

TANZANIA / JUDGMENT

FLOLIAN KAIZILEGE METHOD JUDGMENT FINAL

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA CRIMINAL APPEAL NO. 22921 OF 2024 (Arising from Criminal Case No. 000021076 of
2024 of Missenyi District Court at Missenyi delivered on 26/07/2024) FLOLIAN KAIZILEGE
METHOD..... APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

24/10/2024 & 8/11/2024 E. L. NGIGWANA, J. Before the District Court of Missenyi at Missenyi, the appellant herein above was charged with three counts; Corrupt Transactions contrary to section 15(1) and (2) of the Prevention and Combating of Corruption Act, [Cap.329 R.E 2022], Disobedience of Statutory Duty contrary to section 123 of the penal Code, [Cap. 16 R.E 2022], and alternative count to wit; Obtaining goods by false pretence contrary to sections 301 and 302 of the Penal Code, [Cap 16 R.E 2022]. In the first count, it was alleged that the appellant being an employee of Missenyi District Council as a Village Executive Officer of Bwenkoma Village 1 within Missenyi District Council, on diverse dates in the year 2022 at Missenyi District Council in Kagera Region, did corruptly obtained undue advantage of the sum of TZS. 1,625,000/= collected by him to construct Bwenkoma Village office, the matter related to the principal's affairs. In the second count, it was alleged appellant being an employee of Missenyi District Council as a Village Executive Officer of Bwenkoma Village within Missenyi District Council, on diverse dates in the year 2022 at Missenyi District Council in Kagera Region, contravened the written law namely the Local Government Authority Finance Act, [Cap.290 R.E 2019] and the Local Authority Financial Memorandum of 2009 by failure to deposit at Bwenkoma Village Bank account No. 32610006180 NMB the sum of TZS. 1,625,000/= collected by him, to construct Bwenkoma Village office. In the alternative count (3rd count), it was alleged that the appellant being an employee of Missenyi District Council as a Village Executive Officer of Bwenkoma Village within Missenyi District Council, on diverse dates in the year 2022 at Missenyi District Council in Kagera Region, with intent to defraud, did obtain the sum of TZS. 1,625,000/= falsely purporting that the said money was deposited into Bwenkoma Village Bank account No. 2 32610006180 NMB for constructing Bwenkoma Village office, a fact he knew to be false. The trial court record revealed that on 26/07/2024, the charge was read over to the appellant, and he pleaded not guilty to the 2nd and

3rd counts. The same further reveals that, as far as the 1st count is concerned, the appellant pleaded guilty and the trial court was satisfied that the plea was unequivocal. and hence he was convicted and sentenced to three (3) years in jail. The amount of TZS 1,625,000/= which was tendered as an exhibit was handed over to the District Executive Director, Missenyi District Council. Thereafter being convicted and sentenced on the 1st count, the prosecution side prayed to with draw the 2nd and 3rd counts under section 91(1) of the CPA, whereas the prayer was granted and the 2nd and 3rd counts were marked withdrawn. Aggrieved by both conviction and sentence, the appellant has knocked on the doors of this court to challenge the same. His petition of appeal comprised three grounds of appeal but later on, he filed two additional grounds of appeal. When the matter came for hearing, the appellant through his advocate Mr. Fahad Rwamayanga abandoned the initial petition of appeal 3 and remained with two additional grounds of appeal which were crafted as follows;

1. That, the trial court erred in law and facts to convict the appellant of the offence of corrupt transactions contrary to section 15(1) (a) and (2) of the Prevention and Combating of Corruption Act, [Cap.329 R.E 2022] on the admitted facts not constituting the offence.
2. That, the trial court erred in law for failure to consider the circumstances of the offence and the conduct of the appellant concerning the offence, as a result, sentencing the appellant to a custodial sentence where there is an option of a fine. When this appeal came for hearing, the appellant enjoyed the legal service of Mr. Fahad Rwamayanga, learned advocate whereas the respondent/ Republic appeared through Mr. Elias Subi. On the first ground, Mr. Rwamayanga submitted that section 15 (1) (a) of the Prevention and Combating of Corruption Act, [Cap.329 R.E 2022] under which the appellant was charged, creates the offence of Corrupt Transactions. He went on to submit that a person charged under the said section can only be convicted if the prosecution had proved beyond reasonable doubt that the accused had obtained, solicited, or accepted 4 undue advantage from another person as an inducement to or reward. He added that in the matter at hand, the charge presented before the trial court does not disclose whether the appellant obtained, solicited, or accepted any undue advantage as an inducement, and thus, it was improper for the trial court to convict the appellant on a defective charge. He cited the case of Richard s/o Lionga @ Simageni vs Republic (Criminal Appeal 14 of 2020) [2021] TZCA 671 (11 November 2021) Tanzlii and the case of Mekisadeck Samwel vs The Republic (Criminal Appeal Case 35 of 2023) [2023] TZHC 20372 (18 August 2023), where in the latter, it was held that; in criminal law, the cornerstone or foundation of any criminal case is a charge. The charge is both the heart and the brain of criminal justice and a fair trial which plays the role of informing the accused person on the nature of the accusations, allows him or her to prepare his or her defence, and assists the court in determining whether it has jurisdiction and prepare the procedure to be applied during the trial. On the 2nd ground which is an alternative to the 1st ground, Mr. Rwamayanga submitted that even if it is considered that the charge was proper, still, the trial Magistrate erred in law to convict the appellant to three (3) years

imprisonment without affording him an opportunity to pay fine. He added 5 that the matters considered by the trial magistrate before imposing a custodial sentence were extraneous because they do not feature in the proceedings. He added that the appellant, as per the record was the first offender and he pleaded guilty at the earliest opportunity therefore, he ought to have been the first option of paying a fine. He prayed to this court to enter into the shoes of the trial court and impose a proper sentence. In reply, Mr. Elias Subi learned State Attorney submitted that as per Section 360 (1) of the Criminal Procedure Act, [Cap. 20 R: E 2022], no appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence. He went on to submit that the charge was proper and it was read over and explained to the appellant who pleaded guilty to the 1st count, and then, admitted the facts of the case, hence his plea was equivocal. He further argued that conviction was properly entered, thus the same cannot be challenged by way of appeal. Replying on the alternative ground, Mr. Subi conceded that the appellant ought to have been given the first option of paying a fine because the law allows so but also the appellant was a first offender, and had pleaded guilty 6 at the earliest possible time. He supported the prayer that this being the first appellate court should enter into the shoes of the trial court to impose a proper sentence. Having carefully gone through the trial court record, the grounds of appeal, and submissions by the parties, the issue for determination is whether this appeal is meritorious. Though as a general rule as per Section 360 (1) of the Criminal Procedure [Cap .20 R. 2022], no appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence, through case law, there are grounds for interfering with a plea of guilty. The grounds were stated in the decision of this court (Samata, J) in the case of Laurence Mpinga vs Republic [1983] TLR 166 and confirmed and adopted by the Court of Appeal in Josephat James vs Republic (Criminal Appeal 316 of 2010) [2012] TZCA 47 (28 September 2012) where it was stated that an accused person who has been convicted by any court of an offence on his plea of guilty may appeal against the conviction to the higher court on any of the following grounds; 7

1. That, even taking into consideration the admitted facts, the plea was imperfect, ambiguous, or unfinished, and for that reason, the lower court erred in law in treating it as a plea of guilty;
2. That the appellant pleaded guilty as a result of mistake or misapprehension;
3. That the charge laid at the appellant's door disclosed no offence known to law; and
4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged in Karlos Punda vs. Republic, (Criminal Appeal 153 of 2005) [2009] TZCA 14 (27 November 2009), the Court summed up six criteria that should cumulatively be met for a plea to be regarded as an unequivocal plea on which a valid conviction may be founded to be as follows: -

1. The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law; 8
2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is faced with, otherwise injustice may result
3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.
4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.
5. The accused must be asked to plead and must plead guilty to every ingredient of the offence charged and the same must be properly recorded and must be clear (see Akbarali Damji vs. R. 2 TLR 137 cited by the Court in Thuway Akoonay vs. Republic [1987] T.L.R. 92)”
6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged. 9
Going by the criteria given by the Court of Appeal above, the question now comes as to whether the appellants’ plea was unequivocal. Upon reading the charge, the facts of the case read to the appellant, the reply of the appellant to the charge, and the facts of the case, it goes without saying that the plea of the appellant was equivocal. The charge (1st count) and the facts of the case did not disclose the offence created by section 15 (1) (a) and (2) of the Prevention and Combating of Corruption Act, [Cap.329 R.E 2022], The same provides that; “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 forbearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, commits an offence of corruption.
- (2) A person who is convicted of an offence under this section, shall be liable to a fine of not less than five hundred thousand shillings but not more than 10 one million shillings or to imprisonment for a term of not less than three years but not more than five years or to both.” As pointed out earlier, in the first count on which the appellant was convicted, it was alleged that the appellant being an employee of Missenyi District Council as a Village Executive Officer of Bwenkoma Village within Missenyi District Council, on diverse dates in the year 2022 at Missenyi District Council in Kagera Region, did corruptly obtained undue advantage of the sum of TZS. 1, 625,000/= collected by him to construct Bwenkoma Village office, the matter related to the principal’s affairs. The trial court record revealed that on 26/07/2024, the charge was read over to the appellant, and he responded as follows in respect of the first count. “It is true that I as the Executive Officer took and spent the money on my

own benefit, TZS. 1,625,000/= which I collected from the Villagers of Bwenkoma Village for building the village office” Thereafter, the trial court entered the plea of guilty to the 1st count. The prosecution side was called upon to read the facts of the case. The facts read were to the fact that, in 2022, the appellant by virtue of his position, was given a duty to collect money from villagers for constructing a village office. However, after collecting the said money, he did not use it as planned, 11 instead, he used the money TZS 1,625,000/= for his personal use. Upon the investigation done by PCCB, the appellant confessed to having spent the said money for his personal use. The appellant surrendered the said amount to PCCB, and it was tendered in court as exhibit PE1. When asked as to what facts he admits, the appellant responded as follows; “I admit all the facts read to me as it is true that I got the money from the Villagers and I spent the same on my own benefit instead of constructing the village office as planned” Going by the criteria given by the Court of Appeal in the above-cited cases, and reading the charge, the facts of the case read to the appellant, the reply of the appellant to the charge, and the facts of the case, it goes without saying that the appellant’s plea was equivocal. The charge (1st count) and the facts of the case did not disclose the ingredients of the offence created by section 15 (1) (a) of the Prevention and Combating of Corruption Act [CAP. 329 R.E. 2022]. In my view, had the appellant been charged with embezzlement or misappropriation under section 28 (1) of the Prevention and Combating of 12 Corruption Act [CAP. 329 R.E. 2022], probably the situation would have been different. The same provides; “28 (1) A person being a public official who dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public official or allows any other person to do so, commits an offence, and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both” As a general rule, a defective charge renders the proceedings and the resultant decision a nullity. The rule has its exceptions for instance, where the charge is defective for the reasons of non-citation or wrong citation of the provision in the statement of the offence, the same is curable. As far as the case at hand is concerned, the charge is defectively incurable and renders the proceedings, conviction, and sentence a nullity. Even if, we assume for the sake of argument that the charge was proper, I Agree with Mr. Rwmayanga learned counsel for the appellant and Mr. Elias Subi learned counsel for the respondent that, still the custodial sentence of three (3) years imposed against the appellant who was a first offender and who pleaded guilty on the very date the charge was read to him, was 13 unjustifiable because the provision providing for a sentence has the option of fine. It is a trite law that where a provision of law provides an option of fine, the sentencing court is duty bound to impose a fine first before resorting to an imprisonment sentence particularly where the accused is the first offender unless the offence is so grave or widespread. Further, it is settled that an offender who readily pleads guilty deserves a lenient sentence. See *Anania Clavery Betela vs Republic* (Criminal Appeal 355 of 2017) [2020] TZCA 245 (22 May 2020) Tanzlii. Ordinarily, the appellate court should not interfere with the sentencing discretionary powers of the trial court unless it acted on the wrong principle or overlooked some material factors. See *Njile Samwel @ John vs Republic* (Criminal Appeal 31 of 2018) [2021] TZCA 391 (20 August 2021)

Tanzlii. Had the charge sheet been proper, and the conviction properly entered, the court would have interfered with the sentencing discretion of the trial court because it acted on the wrong principle and considered extraneous matters. In the upshot, I allow the appeal and proceed to nullify the 14 Proceedings of the trial court, quash the conviction and set aside the Sentence of three (3) years meted out against the appellant. I further order for an immediate release of the appellant unless lawfully held for any other lawful cause. It is so ordered. Dated at Bukoba this 8th day of November 2024. E. L. NGIGWANA JUDGE
08/11/2024 15 Delivered this 8th day of November, 2024 in the presence of the appellant and his advocate Mr. Fahad Rwamayanga, Mr. Elias Subi learned advocate for the Republic/
Respondent, Hon. A. A. Madulu -JLA, and Ms. Queen Koba. E. L. NGIGWANA JUDGE
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