

A case of *Dr Wilbroad Slaa* (1) is distinguishable from this. In that case, the question of jurisdiction was in issue from the commencement of the trial, it was a subject of decision by the High Court against which the matter came on appeal to this court. Likewise, the case of *Azim Premji v. Aman Walid Kabourou* (2), does not in our view, advance the appellant's case any further. In that case which also involved an election petition, unlike the situation in this case, the contended issues on appeal were, among others, the question of citizenship which was an issue at the trial and was decided upon. However the question of citizenship was not one of the grounds of appeal but the court raised it *suo motu*, invited arguments on it and made a decision. In this case, the situation is different, the issue did not arise at the trial and so, there is no legal basis upon which it can be specified in the Memorandum of Appeal as a point which is alleged to have been wrongly decided by the High Court. And so, these two cases are not, in our opinion, on all fours with the instant case.

Finally, we turn to Mr Rweyongeza's invitation to the court to invoke its powers of revision. On this, and with respect to the great industry on the part of the learned counsel, we hardly need to dwell for long. For the reasons we have endeavoured to give, namely that in a case such as this where the appellant was ably represented by counsel at the trial the issue was not raised at all despite the prompting by the trial judge, we are not inclined to exercise the court's powers of revision.

In the event, we dismiss ground one of the preliminary objection. Ground two of the preliminary objection is allowed with consequential result that ground one of the Memorandum of Appeal is struck out. Costs in the cause.

YASIN RAMADHANI CHANG'A v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Lubuva and Samatta JJ.A.)

CRIMINAL APPEAL No. 46 OF 1996

(From the conviction of the High Court of Tanzania at Mtwara, Moshi, J, dated 7 August 1996 in Economic Crimes No. 2 of 1996)

Evidence – Evaluation of evidence on appeal – Appellate Court's re-evaluation of evidence of trial Court – Principles to be applied.

The appellant was charged with two counts of corrupt transaction contrary to section 3(1) of the Prevention of Corruption Act 1971. After considering the available evidence, the trial Court acquitted him casting doubt on the credibility of two crucial prosecution witnesses. The Republic appealed to the High Court, which convicted him after re-evaluating the evidence. Subsequently the appellant preferred this appeal.

Held: (i) An appellate court can differ from a trial court if its opinion is not supported by the evidence and the right inferences of fact;

(ii) The first appellate court was wrong in faulting the trial magistrate;

(iii) *Obiter*: Demeanour is exclusively for the trial court. However, demeanour is important in a situation where from the totality of the evidence adduced an inference or inferences can be made which would appear to contradict the spoken word.

Appeal allowed

Case referred to

(1) *Isango v. R* [1968] EA 140

Mr Jadeja, for the Appellant

Mrs Aboud, for the Republic

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JUDGMENT

(Dated 16 December 1998)

RAMADHANI, J.A.: The appellant, Yasin Ramadhani Chang'a, was the Regional Manager of the National Insurance Corporation (NIC), Mtwara Branch. He was charged with two counts of corrupt transaction contrary to section 3(1) of the Prevention of Corruption Act 1971. The particulars of the first count were that on the third day of November 1995, he corruptly solicited a bribe of TZS. 1 000 000 from one Abdallah Said (PW3). In the second count, it was alleged that on the same day he corruptly received from PW3 a bribe of TZS. 50 000. It was not in dispute that the shop of PW3's father in Newala, which had been insured, was burgled and some items of property got stolen. Hence a claim was lodged with the NIC. It was alleged by the prosecution that the appellant solicited and eventually received a bribe as an inducement to hasten the settlement of the claim.

The District Court of Mtwara, the trial court, did not believe the prosecution witnesses and so, acquitted the appellant. The Republic appealed to the High Court (Moshi, J.) which convicted him and sentenced him to imprisonment for a term of five years for each count and ordered the sentence to run concurrently. The appellant has preferred this appeal. When we came to hear this appeal, we were told by Mr Jadeja, learned counsel for the appellant, assisted by Mr Kumwembe, learned advocate, that the appellant was granted a Presidential pardon and was discharged from prison. The learned advocates said that this appeal is to clear his name. Of course, the appeal is more than that. It is also to enable him to get his dues from the NIC should he succeed.

The prosecution procured a total of five witnesses. PW1 was SP John Mhilu who was the RCO. He told the court of how he was approached by one Ahmad who complained to him that the appellant was demanding a bribe of TZS. 1 000 000 as an inducement for settling an insurance claim. PW1 issued TZS. 50 000 of police money to Ahmad who was

in the company of a much younger person. PW1 then set a trap and, together with SP Mshashu Method (PW5) and Assistant Inspector Alphaxad Lugole (PW2), caught the appellant red handed. Both PWs 2 and 5 told the court that while in PW1's office, they witnessed some police money being handed over to PWs 3 and 4, that they followed them to the NIC and that they went to arrest the appellant after PW4 came out of the office of the appellant and gave the agreed sign.

We may point out here that the defence did not dispute the fact that the appellant was caught with the police money shortly after one of the two young persons left his office. So, the evidence of these three witnesses need not detain us. It was agreed at the trial that the issue was "Did the accused solicit the TZS. 1 000 000 from Abdallah to facilitate payment of compensation to Abdallah's burgled shop which had been insured?" We have to see what the two young persons, the crucial witnesses, said.

Abdallah Said (PW3), the son of the claimant of the insurance compensation, came to Mtwara from Newala to check on the progress of his father's claim. At the Newala bus station, he met one Yesaya Ali Kinyau (PW4), a former pupil at Newala Secondary School. PW4 was going to Lindi but agreed to accompany PW3 to the NIC offices at Mtwara. It was further agreed that PW3 would then assist PW4 to board a bus to go to Lindi. At the NIC, PWs 3 and 4 went to the appellant who informed PW3 that all preparations for the payment of the claim were ready but he cautioned PW3 that because of the bureaucracy at the NIC Headquarters Dar es Salaam, it would hasten payment if PW3 gave some TZS. 1 000 000. Immediately they left the office so that PW3 could go to look for the money. As they were going, the appellant told them that he was leaving that very day for Dar es Salaam and so, they should make haste.

PWs 3 and 4 went straight to report to the police where they saw PW1 who gave them the police money which they took with them to the appellant. As they got into his office, PW3 said, the appellant

A remarked "Abdallah you have not prepared for what I told you. So you can give me anything you have". The version of PW4 was almost *verbatim*: "Abdallah as you have not prepared yourself for the amount told you, give me anything". PW3 then gave the appellant the police money and immediately thereafter PW4 got out to give the agreed signal to the three police officers; PWs 1, 2 and 5.

C The appellant in his evidence on oath said that as the Branch Manager he was authorized to pay any claim not exceeding TZS. 300 000 while any claim not exceeding TZS. 2 000 000 had to go through a claim's committee of the branch. Claims exceeding TZS. 2 000 000 were sent to the NIC Headquarters in Dar es Salaam together with some documents for consideration and payment.

D The appellant said further that he was aware of the claim of the father of PW3 which was attended to by one Simon Peter Rweyemamu (DW1) who was then the head of the Non-Life Insurance at Mtwara. On the fateful day, the appellant was going to Dar es Salaam and was approached by PW3 in the company of PW4, who was introduced to him as a younger brother of PW3. The appellant was requested to go with PW4 to Dar es Salaam. The appellant agreed. PW3 left to fetch an air ticket for the trip and he was back within minutes and deposited on the appellant's table an envelope. In cross examination, the appellant said that he was told by PW3 that the envelope contained some money for the use of his younger brother and also saw PW3 taking some money from the envelope and giving it to PW4 so that he could buy himself a drink outside the appellant's office. Immediately after PW4 left to go and buy himself a drink, the three police officers entered his office. The appellant had said the same in his caution statement (Exhibit P. "D").

H DW1 said that on 7 September 1995 he wrote to PW3 a letter (Exhibit D1) urging him to furnish the necessary documents for the submission of the claim to the headquarters. These documents were supplied except for the receipts for the purchase of the various goods which were stolen from the shop. These documents were sent to Dar es Salaam vide a letter of 14 September 1995 (Exhibit PC4).

A On the fateful day, DW1 said, PW3 went to his office but then left to go to the office of the appellant.

B The learned magistrate acquitted the appellant of both charges. As for the first count of soliciting a bribe of one million shillings, the learned trial magistrate had three reasons for discharging the appellant. First, he did not believe the two crucial witnesses, that is, PWs 3 and 4. He found that there was no relationship established between the two witnesses and he felt it strange that PW4 postponed his trip to Lindi so as to escort PW2, whom he had just met in the bus so, he felt that their company and their evidence must have been concocted. Secondly, the learned magistrate did not agree with the prosecution's submission that there was no ill feeling between the appellant and PW3. The learned magistrate had this to say: "Abdallah [PW3] might have not had personal ill feeling with the accused but he certainly was not happy with the affair of visiting the Bima eleven times travelling all the way from Newala."

E Lastly, the learned magistrate was not satisfied that it was established that the appellant solicited any bribe. He observed that it was not shown that in his ten previous visits to the NIC, PW3 was ever asked to give a bribe. The issue of a bribe surfaced only on the eleventh visit. Not only that, but the learned magistrate went on to observe that PW3 said that when he entered the appellant's office he was told by the appellant:

G Kwa kuwa madai ya baba yako yamekamilika taratibu zote ... nataka shilling milioni moja.

H The learned magistrate asked himself whether or not the statement had any truth. He came to the conclusion that the statement was false. The learned magistrate argued that the evidence tendered by the prosecution was that a total of five documents were required to be supplied by PW3 to the NIC Mtwara for transmission to the NIC Headquarters for preparation of compensation. He observed that the prosecution had not proved that by 3 November 1995 three of the five required documents had been produced. Therefore the learned

A magistrate found that the statement could not have been true and he wondered who was the liar as between the appellant, the alleged author of the words, and PW3, who testified that the words were uttered.

As for the second count of corruptly receiving TZS. 50 000, the learned magistrate was of the opinion that the prosecution failed to prove that the appellant received the money corruptly. The learned magistrate relied on *Isango v. R* (1) which sets out that for a money receipt to be corrupt, it must be proved that it was given as an inducement in relation to the duties of the recipient. He was of the opinion that was not proved with respect to the appellant.

As already said, the learned judge on appeal reversed the decision of the trial magistrate and remarked that. "In acquitting the respondent, the trial magistrate, I must say, impeached the credibility of PW3 and PW4 for reasons which were difficult to discern." The learned judge had a five-prong attack on the reasoning of the learned magistrate.

First, he said that the Lower Court did not find PWs 3 and 4 to be credible because he thought it strange that PW4 delayed his trip to Lindi simply to escort PW3. The learned judge found that not to be unusual as between friends. He felt further that it was not material to know the exact relationship between PW3 and PW4. To him what was crucial was what was proved to be their role in the matter. Second, the learned judge faulted the learned magistrate when he doubted the credibility of the two witnesses simply because it was not shown that there had been demands for a bribe during the previous ten trips of PW3 to the NIC. The learned judge said that only one act of soliciting was enough in law.

Third, contrary to what the learned magistrate held, the learned judge observed that it was evident that all the necessary documents had been submitted. Thus the learned judge found the learned trial magistrate to have erred to doubt that the appellant had uttered the words that everything was ready and that what was being awaited was making payment only. Fourth, the learned judge criticized the learned magistrate for finding that PW3 had ill feelings towards the

appellant. On the contrary, the learned judge pointed out that there was cordial relations between the two as was shown by the appellant giving his business card to PW3. The learned judge held further that PW3 ought to have known that plotting against the appellant would have a negative effect of delaying payment. Lastly, the learned judge remarked that the learned trial magistrate should not have taken into account the absence of a bargain between PW3 and the appellant. To the learned Judge that was immaterial for the conviction.

The learned judge was of the opinion that on a proper direction the learned trial magistrate ought to have found PWs 3 and 4 credible. The learned judge started by pointing out that the two witnesses were not accomplices and so, they did not require corroboration. As for the first count of soliciting, the learned judge said:

Having with great presence of mind examined the totality of the evidence, I see absolutely no possibility of PW3 and PW4 bothering the police, and getting them to take the steps they took unless, as I find, PW3 was solicited (*sic*).

As for the second count, the learned judge observed that the only issue was whether the receipt was corrupt or not. He held that certain snippets of information gleaned from the evidence supported the finding that the receipt was corrupt. He mentioned these pieces of evidence as: One, the fact that PW4 was not going to Dar es Salaam but to Lindi. Two, the reason given by PW3 for being given the business card of the appellant, that is, to facilitate his following up of the matter. Three, the way the appellant was caught by PWs 2 and 5 holding the money when the two stormed into his office after the bribe was given to him.

At the hearing of this appeal, Mr Jadeja started by saying that the appellant was framed by the two witnesses. Mr Jadeja pointed out that the trial magistrate heard and saw the witnesses giving evidence and so, he was better placed to determine their credibility than the learned judge who merely read the scripts. The learned advocate remarked that a trial magistrate does not write down all the words spoken at the hearing of a case. However, the learned advocate pointed

A out, all things which transpire in the court do make impressions on the magistrate who will rely on all of them in making his decision.

B Then the learned advocate pointed out that the learned judge did not state the principles on which an appellate court would differ from the finding of not guilty by a trial court. He said that an appellate court might have its own views on evidence but that is not enough to upset the findings of the trial court. Mr Jadeja submitted that in an appeal against an acquittal the position is slightly different in that C the presumption of innocence is reinforced by the acquittal itself.

D Mr Jadeja argued that the trial magistrate was justified in having doubts as to why PW4 abandoned his trip to Lindi so as to escort PW3. He also pointed out that the learned Magistrate had reasons to be doubtful because it was strange for a person to ask for a bribe in the presence of a total stranger, that is, PW4.

E On behalf of the Republic/respondent was Mrs Aboud, learned state attorney. She said that the appellate court followed the principles of reversing the opinion of the trial court as it considered the evidence evaluated it and drew its own conclusions.

F We think that it will help to dispose of this appeal if we catalogue the facts proved and also those pieces of missing information. Then we can be in a better position to determine as between the trial court and the first appellate court, which made the correct inferences.

G The shop of PW3's father was insured and was burgled on 20 August 1995. The theft was reported to the NIC on 22 August 1995, that is two days later. The police confirmed the occurrence of the theft by their letter of 6 September 1995 (Exhibit PC5) to the NIC. On the following day, that is, on 7 September 1995, DW.1 wrote a letter (Exhibit D1) to PW3's father asking for certain documents. H On 14 September 1995, DW1 wrote to the NIC Headquarters, Dar es Salaam, copy to PW3's father, transferring the claim and also transmitting the documents to the headquarters which was the competent authority to deal with claims of over two million shillings. This was I just 24 days after the theft. When the alleged bribe was given, that,

on 3 November 1995, only ten weeks had elapsed since the theft had occurred and about seven weeks since the claim had been transmitted to the headquarters.

B It was not shown whether or not PW3 was accompanied by any person on the ten previous occasions when he went to the NIC. The appellant was not controverted when he said that he had seen PW3 previously but that he talked to him for the first time on that fateful day. The claim had all the time been dealt with by DW1, who was in charge of Non Life Insurance. It was DW1 who wrote the letter to C PW3's father and that to the NIC headquarters. PW4 confirmed that when he said "we came into the accused's office who introduced himself to us". PW3, on the other hand, said "I was told by the manager to come to inquire of payment". PW3 did not elaborate how the D manager told him, face to face or through an intermediary. However, it is undisputed fact that the appellant and PW3 met twice on that day.

E The relationship of PW3 and PW4 is not clear. PW1 and the appellant said that PW4 was introduced to them by PW3 as his younger brother PW3 and PW4 themselves said that they were friends. Their story was that they met in a bus coming from Newala on the fateful day and that at Mtwara PW4 agreed to escort PW3 to the NIC instead of proceeding straight to Lindi, his destination. They went to the F appellant who told PW3 that the headquarters would delay payment and that one million shillings would be needed to expedite matters. PWs 3 and 4 left to go to look for the money and they went straight to the police and got the trap money from PW1. They took the money G to the appellant. Upon arrival, the appellant told PW3 to give him whatever amount he might have. PW3 gave the trap money to the appellant and immediately PW4 went out to make the agreed signal. PWs 1, 2 and 5 stormed the office and arrested the appellant. H

I PWs 3 and 4 said that they came to know from the appellant that he was leaving on that day for Dar es Salaam when they were leaving his office to go to look for the bribe money. The appellant, however, said that PW3 approached him with a request to take PW4 with him

A to Dar es Salaam because PW3 had heard that the appellant was going there on that day.

B From those proved facts and the missing links, let us see what inference could be drawn. It is palpable evidence that the claim was processed with admirable speed. One wonders whether it was necessary for PW3 to make eleven trips to the NIC, that is, a trip a week. The wonder is more amplified by the fact that DW1 had already transferred the claim to Dar es Salaam and that NIC Branch in Mtwara did not have anything more to do. Of course, it has been said that the appellant wanted a bribe so as to expedite matters at the headquarters. But we shall deal with that shortly.

D One wonders why on this eleventh trip PW3 needed an escort. Assuming that PW3 and PW4 were friends, one cannot help asking what sort of friendship that one was, between a thirty years old PW3 and PW4 who was a Form I pupil aged 15 years. Anyway, be it as it may their meeting on that day was purely accidental.

E One is forced to ask why did PW3 deem it necessary to have an audience with the appellant? Had he and PW4 known in advance that the appellant was going to Dar es Salaam, then it would have been easy to see that they had specifically gone to lobby him to try to expedite matters at the headquarters. But they said that they only came to know of the trip as they were leaving the appellant's office to go to look for the bribe money. Of course the story of the appellant is diametrically opposite. PWs3 and 4 approached him precisely because they knew that he was going to Dar es Salaam. This explains why PW3 needed to see the appellant, for the first time and that belatedly, on the eleventh trip, when the matter was no longer at Mtwara but at the Headquarters.

H The next question is what was the purpose of the visit? PW3 claimed that he had gone to inquire about the progress of the claim. But why had he gone to the appellant and not to DW1 who had been handling the matter? The appellant, on the other hand, said that PW3 I approached him with a request of entrusting into his care a youth of

A 15 years who was also going to Dar es Salaam. That sounds more plausible and explains why PW3 on this eleventh trip had to be escorted to the NIC and why he by-passed DW1 and went to see the appellant.

B If we take the explanation of the visit as given by PW3, one wonders why the appellant was so bold as to demand a bribe from PW3 whom he was dealing with for the first time and in the company of a third party, even though introduced as a younger brother. The bewilderment is multiplied when we are told of what happened when PWs 3 and 4 went back to the appellant with the police money. Immediately PWs3 and 4 entered the office, the appellant blurted that he could be given any amount of money that was available, so blurting without knowing whether or not PW3 had gone back with any money at all.

D Now, after making the above inferences, we can appreciate the doubts entertained by the learned trial magistrate in believing PWs 3 and 4. If it is doubtful that the appellant solicited a bribe of any amount from PW3 then one wonders why he received the trap money except, as he said, in trust for the use of the teenage PW4 who was to be in his care for the trip to Dar es Salaam. With due respect we differ from the opinion of the learned first appellate judge that the learned trial magistrate "impeached the credibility of PW3 and PW4 for reasons which were difficult to discern".

G Before we come to the end, we have to say that what was before the High Court was a first appeal, so it was by way of a rehearing and the learned judge was entitled to re-appraise the evidence and draw inferences of fact. It is true, as Mr Jadeja pointed out, that the appellate court should tread with a lot of care since it is dealing with scripts while the trial court dealt with live persons revealing their demeanours. Despite of that, the appellate court can differ from the trial court if its opinion is not supported by the evidence and the right inferences.

I It is true that demeanour is exclusively for the trial court. However, demeanour is important in a situation where from the totality of the evidence adduced, an inference or inferences can be made which

A would appear to contradict the spoken word. In other words, when the evidence given would appear hard to believe, then the trial court can make an observation of the demeanour of the witness or witnesses and hold that they must have, nevertheless, told the truth.

B The appeal is therefore allowed. The convictions by the High Court are quashed and the sentences set aside. Since the appellant is already out on a Presidential pardon, we make no order with respect to his release.

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