H/C - DODOMA

IN THE HIGH COURT OF TANZANIA

AT MBEYA

DC. CRIMINAL APPEAL NO.84/2005

(From Njombe District Court Criminal

Case No.61/2005).

RACHEL A. KATAMBI..............APPELLANT

VERSUS

THE REPUBLIC.................RESPONDENT

J U D G M E N T

MACKANJA, J.

Mrs. Rachel Abisai Katambi, the appellant, convicted of demanding a bribe C/S 4 (1) of the Prevention of Corruption Act, Cap. 329 (RE,2002) and of obtaining a bribe C/S 4 (1) of the Prevention of Corruption Act, Cap.329 (RE, 2002). She was sentenced to ten years imprisonment on each count. The sentences were ordered to run concurrently. Having been aggrieved the appellant brought this appeal in which she has given seven grounds as follows:-

1. That the learned trial Magistrate did not consider the ingredients of the offences charged before convicting the appellant, otherwise he could not have done so;

2. That the learned trial Magistrate erred in convicting the appellant of the offences charged when none of them was proved according to law;

3. That the learned trial Magistrate should have drawn an adverse inference in relation to PW1's failure to report the alleged demand for a bribe to the appropriate authorities for a trap before or soon after the alleged offence was committed;

4. That the defence Case was not considered by the trial Court before entering convictions against the appellants;

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5. That the learned trial Magistrate did not ascribe any reasons for his judgment;

6. That the sentence of ten years imprisonment on each count is unlawful as it is ultra vires thepeval jurisdiction of the trial court; and

7. that the orders that were made by the convicting Court were irregular and bad in law.

In this appeal Mr. Mbise, learned counsel, and Mr. Mwenda, learned State Attorney, appeared for the appellant and the for the Republic, in that order. They argued the appeal Viva voce. I will re - visit the evidence upon which the appellant was convicted before I consider the learned arguments.

Paul Jackson Nusurupia (PW3) was, at the time events that concritized in the prosecution took root, was the Manager of Amani Primary School in Njombe. The School belongs to the Tanzania Presbyteria Church. The Missionary in-charch of that Church is a Korean known as Paul Chani. The Church asked PW3 to look for more land for the Church. In order to accomplish this Mission PW3 approached the District Land Officer, one Mr, Mfaume. The latter referred PW3 to the appellant. PW3 went on to testify that the appellant, armed with a map showed him a Plot which he declined to accept. After some time of waiting PW3 and the Missionarry were directed at another area at Njombe township known as Mjimwema. It was at Mjimwema that the complainants land is situated.

The Missionaries approached one Stephano Pesambili Kinyangaazi (PW4) and his wife Mariana Jackson Mnyalape (PW1) to regotiate the purchase of a parcel of land from the couple. The first negotiations were made on 23rd March, 2004, in which the hight the Missionaries could go was a sum of Shs.12,000,000.00. PW4 declined to accept that sum and returned to Songea where he works for gain.

It seems that later in the day, if the account of PW1 is anything to go by, the appellant returned to her, alleging that was a public announcement on posters that the Government intended to acquire the land in question for redistribution to the landless and that this could be done within seven days, presumably three to four days from that date. It was alleged that the appellant urged PW1 to accepte a lower price to ...pe from the acquisition to accept whatever price the Koreans would offer. PW1 went on to allege that the appell... told her to inform the Village Chairman that the Koreans would take the land on 25th March, 2004, and that he should be on the site.

Events went in quick succession. It was alleged that PW1, met the appellant as she, PW1, was returning from the Village Chairman's residence. PW1 said this of the appellant, as the record of proceedings of the lower Court shows at the foot of page three of the typed script:-

> "...(The appellant) said as the area is a commercial area she would need money Shs.2,3000,000/= as she had helped to get a buyer lest the land would have been confiscated by the Government..."

That soon after the above event two Koreans, Mr.Noswmpia are the Koreans driver arrived at PW1's residence. In the end the price was reduced to Shs.7,500,000.00, a sum PW1 accepted gradgingly. This latter transaction was witnessed by Ester Mayemba (PW2) who alleged to been told by PW1 the appellant's demand to be given for her having facilitated the sale. PW1 did not report these matters either to the Police or the Prevention of Corruption Bureau (PCB).

PW4 returned to Njombe on 5th April, 2004. He was not amused by the sale of the land at that low price. So he went to see the Koreans; but they could not listen to him. He decided to go to PCB. PCB received him, recorded his statement and finally pounced on the appellant.

The appellant made a very brief defence on Oath. She swore that on the day in question PW1 and the Koreans sent her office. She accompanied them to the land in dispute whereat the Koreans and PW1 discussed their affairs at the and of which they all reft for their respective Missions. She denied to have received any payment or to have induced PW1 to accept the price that the Koreans paid.

After laving reproduced the various testimonies in his judgment the learned trial Magistrate said this at page three and four of his judgment:-

" What I am to consider is whether the accused solicited the bribes and received them. Indeed as for as the 1st and the 2nd accused are concerned.

I am satisfied that the accused did solicit the bribe of T. Shs.2,300,000/= as alleged and eventually received it in her capacity as a Civil servant by virtue of her emplyment as a land Planner.

No tribunal properly directing its mind would have acted on the contrary..." (Quoted verbatim)

With that said the learned trial Magistrate was satisfied that the Republic had made out its case against the appellant according to law. He therefore convicted the appellant as charged.

Now, in order to have a coherent analysis of the case, it of prime importance that the law under which the appellant was convicted be consider to determine whether or not the evidence proves the fundamental elements of the crime. This is so because in the first and the second grounds of appeal the appellant Complains that the ingredients of the offences charged were not proved. In the first count the appellant was charged of demanding a

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bribe under S. 4(1) of the Prevention of Corruption Act, Cap.329 (RE. 2002), the second count was preferred under S.4 (2) of the same legislation, namely, demanding a bribe. Section 4(1) (2) of Cap 329 (RE, 2002) provides thus:-

> " 4 (1) Any person who by himself or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person, any advantage as an inducement to, or as reward for, or otherwise on account of, anye agent (whether or not such agent is the same person as such first mentioned person) doing, or forbearing to do, or having done or forborne to do, anything in relation to his Principal's affairs or business, shall be guilty of an offence. "

Under Section 4 (1) the offence will be proved if a combination of the following ingredients are proved, namely that, any person by himself or in conjunction with any other person-

(a) 1. Corruptly solicits; or

2. Corruptly obtains; or

3. Corrupltly agrees to accept; or

4. Corruptly attempts to obtain

from any person for himself or for any other person

(b) 1. any advantage as an inducement or

2. reward for or otherwise

On account of any agent

(c) 1. to do, or

2. to forbear to do; or

3. having done; or

4. having forborne to do

anything in relation to his Principal's affairs or business.

Therefore, it is an offence:

1. to corruptly solicit any advantage or re-ward as an inducement to anything in relation to the affairs or business of the accused's Principal; or

2. to corruptly obtain any advantage or reward to forbear to do anything in relation to the affairs or business of the accused's principal; or

3. to corruptly agree to accept any advantage or any reward to do, or to forbear to do, or having done or having forborne to do anything anything in relation to his Principal's affairs or business; or

4. to corruptly attempt to obtain any advantage as an inducement or reward to do; or to forbear to do; or having done or having forborne to do anything relation to his Principal's in affairs.

Proof of any of the above scenarios will constitute proof of the offence which is created under Section 4 (1) of Cap.329 (RE).

Under the first count the appellant was, as I have already pointed out, charged with demanding a bribe. The law is very plain; demanding a bribe is not one of the ingredients of that offence. It is also plain that the particulars of offence do not disclose the offence charged. For instead 7 alleging that the appellant " corruptly demanded " a bribe, they allege that the appellant " did corruptly solict a bribe ". Obviously, the word " demand " and solicit do not mean one and the same thing. They are not synonymous. Several meanings are ascribed to the word

" solicit " by Collins Dictionary of the English Language, Second Edition. One such meaning is this:

> " to proke or incite (a person) to do something wrong or illegal."

The same dictionary assigns the following meaning to word " demand":-

" 1. to request ~~peremptorily~~ or urgent ". The word " peremptorily" is an adverb of the word "peremptory " which is defined thus, interalia, by the same dictionary:-

" Urgent or commanding". Thus word " demanding" implies a suptle command, so that failure comply may be visited with sunctions or repercussion or reprisals in the form of an illegal act.

From the above observations, it is my considered opinion that there is no offence termed "demanding a bribe " in section 4(1) of Cap.329. Accordingly the first count is fatally defective. Assuming that the first count was potent, is there any evidence upon which a Court properly directing itself could make a sound finding to the effect that the appellant solicited a bribe from PW1?

Mr. Mbise, learned counsel, submitted that PW1 was an unreliable witness because, if indeed she had given a bribe to the appellant she should have reported the matter to the relevant authorities immediately. Instead she kept quiet until her husband (PW4) returned to Njombe 5th April, 2004. Since it is alleged that the appellant solicited the bribe on 23rd March, 2004, more than ten day had ellapsed before PW4 longed his Complaint with the Prevention A Corruption Bureaux.

Mr. Mwenda, learned State Attorney, could not buy PW1's story either. He found no reason in PW1's silence. In addition, he said, PW1 invited several people to witness the sale. If, therefore, the appellant had corruptly influenced her to sell the Property on a return of a kickback, she should have laid the matter bare before those other people. In addition, he said, PW4 referred the matter to PCB because he was not satisfied with the sum of Money his wife gave him.

I am at one with Mr. Mbise, learned counsel, and Mr. Mwenda, learned State Attorney, that PW1 was not a witness of truth. I venture to say this fully aware that indeed the trial court was in a better position to assess the credibility of witnesses. As a first appella-te Court the High Court many still make its own assessment when the facts are completely at variane with the trial Court's findings.

As to the credit of PW1 one should not lose sight of the fact that she had already spent a sum of Shs.200,000.00 before her husband returned home. Nothing could have prevented her from misappropriating the sum of Shs.2,30,000.00 and cover it up with allegations that she gave it to the appellant. I am stisfied, therefore, and I find it as a fact that there is no proof that the appellant corruptly solicited and corruptly received a sum of Shs.2,300,000.00 from PW1.

As to the second count it is an offence under section 4(2) of Cap. 329 for any person -

> "... who by himself, or by or in conjunction with anye other person, corruptly gives, promises or offers any advantage to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any agent (whether as not such agent is the person to whom such advantage is given, promised or offerned) doing, or forbearing to do, or having done or forborne to do, anything in relation to his Principal's affairs or business......".

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The law is plain; it punishes the giver of a bribe.

In the second count the appellant was charged with obtaining a bribe C/S 4 (2) of Cap. 329 (RE), 2002). The law cited does not create the offence under the second count. It follows that the charge under the second count is equally, and Materially, defective the same was the first count is.

The appellant Complains in the fifth ground of appeal that the learned trial magistrate did not ascribe any reasons for his judgment. When arguing this point Mr. Mbise, learned counsel, submitted that the impugned judgment does not conform to the requirement of S.312 (1) of the Criminal Procedure Act, Cap.20 (RE-2002). He cited Jeremiah Shemweta V.R (1985) T.L.R 228 and George Mhando V.R (1983) T.L.R. 118 as authority for his arguments.

Section 312(1) of the C.P.A, the relevant part only, provides thus:-

> " (1) Every judgment under the Provisions of section 311... shall contain the point or points for determination, the decision thereon and the reasons for the decision...".

In order to comply with the statutory requirement the trial court should have determined matters that create controversy in the form of issues, it was required to discuss the evidence as it relates to those issues and the point or points for determination would have emerged from the issues. The trial court was required to reasons why it was satisfied that the accused solicited a bribe before concluding that indeed the appellant abused her office. Since the defects in the charges are glaring, the trial Court had a duty to give reasons why it proceeded to convict the appellant of a non-existent offence under the first count. Similarly, since the accused was not the giver, the trial court could not have convicted the appellant if it had convicted the appellant if it had considered the charge, gave reasons for his decision and finally deciding whether or not the the charge in the first count was sound. It follows, as it was held by this Court, Maina, J., as he then wa in George Mhando V.R, (Supra) failure to give reasons in the judgment of the trial court occasioned a failure of justice. For had the trial court subjected the charge's to an angle's eye, it would not have convicted the appellant on any of the two Counts. Indeed, as this Court, Sisya J., as he then was held in Jeremiah Shemweta (supra) merely saying that

" I am stisfied that the accused did s ice the bribe...."

without subjecting the evidence to critical analysis and without showing how the evidence supports that conclusion the trial Court's conclusion is violative of the clear provisions of section 312(1) of the CPA. This non-Conformity with the law has rendered the whole judgment a nullity.

It is upon the foregoing observations that, upon hearing Mr. Mbise, learned counsel, and Mr. Mwonda, learned State Attorney, and upon reading the record of Proceedings, that the appeal was allowed on the day the appeal was heard and the reasons were reserved. The reasons are contained herein.

Delivered in the absence of the parties.

Sgd. J. M. MACKANJA
JUDGE
19/12/2005

Certfied true copy of the original.

THE HIGH COURT OF TANZANIA

DISTRICT REGISTRAR