TZS. 2,500,000.00. While, at page 97 of the same record, PW4 testified that, it was PW1 who was asked a bribe of TZS. 3,000,000.00 by the respondent and later, after negotiation, they reduced the same to TZS. 1,500,000.00. We are mindful of the fact that, in his submission, Mr Khamis argued that the said contradictions are minor and do not go to the root of the matter. With respect, we are unable to agree with him. It is our considered view that, the above pointed out contradictions are material and go to the root of the matter to the extent of casting doubt on the prosecution case. As such, we find the second and third grounds of appeal devoid of merit. 15 For the foregoing reasons, we do not find any cogent reasons to disturb the findings of the learned trial Judge, as we entertain no doubt that the learned trial Judge properly evaluated the evidence on record and held that the case against the respondent was not proved beyond reasonable doubt. In the event, we find no merit in the appeal and we hereby dismiss it in its entirety. DATED at ZANZIBAR this 3rd day of May, 2024. W.B. KOROSSO JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL G. J. MDEMU JUSTICE OF APPEAL The Judgment delivered this 3rd day of May, 2024 in the presence of Mr. AM Bilal Hassan, learned Principal State Attorney for the appellant Republic and Mr. Rajab Abdalla Rajab, learned counsel for the respondent is hereby certified as a true copy of the original.

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Prepared on 14 October 2026 · Esheria