

TANZANIA / JUDGMENT

mohamed ally bushiri vs the republic

2023 tzhc 23708 15 december 2023

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TZHCDECIDED
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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DAR ES SALAAM DISTRICT
REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO.117 OF 2023 (Appeal from the Judgment of
the District Court of Ilala at Kinyerezi, given before (Hon. F.E LUVINGA-SRM) dated on 19th day
of January, 2023 Originating from Criminal Case No. 450 of 2021) MOHAMED ALLY
BUSHIRI..... APPELLANT VERSUS THE REPUBLIC.....
.....RESPONDENT

JUDGMENT

MKWIZU, J:- The Appellant Mohamed Ally Bushiri was convicted before the District Court of Ilala at Kinyerezi with three counts the first and second is on Corrupt Transactions Contrary to section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act, (Cap 329 R: E 2019) and Destroying Evidence Contrary to Section 109 and 35 of the Penal Code (Cap 16 R: E 2022) in the third count. It was alleged by the prosecution side that the appellant on 14/4/2021 being Ward executive officer of Kiwalani Ward he corruptly solicited bribe worth Tshs. 500,000 from Leonard Wilson Lukosi as an inducement for forbearing to report and initiate legal proceeding against the latter who at the material time was alleged to drop off the earthen rubble in a prohibited area, the matter which is related to his principal's affairs. 1 The facts of the case collected from the trial court proceedings are briefly to the following effect: On 14th date of April 2021, PW2, Leonard Wilson Lukosi was supervising collection of earthen rubble on his plot at Kiwalani area within Ilala District in Dar es salaam Region after he had acquired a building permit from the city council. While at the site, there arrived four people including the appellant who quizzed why he is collecting sand on a restricted area and whether he had a permit or not. PW2 said, he informed the appellant and his colleague that he is the owner of the plot and that he has a building permit. They checked the permit and found them valid, but they asked for 5,000,000/= from Pw2 so that they can leave him safe on the plot. Having discovered from the neighbours that that is the appellants habit, he decided to report the matter to PCCB, a trap was set against the accused and Tsh 100,000/= was issued to PW2 by PCCB and ultimately handed to the appellant on 16/4/2021 but he destroyed the evidence immediately thereafter with intent to prevent it from being used as evidence against him. A plea of not guilty was recorded in all counts necessitating trial in which a total of five witnesses were called by the prosecution to prove the charge. At the end, the

appellant was found guilty on the 2nd and 3rd counts, convicted and sentenced to serve three years jail term or to pay 500,000/= as a fine in the 2nd count and 100,000 fine or 12 months imprisonment in the 3rd count. Disgruntled, the appellant has filed this appeal on two (2) grounds: -

1. That the honourable trial court magistrate erred in law and fact for failure to analyze and evaluate evidence correctly and for not considering evidence adduced by the appellant thereby 2 erroneously and unjustly convicted and sentenced the appellant.
2. That the honourable trial magistrate erred in law and fact on the question of burden of proof thereby wrongly and unjustly convicted and sentenced the appellant. At the hearing of this appeal appellant represented by Mr Kiondo the learned advocate while the Respondent/ Republic had the service of Mr Laiton Muhesa learned state attorney. The appeal was disposed of through written submissions. The appellant's counsel contends that the appellant defence was not considered, apart from a short summary of the appellant evidence, the defence evidence was not evaluated. Reliance was made on the case of Charles Samson Vs Republic, Criminal Appeal No. 29 of 1990(unreported); Hussein Iddi & another Vs R (1986) TLR 166; Goodluck Kyando V R (2006) TLR 363 and Okale vs Uganda(1965)EA 555 and Lockhort -Smith V R(1965) EA 211 condemning the trial court Magistrate for considering the prosecution case in isolation to the cross examination questions, and the defence evidence. He in the second ground blamed the trial court for misdirected himself on the question of the burden of proof. His contention was that the burden of proof in criminal trials lies on the prosecution and the standard of proof is beyond doubt as enunciated in the case of Nathaniel Alphonse and Benjamin Vs R,(2006) TLR 395,Said Hemed Vs R(1987)TLR 116,Matula Vs R(1995) and that that burden never shifts to accused person . He insisted that the prosecution failed to prove the alleged 3 offences to the required standard with an invitation for the court to allow the appeal. In reply, the learned state attorney was in support of both the conviction and sentence meted against the appellant. With regard to the first ground the learned state attorney was of the view that the prosecution evidence is very clear that PW2 received trap money from PW1 through signing in a special form (exhibit P1), PW3 witnessed the accused person (the appellant) accepting the bribe money, Tsh 100,000/= from PW2, and therefore ,2nd count was properly established. He maintained that the appellants defence was considered but could not wobble the prosecution case. In respect to the 2nd ground of appeal, the state attorney argues that the prosecution witness were able to show that appellant went to PW2's house and received a total of TZS 100,000/= as corruption contrary to section 15(2) of the Prevention and Combating of Corruption Act(Cap 329 R:E 2019) . This evidence was supported by an independent witness, PW3 Christina Chedi Haule who testified to have seen the appellant receiving money from PW2 and of PW5. He finally prayed for the dismissal of the appeal. I have considered the grounds of appeal, trial courts records and the arguments by both parties. As stated earlier, in the second count the appellant was charged of soliciting and receiving 100,000 as a bribe contrary to section 15(1) (a) of the Prevention and Combating of Corruption Act, [Cap. 329 2019 now 2022], (the

PCCA).According to that section the prosecution are to establish two main elements, corrupt solicitation and acceptance. Both prosecution and defence agree that the 4 appellant went at the Pw2's house on the material date, though on different reasons. Pw2 says the appellant visit was to collect the trap money 100,000, while the appellant says he went to collect the building permit which was not availed to him on the reasons that the door of the house wasn't open. There is no doubt also that the appellant was arrested at his office shortly after he had left PW2 house without the trap money. The crucial question for determination is whether, the prosecution did prove the offence in the required standards. As rightly submitted by the appellant's counsel, in any criminal trial, burden of proof lies on the prosecution case and the standard is always beyond reasonable doubt. A close evaluation of evidence by the prosecution uncovers enormous weak planned bribe trap, if any that left the appellant flawless. There is no doubt that the PCCB's officer presence at the PW2 house was not for ceremonial purposes. According to their evidence they attended the scene to confirm the appellant's corrupt conduct reported to them by PW2. They arrived to PW2's house earlier that day, they arranged for the trap including stationing for an independent witness (PW3) and handed the trap money to PW2. They stayed waiting for the appellant to come. The aim here was to arrest the appellant immediately after he accepts the bribe (trap money). According to the evidence, PW2 gave the trap money to the appellant in the presence of PW5 a PCCB officer and PW3 an independent witness and the Victim, PW2 escorted the appellant who left with his motorcycle before they could track him, just to arrest him later at his office without the money. Answering the question why they left the appellant go after they had handed him the trap money, PW1 said he left through the back 5 door without them noticing. Why could that be possible while one of the officer was at all the time watching inside the house and if that wasn't enough why was it possible for Pw2 to escort the appellant through the back door without notifying the PCCB officers who was outside waiting . I find it unsafe, under the circumstances of this case to find the offence in the 2nd count proved. 'This goes also to the third count. Firstly, because there is no evidence that appellant received the trap money and secondly that no evidence led to show how the appellant destroyed the trap money. Generally, the prosecution failed to establish their offence beyond reasonable doubts. I find the appeal meritorious and hereby allow it, quash the conviction, and set aside the sentence meted out against the appellant. Order accordingly. DATED at DAR ES SALAAM this 15 day of December 2023. E. Y Mkwizu Judge 15/12/2023 COURT: Right of appeal explained E. Y Mkwizu Judge 15/12/2023 6 7

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