

TANZANIA / JUDGMENT

20210331 TZHC Mbeya

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•1, .. IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF MBEYA AT MBEYA CRIMINAL APPEAL NO. 188 OF 2016 (Originating from Criminal Case No. 6112014 in the District Court of Kyela) VITALIS KYABONA MAGAI APPELLANT
VERSUS THE REPUBLIC RESPONDENT •., V .r

JUDGMENT

Date of last order: - 0210312021 Date of Judgment: - 3110312021 IDUNGURU,J; Before the District Court of Kyela, the appellant VITALIS KYABONA MAGAI stood charged with two counts The first count being Solicitation c/s 15(1) (a) of the Prevention and Combating of QFu*iôflAc 2007 Act No. 11 of 2007. It was alleged by the proœution sidthat the accused on 12/3/20 14 being WEO at Ikolo Ward thà\$h!" corruptly solicits bribe worth Tshs. 50,000 from Tupyelesyege Juma Mwamfupa being a condition for not taking further legal action against her for her failure to ensure that her daughter attends her studies. Page 1 of 10 On the second count, the accused has been charged with the offence of Obtaining Advantage c/s 15(1) (a) of the Prevention and Combating of Corruption Act, 2007 No 11 of 2007. The prosecution as well alleges that the accused on 07th day of May, 2014 being WEO at Ikolo Ward did corruptly obtained bribe worth Tshs. 50,000 from Tupyelesyege Juma Mwamfupa being a condition for not ___ An. taking further legal action against her for her failui -et enstàt her daughter attends her studies. The accused did deny th during which the prosecution side paraded the charge against the appellant. As n, the appellant was found guilty on the second cour sentenced to serve three years jail term and or to pay = as a fine. He opted to pay fine and was setifffeAe, „Aggrieved appellant marshalled his three grounds of aéal to this cOur to wit (I) QTf//ng acquitted the appellant on the first count of solicitation, the trial magistrate erred in fact and law to enter conviction on the second count of obtaining advantage without dear reasons for distinct/on The trial magistrate erred in law to hold that the facts before his supported the meaning of advantage The defense case was not given due consideration. Page 2 of 10 When the appeal was placed before me, Mr. Mushokorwa, the learned senior counsel appeared for the Appellant whereas Miss Anna Rose, the learned state attorney appeared for the Respondent Republic. With the leave of the court, the appeal has been disposed by way of written submissions. Before going through the merits of the ase, I thinkand it will be "p sensible to give a brief summary of the leatljpg a'i:rest and the subsequent charge, conviction a red at the trial court against the appellant. I f evidence by the pro5 I. It is somehow not corr record, the appellant was a War vithin Kyela District. It appears that iter to Tupyasekege was

found prec Having observed such situation, the ort and submit the same to the police. e.aged in turn asked for money in total of 70,000/= so as not to take the matter into the police hand. Unfortunately, the complainant had only Tshs. 10,000/= . The matter was reported at PCCB and a trap was set against the accused. A total of 50,000/= was issued by PCCB which culminated to the arrest of the accused. Page 3 of 10 13 In his defense, the appellant vehemently denied having committed the offence charged. He confidently stated that he was called by the Headmaster at Ikolo Secondary School and on how he went to hospital with the complainant and her pregnant daughter. The appellant testified on how he prepared the report and how the same was handle to Inspector Idrisa. He forceful denied having solicited anl received a bribe from Tupelesyegele Submitting on behalf of the app.e.liant'Mr MUthokorwa strongly opposed the conviction and the sentence ietered out against the appellant by the trial courtHe was iiUzzled'on why the appellant was acquitted on the first cotnt and convicted and sentenced on the second count. He fithier : sübmitthd that there was no proof of solicitation hêtime €Fé secondco4unt is as well not proved. He maintained % AN that théaccusèd has denied having solicited and received the alleged bribbA from PW2-. Mr. Mushokorwa was of the view that the trial magissj'nduly influenced by the admitted fact that the accused was found with the trap money in his mouth and the cautioned statement and convicted the appellant. The leaned counsel went on to state that the trial magistrate did not give a due consideration to the defense case. He invited the court to find its inspiration in the case of Page 4 of 10 John Nkize V R (1992) TL.R 213 where the court stated that the accused has no duty to prove his innocence rather to raise a reasonable doubt. In his reply, Ms. Anna Rose supported the conviction and the sentenced entered by the trial magistrate against the appellant. She went on to challenge the appellant submission by stating that it is not true that the there in nowhere in the triaj court'judg,pient where the ... court required the appellant to prove his innocren ,ce She went further to state that there is no proof tha,t PCCB officials forced the appellant to swallow the alleged money, She was 'conudeiit to state the when the nx appellant was being s,earched, hewas seen chewing something and later it was discovered that it was a tiap thoney Ms Anna Rose went further to state that, the offence of solicitation and i eceiving are two distinct 'c offence anare to trated and proved as such hence the trial maitrate wasright to convict and sentence the accused after having satisfie& that the second count has been proved beyona reasonable doubt. In his rejoinder, Mr. Mushokolwa reiterated his earUer submission that the appellant did not receive the money that was found stacked in his mouth. He went on to insist that it is the PCCB Officers who forced Page 5 of 10

- the money in his mouth after mishandling him and was bitten by four officers because he refused to sign the documents. He prayed for the court to allow this appeal and After a carefully analysis of the rival submissions from the both parties, the court is called upon to determine on wheter this appeal has merit or otherwise. However, upon having scrutjiLzed th rLecord q1the trial court at page six, seven of the of the typ the court, I noted that the charge was noad accused before PH and during the commencemeiit, of hrin.In:..äddftion to that, at NA page 14 of the typed proceedings as\iell, the facts of the case are not A- reflected on the court proceedings /*; /\ '-... ;,;:.... lip Undoubtedly, theproceedirig' of the case reveals that plea was neither tak durijPH oi?4/6/2014 nor on 23/6/20 14 when the headfT J

The prosecution simply told the court that they had witnesses ready for hearing. The appellant is recorded as saying: I am ready for hearing. It is clear that the parties do not dispute the fact that the trial court did not read the charge to the appellant upon conducting preliminary hearing and before the commencement of prosecution hearing. The appellant did not thus, plead to his respective count at that stage of the original case. It is my considered view that, Page 6 of 10 the context of this appeal does not encourage answering the raised issue under consideration favorably. This is because the law is quite certain that reading and explaining the charge to the accused who is before the subordinate court and taking their plea is not only mandatory, but also it is also to ensure that the appellants fundamental right to plead is observed. This is in compliance with Section 228(1) of the Criminal Procedure Act, Cap 20 R.E 2019 which initially provides for fair hearing. Additionally, the law requires that the accused's plea be recorded before conducting the trial, a measure to ensure that the charge is read over to the accused and his plea must be recorded. The same has to be done before the commencement of the trial by recording the prosecution evidence. This practice was observed in Emmanuel Malahya V Republic, Criminal Appeal No. 212 of 2004, CAT at Tabora and also in the case of Joseph Osmi @ Sugu and Another V Republic, Criminal Appeal No 29 of 2018 HCT at Mbeya (unreported) which was decided by Senior Brother Hon Utamwa, 3. I am alive that the CAT in Emmanuel Malahya case observed that according to our established practice pleas are taken at two states; one is when the plea triggers off a preliminary hearing, that is, if it is a plea of Page 7 of 10 and the trial begins. There is no gainsaying that failure by the trial court to read the charge to the accused and take his plea after conducting preliminary hearing and before the commencement of the trial that when the prosecution case commences, is fatal to the proceedings and renders them a nullity. This was highly observed in the case of Cheko Yahya Case (supra). What can be gleaned from this case is that according to our law on criminal procedure, the actual trial begins after the completion of preliminary hearing. This procedure therefore violates the accused's right to a fair trial hence any decision reached upon violation of the accused's right to a fair trial cannot stand. This was also observed in the case of Kabula d/o Luhende V Republic, Criminal Appeal No, 281 of 2014, CAT at Tabora, (Led) sing at T. (I've enunciated stating herein above, I have the confidence to state that it was highly improper for the trial court to skip reading the charge to the appellant and record his plea after conducting preliminary hearing and during the commencement of the prosecution case. This omission is also fatal to the proceedings before the trial court hence renders it a nullity and deserves to be quashed. The impugned judgment and the sentence metered against the appellant merits to be Page 8 of 10 set aside. The findings made by the court are sufficient to dispose the whole appeal. Next issue to be determined is that the facts of the case are not reflected in the court proceedings. Looking closely at page 14 of the typed proceedings, the trial magistrate is seen to have adopted the facts of the case. The said facts are not recorded or reflected in the proceedings. This is against the principles of fairness which reveals that the facts of the case during preliminary hearing were adopted by the court and formed part of the proceedings. This procedure is foreign in our jurisdiction. Facts must be recorded by the court and form part of the proceedings. Therefore the court must be clear. The must be revealed what the trial court. This is important because the appellate court relies on the trial records and

not otherwise. Failure to reflect the facts in' the proceedings is fatal hence deseR'es to be nullified N, I have also co'isidered whether or not to order ietrial basing on the abo Ti1sis. There is no dispute that the sentence was entered on 27/7/ 2015. It is now almost six years hence ordering retrial will not serve the interest of justice amid the existence of undisputed fact that the appellant after being sentenced opted to pay fine and was released. I am therefore unenthusiastic to order any retrial. What remains is to Page 9 of 10 quash the proceedings of the trial court, set aside the impugned judgment and the corresponding sentence levied against the appellant. Order accordingly. N iff DB.NDUNGURU .._I •-.>._.,. I. •' '(t• JJJ.DGE \ç4o3/2o21 ,. Right of appeal explained.)'D.B.DUNGURU)N \ J1JDGE 31/ O3/2021 . / Page 10 of 10

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