

TANZANIA / JUDGMENT

JUVI JUDGMENT 1 2

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19 June 2023

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IN THE HIGH COURT OF TANZANIA GEITA SUB-REGISTRY AT GEITA CRIMINAL APPEAL NO.
24020 OF 2024 (Original Criminal Case No. 119 of 2023 from Geita District Court at Geita before
S.L Maweda PRM) PAUL JUVINALIS NG'WANDU-----APPELANT
VERSUS THE REPUBLIC -----RESPONDENT

JUDGMENT

Date of last Order: 13/09/2024 Date of Judgment: 10/10/2024 K. D. MHINA, J. The appellant, Paul Juvenalis Ng'wandu, was charged before the District Court of Geita at Geita (the trial court) with two counts of corrupt transaction, both contrary to section 15 (1) (a) and (2) and (3) (a) (i) of the Prevention and Combating of Corruption Act, [Cap. 329 R.E 2022]. In the 1st count, it was particularized that the accused person, being the Medical in-charge of Nyarugusu Health Centre, on 19 June 2023, at the premises of Nyarugusu Health Centre, in Geita District and Region, he 1 corruptly solicited TZS 10,000/= from Joyce d/o Elias as an inducement to provide medical treatment to her, the matter which was in relation to his principal affairs. In the 2nd count, it was alleged that the accused, being the Medical in- charge of Nyarugusu Health Centre, on 20 th June 2023, at the premises of Nyarugusu Health Centre, in Geita District, he corruptly received TZS 10,000= from Joyce d/o Elias as an inducement to provide medical treatment to her, the matter which was in relation to his principal affairs. At the start of his trial, the appellant vehemently refuted the charges against him, firmly asserting his innocence. In the end, the trial court found the prosecution sufficiently proved the charge for both counts against the appellant. Consequently, it convicted him, and he was sentenced as follows: For the first count, he was to pay a fine of TZS. 500,000/= or to serve one (1) year in prison, and for the 2nd count, he was to pay a fine of TZS. 500,000/= or to serve one (1) year of imprisonment. Despite the trial court's decision, the appellant remains undaunted and has chosen to appeal, grounding his appeal on four complaints. 2

1. The trial Magistrate erred in law and, in fact, by convicting and sentencing the Appellant on the 1 st count of soliciting for himself the sum of 10,000/= without considering that there was no evidence in record connecting the appellant with the victim to support the findings of the trial court.

2. The trial Magistrate erred in law and, in fact, by convicting and sentencing the Appellant on both counts without considering that the prosecution side failed to prove their case beyond reasonable doubt as required by the law.
3. The trial Magistrate erred in law and fact by convicting and sentencing the Appellant herein without considering that there was a variance of the name of the victim in charge and the victim who appeared to give evidence in court.
4. The trial Magistrate erred in law and, in fact, by convicting and sentencing the Appellant on circumstantial evidence that lacked collaboration. At the hearing, the appellant was represented by Mr. Yisambi Siwale and Mr. Shija Jeremia, learned advocates. The State Attorney, Ms. Verena Mathias, appeared for the respondent Republic. In arguing the 1st ground of appeal, Mr. Jeremia stated that, at the trial, there was no evidence from the prosecution to prove that the appellant and the victim (PW4) ever met on 19 June 2023. 3 The evidence of PW3, the nurse at Nyarugusu Health Centre did not tell the trial court if, after attending to the victim, she referred her to the doctor (the appellant). Furthermore, he submitted that in the clinic attendance (exhibit P1), it was not recorded that the victim was referred to the doctor (the appellant). Also, no witness from the reception desk indicated that PW4 (the victim) requested to see the appellant. Mr. Jeremia argued that the absence of such evidence affected the first count and that it was not proved to the hilt. Regarding the 2nd ground of appeal, he submitted that the prosecution evidence was weak based on the following: One was hearsay evidence, and two, the prosecution evidence was characterized by contradictions. Explaining the hearsay nature of the evidence and contradictions, Mr. Jeremia submitted that in her evidence, PW1 (PCCB officer) testified that the victim told her that on 19 June 2023, she was solicited to give TZS. 10,000/= to get treatment. However, the victim (PW4) stated that she requested TZS. 5,000/=. 4 Further, the victim stated that on 20 June 2023, she went straight to the appellant at the hospital and gave him TZS. 10,000/=. Meanwhile, PW5 and exhibit P2 indicated that on 20 June 2023, the victim followed the routine procedures in getting the treatment/ clinical procedures. Furthermore, PW1 stated that she found PW4 restless at the health centre, while PW4 stated that she met PW1 at Zahanati Primary School. Thus, Mr. Jeremia argued that the prosecution case was weak, and the trial court was supposed to warn itself before convicting the appellant. On the 3rd ground, he stated that the name of the victim who appeared in the charge sheet was Joyce Elias, while PW4, who at the trial testified as the victim was Joyce Zacharia. Mr. Jeremia argued that the difference means those were two different persons. He explained that the effect of that variation means the case/charge remains unproven. To bolster his argument, he cited the decision of the Court of Appeal in *Mabula Limbe vs. Republic*, Criminal Appeal No 563 of 2015 (Tanzlii) on page 7. 5 On the last ground, he submitted that the prosecution evidence at the trial was circumstantial and thus needed corroboration. Due to a lack of corroboration, the prosecution's evidence was not enough to convict the appellant. In response, on behalf of the Republic, Ms. Mathias declined to support the trial court decision. She supported the appeal and argued that the conviction and sentence be quashed and set aside. In faulting the trial court's decision, Ms. Mathias submitted that the victim

(PW4), in her evidence, testified that she attended Nyarugusu Health Center on 19 June 2023 and 20 June 2023. However, PW5 stated that the registration system indicated that the victim went to the Health Centre on 20 June 2023. Further, Ms. Mathias stated that PW5 tendered exhibit P2, the information retrieved from the system with the name of Joyce Elias Lubigisa. Therefore, that means PW4 was not attended at the health centre by the appellant, and that implied the name of the victim in the charge sheet, and the victim who testified at the court were two different persons. That means Joyce Elias, in the charge sheet, was not called to testify before the court. 6 Having gone through the grounds of appeal, the submissions by both parties and the entire appeal record, I wish to start with 3rd ground of appeal, which addresses the variance of the name of the victim as appeared in the charge sheet and the evidence. This is because it is trite that a charge sheet is a foundation of a criminal trial as it was held by the Court of Appeal in *Thabit Bakari vs. Republic*, Criminal Appeal No. 73 of 2019 (Tanzlii), that; “Undoubtedly, a charge sheet is the basis of a criminal trial. Its purpose among others being to inform the accused person the nature and magnitude of the charge facing him to enable him/her to prepare his/her defence”. Further, section 132 of the Criminal Procedure Act provides that: “Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”. The cited provision of law and case cited above cherished the principle of natural justice because the accused has a right to know what the prosecution has against him or her. 7 Reverting to the merits or demerits of the ground, I revisited the trial court's records and found that the victim's name in the charge sheet was Joyce Elias. In contrast, when the victim (PW4) testified at the trial, she introduced herself as Joyce Zakaria. Further, the victim's information retrieved from the system (exhibit P2) by PW5 (the IT officer) indicates that the victim's name was Joyce Elias Lugibisa. At the trial, the appellant raised that issue in his defence; however, the trial court declined to give it any weight. This is what was held by the trial court; “Apparently, the accused person, in this case, has failed to bring evidence to prove, on the balance of probabilities, that Joyce Elias Lubigisa and Joyce Zakaria were two different persons in order to support his challenge that he only attended Joyce Elias Lubigisa and not Joyce Zakaria (PW4). To that end, therefore, I find his allegations to be an afterthought and feeble attempt to pervert the clear whims of substantive justice based on the watertight evidence”. Having gone through the evidence, submissions and the impugned decision, I have the following; 8 One, as rightly submitted by Mr. Jeremia advocate and conceded, elaborated further by Ms. Mathias SA, it is quite clear that Joyce Elias and Joyce Zakaria were two different persons. No evidence was adduced at the trial by the prosecution to the contrary. Two, the onus of proving criminal cases always lies on the prosecution to prove the case and never shifts away from the prosecution. This is the cardinal principle of criminal law. See *Galus Kitaya vs. The Republic*, Criminal Appeal No. 196 of 2015 (Tanzlii). No duty is cast on the side of the accused person to establish his innocence. However, there are a few exceptions to this rule, as stated by the Court of Appeal in *Ntobangi Kelya and another vs. Republic*, Criminal Appeal No. 256 of 2017 (Tanzlii) while cited *Joseph John Makune vs. Republic*

[1986] T.L.R 44, where it was held that; "The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well-known exceptions to this principle, an example being where the accused raises the defence of insanity, in which case he must prove it on the balance of probabilities".⁹ At the trial, the court shifted that balance and required the appellant to prove by evidence that Joyce Elias and Joyce Zakaria were two different persons. I think that is not what the law requires; it was the prosecution's duty to prove that Joyce Elias, the victim in the charge sheet, was the same person as Joyce Zakaria (PW4), the victim in the evidence. Proving of the victim mentioned in the charge sheet is not an exception to the general principle. As already previously alluded, it was the duty of the prosecution to make sure that they prove the victim named in the charge sheet, Joyce Elias, was the same person who testified as a victim (PW4), Joyce Zakaria. Flowing from above, there is no doubt that there was a variance between the charge and the evidence on the name of the victim. The question is, what is the effect of that variation? In the cited case of Mabula Limbe (Supra), the Court of Appeal held that; "In the same breath, the reasoning made in Noel Gurth, a.k.a Bainth and Another Vs. Republic (supra) can be adapted to the present appeal that, where there is variation as to the names¹⁰ of the victim/s of an incident, then the charge must be amended forthwith. Normally, it is expected for the prosecution to seek leave to amend charge (s) when they become or are made aware of the variance between the charge and evidence. See Thabit Bakari (Supra). However, at the trial, that was not done. The trial proceeded to its finality; the judgment was read, and the appellant was convicted and sentenced, while there was a variance between the charge and the evidence on the name of the victim. The consequence of failure to amend the charge sheet, which has a variance, is fatal. In the cited case of Ntobangi Kelya (Supra), it was held that; "It is well settled that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case". Further, in the cited case of Thabit Bakari (Supra), it was held that the effect of failure to amend means that the charge against the appellant was not proved.¹¹ Furthermore, in Mabula Limbe (Supra), the Court of Appeal, on failure to amend when there is variation as to the names of the victim/s of an incident, held that; "And if this is not done, the preferred charge against the accused will remain unproved, and the accused shall be entitled to an acquittal as a matter of right. Short of that will occasion injustice." From the above discussion, it is clear that the trial proceeded on a defective charge, and that suffices to dispose of this appeal because the charge against the appellant was not proved. Thus, I find no need to determine the remaining grounds of appeal. Consequently, for the foregoing reasons, the appeal is allowed, the conviction is hereby quashed, and the sentence is set aside. If the appellant is in prison, he shall be released forthwith unless their continued incarceration is due to any other lawful cause, and if he paid the fine, he shall be given back the amount of money he paid as a fine.¹² K. D. MHINA JUDGE 10/10/2024 Court: Right to appeal explained. K. D. MHINA JUDGE 10/10/2024^{13 14}

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Prepared on 14 October 2026 · Esheria