**Mohamedi v Republic**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 10 August 1973

**Case Number:** 80/1972 (53/74)

**Before:** Biron J

**Sourced by:** LawAfrica

*[1] Criminal Practice and Procedure – Closing address – Right of an accused to make – Accused not*

*informed of right – Curable irregularity. – Criminal Procedure Code, s.* 208 (*T*).

*[2] Criminal Practice and Procedure – Witness – Defence witness not present – Trial court’s duty –*

*Criminal Procedure Code, s.* 206 (2).

*[3] Evidence – Criminal acts – Other than those charged – Bribes – Admissible to rebut defence of*

*innocent possession of money.*

**JUDGMENT**

**Biron J:** The appellant who was charged in the resident magistrate’s court, Dar es Salaam on two counts under the Corruption Act 1971; of soliciting a bribe and of obtaining a bribe, was acquitted on the former and convicted on the latter charge, and he was sentenced to imprisonment for two years. He appealed to this court. It was established in evidence that the appellant was at the material time employed as an assistant works manager and supervisor by the National Housing Corporation (hereinafter referred to as the Corporation) at Kijitonyama. His duties included *inter alia*, the allocation of plots to contractors, apparently masons, who would build houses on these plots allocated to them, apparently under supervision and then after their work had been passed as satisfactory, the would be paid by the Corporation. A mason contractor, Iddi Seif, testified to the effect that he had been allocated four plots on which to build by one, Semtumberi, who was apparently of the same rank and had similar duties as the appellant in the employment of the Corporation. One day, so Iddi Seif testified, the appellant came to him and asked him for Shs. 300/-, obviously as a bribe to allocate to him more plots, and further threatened him, that if he did not pay the money requested, he would never get any more plots allocated to him. Evidence was given by two other mason contractors, Simon Chuma and Ramadhan Chando, to like effect, that the appellant solicited bribes from them. [The judge set out the evidence and continued.] In his judgment, after reviewing the evidence, the magistrate went on to say and I consider it pertinent and necessary to quote him verbatim in extenso, for reasons which will hereinafter become apparent: “That the accused was an assistant building inspector employed by the National Housing Corporation is a matter which calls for no dispute. It is also an established fact he surveys, and allocates building sites on behalf of the National Housing Corporation to building contractors. It is also admitted that the accused has power to take away plots given one contractor and give them to others. It is clearly shown that the accused is an agent of the National Housing Corporation. I accept his evidence that he has taken two plots from the complainant. The first issue I have to decide is whether there is a conspiracy against him. From the evidence during cross-examination of the complainant Iddi Seif, Simon Chuma and Ramadhani Chando coupled with his defence witness Mohamed Said and Ramadhani Siwatu there is not even an iota of evidence to support the charge of conspiracy. The evidence of Nassoro Mondo regarding this issue is that he has heard people saying that if accused is convicted Iddi Seif will be paid Shs. 500/-as compensation and will be employed permanently. This evidence is rejected for being hearsay. Apart from this there is no evidence to establish that a conspiracy exists and if it exists at all it is the accused’s figment. I therefore hold that there is no conspiracy against him. The second issue I have to decide is whether the powder which was found in the hands of the accused and in his pockets were such to hold that the police tucked the money in them. In deciding this issue I bear in mind that the accused was being watched from a distance of about six feet from where the accused and complainant were standing. The evidence of the complainant that the accused accepted the money and (put) it in his trouser pocket had been fully corroborated by D/Sgt. Kalamo who was watching accused and complainant. The powder was also seen in his trouser at the I.B. The accused allegations that the powder on the hands were due to beating the complainant was denied by his witness Mohamed Said. His allegations that the Police had put the money into his pockets were also denied by his witness Mohamed Said. It is therefore clearly proved that he was not grabbed by any person, that the accused did not fight with the complainant or slapped the money so as the powder appeared on his hands, and that no one had put the money in his pocket. The prosecution evidence being fully corroborated shows that the accused at Mikoroshoni Bar received the money from the complainant, put it in his pocket and then on becoming suspicious threw it away whereupon he was arrested. I accept the evidence of the complainant, Inspector Akilimali, D/Sgt. Kalamo and D/Cpl. Absolomon that accused by his own will received the money from complainant and then threw it away. The third issue is whether the money received by the accused was an inducement for doing something in relation to the affairs of his principal. The prosecution case is that the accused would give Iddi Seif a contract to build a house if he gave the money to the accused. The accused said that at that time there were no plots to build. This has been admitted by Ramadhani Chando during cross-examination that at the time of the arrest of the accused there were no plots left. I therefore find as a fact that at the time of the accused arrest consequently when he received the money there were no plots left in Kijitonyama. The issue is whether that fact affects the legal position under the Corruption Act. After examining the position of s. 3 (1) of the Corruption Act 1971 I find that the fact that there were no plots to be allocated to the complainant is no defence since the Shs. 300/- was an inducement for further transaction, that is on the availability of plots the accused would give to the complainant a site to build. I therefore find that it is not a defence that at the time the inducement was made there were no plots to be allocated to the complainant. I am therefore satisfied that the accused as an agent had received Shs. 300/- from Iddi Seif as an inducement for doing something in relation of his principals affairs. I accordingly find him guilty on count 2. The remaining issue is whether there is any evidence to support the allegations in count 1. The fact that the accused received Shs. 300/- as an inducement cannot be presumed that he also induced the complainant to give him money. Corroboration is necessary to prove a charge under corruption and in this case apart from complainant’s testimony there is no evidence that he solicited Shs. 300/-. In this case the prosecution was more concerned with count 2 than with count 1. I am therefore satisfied that the prosecution have failed to prove the charge against the accused in count 1 and I acquit him on that count.” In his first petition of appeal, which is prolix in the extreme, the appellant raises a large number of points, but the main complaint of any substance was that the magistrate had refused to let his defence witnesses give evidence, and he therefore had not had a fair trial. He enlarged upon this in a memorandum headed “Final Submission’, which is even more prolix than his original petition. Mr. Chirwa, filed an “Additional Memorandum of Appeal” wherein it is averred, *inter alia*, that: “1. That the president magistrate misdirected himself in fact and in law as to the ingredients of the offence of corrupt transaction; viz: ( *a*) H e failed to realise that bribery and corruption usually involves two persons one of whom is probably the villain of the piece. ( *b*) H e failed to consider whether the complainant’s story was properly corroborated in fact or in law. ( *c*) H e dismissed off-hand and in a high-handed manner the appellant’s allegation that the complainant had once or twice tried to bribe him. The appellant was prepared to support this allegation by independent evidence which the magistrate would not allow him to do.” He also repeated the appellant’s allegation that he was not allowed to call his witnesses asserting that: “3. The magistrate followed a procedure which is contrary to all rules of justice and fair trial. As a result the appellant was prejudiced beyond repair, viz: ( *a*) D espite the fact that the appellant wanted to call 14 witnesses, the magistrate closed the case for the defence after the third witness. The Court had no legal right to do so. ( *b*) T he magistrate was wrong in recording that the nature of the evidence was only to establish that accused was absent during the period 16 March to 1 April 1971 (which was quite relevant in itself), but it was also to establish that P.W.1 on more than one occasion attempted to bribe the appellant. These witnesses were in the court precincts duly summoned. Had they been heard the court would not have come to the same conclusion.” And Mr. Chirwa further complained that: “4. The magistrate erred in law in admitting the evidence of P.W.4 and P.W.5 as to the general bad character of the appellant as one who usually goes about soliciting bribes. In the result this evidence influenced the mind of the magistrate throughout his judgment and thus occasioned a failure of justice.” In arguing this appeal, Mr. Chirwa repeated and elaborated the grounds of appeal set up by the appellant himself and also by counsel in his Additional Memorandum of Appeal, asserting that the appellant’s witnesses were present in court, but the magistrate refused to hear their evidence and closed the case, thus denying the appellant a fair trial. With all due respect to Mr. Chirwa, he does not appear to have consulted his client and he has certainly not perused his “Final Submission” wherein he expressly states at para. 6 (*a*): “My Lords if you can not at p. 17 the hearing was supposed to be on the 10 January 1972 and all defence witnesses were present, but the trial magistrate adjourned the hearing up to 11 January 1972 without notifying my all defence witnesses to appear on the next day of 11/1/72, see in the proceedings nowhere he had informed my witnesses to turn up on the 11/1/72, since the absence of my defence witnesses on the 11/1/72 was not my fault or neglect, then the Court should have adjourned the trial and issue process or take other steps to compel the attendance of such witnesses as prescribed by the law s. 206 (2) of the C.P.C. please see to it.” It is, therefore abundantly clear that, even according to the appellant, the defence witnesses were not present in court. S. 206 (2) of the Criminal Procedure Code referred to by the appellant in his “Final Submission” reads: “206 (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses.” I now propose to examine the record and consider whether the magistrate did not comply with the subsection. After the appellant had completed giving his evidence, he is recorded as saying that he had witnesses to call. The court then made an order in terms as follow: “ORDER: Hearing on 13/12/71. There are 14 witnesses for defence. Please do not fix another case for me. Witness summons to issue.” Pausing there, it is abundantly clear that the magistrate there and then did comply with the subsection above set out. On 13 December 1971, the appellant announced that he had two witnesses present. The Court duly recorded the evidence of these two witnesses and then the accused is recorded as saying that he still had twelve witnesses. The court accordingly adjourned to 10 January 1972, and extended the appellant’s bail. On 10 January, when the appellant is recorded as announcing that his witnesses were present, the hearing was adjourned until the following day, 11 January, and the appellant’s bail was duly extended. On 11 January, the appellant’s third witness gave evidence, at the end of which the appellant is recorded as saying: “Other witnesses are not present”. The record then continues: “COURT: What is the nature of the evidence of the witnesses? ACCUSED: The witnesses who are remaining will come to establish the fact whether from 16/3/71–1/4/71 I was present. That is all I want them to do. COURT: Having regard to the fact that the only issue remaining for the defence is whether the accused was on duty between 16/3/71 and 1/4/71 which fact is not material in the light of the evidence on record I close the defence case.” Now, how can it be said that the magistrate failed to comply with the requirements of s. 206 (2)? According to the appellant in his “Final Submission” it was the duty of the magistrate to inform his witnesses of the adjournment. And he goes on to say that: “The court should have adjourned the trial and issued process or take other steps as prescribed by the law, section 206 (2) of the C.P.C.” There was not the slightest duty on the court to issue any further summons to the defence witnesses. It was the appellant’s duty to inform his witnesses of the adjournment. The court could hardly do so, as the witnesses would not be in court, and it cannot be overstressed that the appellant was allowed out on bail and he, therefore, had every opportunity of informing his witnesses of the adjournment. S. 206 (2) above set out, gives the court a discretion whether or not further to adjourn a case for the attendance of defence witnesses. In fact, it could well be argued that on a strict interpretation of the subsection, the magistrate’s discretion as to whether to adjourn the case, is limited, in fact, fettered, in that he must first be satisfied that the absence of the witnesses is not due to any fault or neglect of the accused person and in addition, that there is a likelihood that they could, if present give material evidence on behalf of the accused person. Then the section goes on to say that the court *may* adjourn the trial etc. In this case how could the magistrate be satisfied that the failure of the witnesses to attend was not due to any fault or neglect on the part of the appellant? In fact it was he, as remarked, who should have informed them of the adjourned hearing date. Further, the magistrate duly considered whether the evidence that the witness could give would be material to the case, and he found that it would not. And on the record as it stood, it is evident that such evidence would not in the least have been material to the case. In his “Final Submission” to the Court of Appeal, the appellant raised, obviously as an afterthought, a novel and highly technical point, submitting at para. 7, “Mwakasendo, Ag. J. ignored the fact that the judgment of the trial court should have been treated as null and void in law, because it was passed before the defence had closed and before both parties had addressed the court as to their entitlements in law (see s. 208 of the C.P.C.). A trial is a test between the prosecution and the defence, justice should be done for every party during the trial and that each party should be certified before the judgment is passed. A judgment is ruling of a dispute between two parties and any judgment in every trial in any criminal case shall be pronounced after the termination of the trial as prescribed by s. 170 and 171 (1) of the C.P.C. I submit any judgment passed before one party had closed its side would be contrary to the expressed intention by of the law in my opinion the judgment of the trial court is fatal it occasions a failure of justice and it wouldn’t be said that the court acted within the meaning of s. 171 (1) of the C.P.C.” Novelty however, is by no means fatal to a point raised on appeal, nor is a mere technicality, though it is not particularly persuasive, but being raised as an afterthought, is not calculated to add weight to it. S. 208 of the Criminal Procedure Code referred to, reads: “208. The prosecutor or his advocate and the accused or his advocate shall be entitled to address the court in the same manner and order as in a trial under the provisions of this Code before the High Court.” The point raised is novel in that in close on a quarter of a century’s experience on the Bench in this country, I cannot recall an accused when unrepresented by counsel ever making a closing address, nor have I ever heard of a court in practice informing an accused of such a right. I pause to remark that if the failure to inform an accused person of his right to address the court at the close of his case, is a fatal omission in procedure, a hundred per cent of convictions in this country where the accused is unrepresented by counsel, would thereby be invalidated. It may well be argued that an accused person should be informed of such right, but as observed, I have never known this to be done in practice. I remarked earlier that this point raised was an afterthought, in that there is not the slightest reference to it in the original petition of appeal filed by the appellant, nor, I may add, in arguing this appeal before this court, has Mr. Chirwa for the appellant, even referred to it. The appellant in his submission complaining of having been deprived of a right to address the court, himself states that the prosecution was likewise so deprived. Thus, if there has been any irregularity, it has been suffered by both sides so that each cancels out the other. In any event, the failure of the appellant to address the court, or of his having been informed of his right to address the court, cannot by any stretch be said to have resulted in any failure of justice, and it is certainly curable under s. 346 of the Criminal Procedure Code. As I think sufficiently demonstrated, the magistrate cannot in the least be faulted for not adjourning the case any further and least of all for not, as complained by the appellant, issuing any process for the attendance of his other defence witnesses, nor, I should add, can the magistrate be faulted for not informing the appellant of his right to address the court, as such practice is unheard of. And the appellant’s failure to address the court, even if he had been informed of a right to do so and had availed himself of such right, cannot as remarked, by any stretch be said to have occasioned any failure of justice. This ground of appeal therefore fails. I now propose to consider the only other substantial ground of appeal, and that is that the evidence of the two witnesses who testified that the appellant had not solicited bribes from them, was inadmissible. First of all, I am by no means persuaded that this evidence was inadmissible, as once it is established, as it was in this case, that the appellant received and accepted the money (in that even according to appellant’s own witness, the appellant had put the money in his pocket), then evidence of similar acts by the appellant, that is of soliciting bribes, became admissible in order to rebut the defence of innocent receipt on the part of the appellant, that the money was thrust and “planted” on him as a trap. The evidence of similar acts, that is, that he had solicited bribes from other mason contractors, was admissible to prove his guilty intent that he received and accepted the money in consequence of his having solicited it as a bribe. To my mind, this evidence of similar acts was therefore admissible. Even if I am wrong in so holding, the admission of such evidence would not be fatal to the conviction, as it is expressly provided in s. 178 of the Evidence Act, 1967, that: “178. The improper admission or rejection of evidence shall not be ground of itself for a new trial, or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought not to have varied the decision.” As will be noted, the magistrate in considering and deciding the issues he had himself framed, in the passage from his judgment above set out in extenso, did not make the slightest reference to this evidence of similar acts on the part of the appellant. It is thus abundantly clear that in coming to the conclusion he did, the magistrate did not take this evidence of similar acts into consideration. And I will go further and say that in my judgment, even if this evidence is rejected in its entirety, there is more than ample evidence on the record to justify the conviction. The only fault to be found with the magistrate’s judgment is his acquittal of the appellant on the first count, that of soliciting a bribe, because he considered that corroboration was necessary. Whereas, neither in law nor in practice does the evidence of Iddi Seif that the appellant solicited a bribe from him, require corroboration, as it is not suggested that he was an accomplice. However, as the Republic has not cross-appealed from this acquittal, there is nothing this court can do about it, beyond pointing out to the magistrate, that no corroboration was necessary, and he improperly acquitted the appellant on the charge of soliciting a bribe. *Appeal dismissed.*

For the appellant:

*OEC Chirwa, QC* (instructed by *Chirwa & Co*, Dar es Salaam)

For the respondent:

*I Dewji* (State Attorney)