

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA ATMWANZA (CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.) CRIMINAL APPEAL NO. 26 OF 2001 BETWEEN ABDALLAH MWINYIMKUU '] EZEKIEL MICHAEL @ MIKA J APPELLANTS AND THE REPUBLIC p: RESPONDENT (Appeal from the conviction of the High Court of Ta~zania at Tabora) (Masanche, J.) dated the 16 th day of May, 2001 in Criminal Appeal No. 49 of 2000

JUDGMENT

MROSO, J.A.: Ezekiel Michael @ Mika is the sole appellant after Abdallah Mwinyimkuu, who was the first appellant, passed away before the appeal was fixed for hearing. The appeal of the first appellant has . therefore abated. The-- remaining appellant Ezekiel together - with Abdallah Mwinyimkuu were prosecuted in the Court of Resident Magistrate at Tabora on two counts under the Prevention of Corruption Act, No. 16 of 1971. In the first count the charge was that the two jointly and

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- ' 2 corruptly solicited for a sum of shillings 240,000/= from the Tanzania Leaf Tobacco Company (TLTC), and in the second count the charge was that the two jointly and together corruptly received T.Sh. 240,000/= from the said company. The trial court acquitted both accused persons. The Director of Public Prosecutions was aggrieved by the acquittal and appealed successfully to the High Court at Tabora. The High Court sentenced the appellant and the deceased to fifteen years imprisonment on each of the two- counts. This time round the appellant and the deceased felt aggrieved and appealed to this Court. Since, as already mentioned, the first appellant passed away and his appeal has abated, we consider the appeal of the original second appellant, Ezekiel, or:ily. At the trial Ezekiel was the second accused and the deceased was the first accused. _ Both were employees of the Tanzania Revenue Authority (TRA) at Tabor~. Ezekiel, now to be referred to only as the appellant, was a Tax Collector while the deceased was an accountant. In early June, 1998 the two were assigned audit duties at the offices of the Tanzania Leaf Tobacco Company - TLTC - at Tabora. 3 On 11/6/1998 it was said that the two intimated to Anthony Kilinda (PW1), who was an accountant working with TLTC, that if · they were paid shillings 120,000/= each they would reduce a tax liability of Shs. 40,000,000/= to a lesser sum and would issue to the

Company a clean audit certificate. PW1 informed one Trevor John (PW7), who was the Company Director in Tabora, about the intimation from the appellant and his late colleague. PW7 informed his superiors at TLTC Headquarters, Morogoro. The Headquarters directed PW7 to report to the Regional Police Commander (RPC), Tabora. That was done. The RPC in turn reported to the head of the Prevention of Corruption Bureau (PCB) at Tabora. The PCB made arrangements for a trap by marking and taking serial numbers of currency notes with a total value of T.Shs. 240,000/=. According to prosecution evidence, the money was taken to PW7 who, having put the whole of it in one envelope, handed it to the deceased who was accompanied by the appellant. The two were then in PW7's office. The appellant and the deceased were told that each had been given T.Shs. 120,000/=. When the appellant and the deceased left PW7's office they were immediately confronted by PCB officers in the office of PW4 - Verynice Ukwai, who was PW7's personal secretary. Again, according to the prosecution evidence, the deceased threw the envelope containing the money under PW4's table. When the money was checked in PW4's office the serial numbers of the notes tallied with numbers which had been written on a piece of paper previously when the trap was being arranged. The trial court acquitted the appellant and the deceased for the reasons that the prosecution evidence was not credible and that it was highly probable that the TLTC officers, "framed up the case to suit their interests". The High Court on the other hand convicted the appellant and the deceased because it found there was "fulminating evidence to justify a conviction". The appellant who defended himself at the hearing of the appeal, had filed six grounds of appeal. These however, essentially boil down to three substantive grounds. First, that there was no cogent evidence that he either corruptly solicited and or corruptly received any money from TLTC. Second, that material exhibits such as the alleged corruption money or the accounts books which he audited were not tendered in evidence during the trial. Third, that the first appellate court erred in law in interfering with the findings of fact of the trial court which saw and heard the witnesses testify. We are satisfied that there was cogent and credible evidence that he corruptly solicited and received money from TLTC at Tabora on 11 th June, 1998. It was not disputed that the appellant and the original first accused were assigned by their superior officer to make a tax audit of the TLTC at Tabora. In the course of doing that work they found out that the Company had a tax liability of shillings 40,000,000/= arising from imprest payments to staff, among other factors. The company disputed that liability. Both PW1 and PW7 were credible witnesses in their claim that each of the two TRA officers asked to be paid Shs. 120,000/= in order to overlook irregularities and issue a clean certificate. We think that the company director would not have lightly taken the laborious steps of reporting on appellant's approach for corruption to the company headquarters at Morogoro and to Senior TRA officials at Tabora who in turn reported to TRA headquarters in Dar es Salaam. PW7 also reported to the Regional Police Commander, Tabora who, in turn, reported to the Regional Commandant of the PCB, Tabora. It was also not disputed that during the afternoon of 11 th June, 1998 the appellant and the deceased went into the office of PW7.

- The evidence which is credible shows -that the latter handed an envelope containing Shs. 240,000/= to the deceased for both himself and for the appellant. We uphold the first appellate court in his holding that the case against the appellant and the deceased had not been fabricated by TLTC officers as wrongly found by the trial court. ; The argument by the appellant that there was no evidence that he personally received the corruption money and, therefore, that in law he did not receive any money corruptly is untenable. The evidence from PW1 and PW7 is that ~II along both the appellant and - the deceased were acting and speaking in concert with one another and there is no evidence that the appellant at any material stage (' dissociated himself from the solicitation or receipt of the money. Once it is shown, as it was indeed, that the two were acting in concert with no dissociation at the material times, the appellant was as guilty as his colleague, the deceased of soliciting and receiving the corruption money. Similarly, although it was the deceased who had physical possession of the corruption money before it was thrown under PW4's table and that the appellant only had physical possession of it when he was ordered to pick it up from under the ' ' table, he was nevertheless in constructive possession of it because of ' I ' his corrupt common intention with the . deceased to receive and take ' ' I away the corruption money. There is no merit in the appellant's complaint therefore, that he was not in possession of the corruption ' money. ' The first appellate judge properly directed himself in law when I I I he differed with the trial court on findings of fact. He was aware that, in principle, an appellate court must not lightly differ with the I I findings of fact by the trial court which had the opportunity to see I I I and hear the witnesses as they testified. He, however, found, I I --- I correctly, that the trial court had misapprehended material facts. For example, the trial court thought that the evidence showed that each I I of the accused persons received separately Shs. 120,000/==. The truth of the matter, however, was that all the money - Shs. I I 240,000/= was put in one envelope and handed to the original first accused who took it out of -PW7's office. The trial magistrate also I I wrongly believed that since the .: books of accounts which the appellant and the deceased were auditing were not produced at the trial, then TLTC had not demonstrated that they were clean. I • • This ' 8 ---1 I was a misdirection by the trial court because it was not the case that I I TLTC was "clean". They may indeed have I failed to pay certain tax I liabilities despite their protest to the appellant I and the deceased. But the question for trial was whether the/ appellant and the deceased I having discovered that the TLTC were liable to pay a tax of Shs. . I I 40,000,000/= used that fact to try to influence the company to bribe I I them. There is no merit therefore, in the complaint that the High I I Court wrongly interfered with the findings of fact by the trial court. I I We are satisfied that the first appellate court was justified to I I set aside the acquittal of the appellant and substitute thereof a I I conviction on both counts and correctly I sentenced him as it did. The -- I I appeal is dismissed in its entirety. I I I j DATED at DAR ES. SALAAM this . 9th day of September, I .. 2004. I I I I D. Z. LUBUVA JUSTICE OF. • APPEAL I ' I I J. A. MROSO I JUSTICE OF: APPEAL S. N. !p.JI JUSTICE OF APPEAL I I I I I I I I I I I I I certify that this is a true copy of the original. . I -- I -- --

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