IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPLICATION NO. 9/01 OF 2021

MICHAEL JOSEPH ..... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review of the decision of the Court of Appeal of Tanzania at Dar es Salaam

(Mkuye, Sehel and Kitusi, JJA.)

Dated the 29th day of January, 2021

In

Criminal Appeal No. 96 of 2018

.....

RULING OF THE COURT

17th July & 7th August, 2023

MAKUNGU, J.A.:

In this application, Michael Joseph, the applicant is seeking this Court to review its previous decision in **Geofrey Kitundu @ Nalogwa and another v. The Republic,** Criminal Appeal No. 96 of 2018 (unreported) where the applicant's appeal was dismissed for want of merit. In that appeal, the applicant along with Geofrey Kitundu @ Nalogwa were challenging the decision of the High Court at Dar es Salaam in Criminal Session Case No. 96 of 2015 where they were charged with

murder contrary to section 196 of the Penal Code. Upon conviction, they were sentenced to suffer death by hanging.

Dissatisfied, the duo appealed to the Court which, however, dismissed the appeal. The decision aggrieved the applicant hence the present application.

The application before us is by way of notice of motion made under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) and rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (hence the Rules) supported by an affidavit deponed by Mr. Brayson Shayo, learned advocate for the applicant. There was no affidavit in reply filed by the respondent.

The application was argued by Mr. Brayson Shayo, learned advocate who represented the applicant who was also present in Court, while Ms. Dorothy Massawe, learned Principal State Attorney, represented the respondent Republic.

Submitting in support of the application, Mr. Shayo commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavit and his written submission. He prayed the written submission to be considered as written arguments for the purposes of this

application. He then pointed out the two main grounds for consideration which are:

(a) *The decision was based on error of the law on the face of record resulting in the miscarriage of justice to the applicant under the following* ***one,*** *that the decision was based on exhibit P2 (short gun) while there was no evidence on record to show that the applicant made any statement to the Police as to whereabouts of exhibit P2.* ***Two,*** *that the decision was based on hearsay evidence of PW2 without such hearsay evidence being corroborated;* ***three,*** *that the decision was based on retracted confession caution statement of the 1st appellant without being corroborated with any material evidence on the record.* ***Four,*** *that the decision was based on the weakness of the defence witnesses on the record thereby shifted the burden of proof to the 2nd appellant (the applicant) to prove his innocent; and* ***five,*** *that the Court decision was made without considering the serious doubts raised in respect of the conviction of the second appellant:*

(b) *The applicant was wrongly deprived an opportunity to be heard in full as the Court did not consider applicant's advocate 13 pages written arguments filed on the Court together with the supplementary memorandum in substitution of the memorandum of appeal. He argued that if those written arguments and the supplementary memorandum were fully considered, the Court could come to different decision. He thus*

urged us to grant the application and release the applicant from the prison.

Ms. Massawe commenced her submission by imploring us to record the respondent's opposition to the application despite having failed to duly file the affidavit in reply. Subsequently, she sought and was granted leave to address the Court on points of law only. She then briefly submitted that the two grounds raised by the applicant do not comply with the requirements envisaged in rule 66 (1) (a) of the Rules.

The learned Principal State Attorney contended that the Court has in previous decisions given directions on condition requisite for the grant of an application for review and cited the case of **Mashaka Mussa v. Republic,** Criminal Application No. 10/01 of 2018 (unreported) that discussed the benchmarks for exercising the Court's jurisdiction in an application for review in terms of rule 66 (1) (a) of the Rules. These include, outlining the presence of a manifest error on the face of the judgment sought to be reviewed resulting in miscarriage of justice. She concluded that the grounds raised by the applicant are grounds of appeal and not for review, thus prayed that the application be dismissed.

The applicant's counsel rejoinder was to reiterate the contents of the application found in the notice of motion and supporting affidavit and to

reaffirm the fact that the application was not an appeal in disguise but an application for review. He urged the Court to find that there is a manifest error on the face of the judgment of the Court on appeal that has prejudiced the applicant's rights. He implored us to grant the application as prayed.

We have dispassionately considered the contents of the application before us and the submissions of both learned counsel for and against the application. Our understanding is that what is before us for determination is whether there is a manifest error on the face of the record as envisaged in rule 66 (1) (a)of the Rules, to warrant this Court to review its decision.

We shall begin our discussion with a statement that, the mandate for the Court to review its decision is provided by section 4 (4) of the AJA. The parameters governing for the court's power of review have been developed through case law and codified in rule 66 (1) (a) to (e) of the Rules which stipulates that:

> *"66 (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:-*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*

(b) a party was wrongly deprived of an opportunity to be heard;

(c) the Court's decision is a nullity; or

(d) the Court had no jurisdiction to entertain the case; or

(e) the judgment was procured illegally, or by fraud or perjury."

In our previous decisions, we have endeavored to define the phrase "manifest error on the face of the record" as can be discerned from the cases of **Chandrakant Joshubai Patel v. Republic** [2004] T.L.R 2018, **George Mwanyingili v. The Director of Public Prosecutions,** Criminal Application No. 27/6 of 2019 and **Elia Kasalile and 17 Others v. Institute of Social Work**, Civil Application No. 187/18 of 2018 (both unreported). In **Chandrakant Joshubai Patel** (supra), the Court quoted an excerpt in **MULLA**: **The Code of Civil Procedure,** 14th Ed; on pages 2335 – 6 on what amounts to" a manifest error on the face of the record" that:

"An error apparent on the face of the record must be such as can be seen by one who runs and reads that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably two opinions ... A mere error of law is not a ground for review under this

rule. That a decision is erroneous in law is no ground for ordering review ... It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborated argument to be established ..."

We subscribed to the passage above which clearly extrapolates what a manifest error on the face of the record is to warrant the Court to exercise its review mandate within the confines of rule 66 (1) of the Rules. On our part, we can say that an error on the face of the record essentially envisages a plain error that is obvious, discernible, and substantial. It must be important and occasioned injustice to the party seeking the review.

The instant application is grounded on the contention that centres on paragraphs (a) and (b) of rule 66 (1) of the Rules. As stated before, rule 66 (1) (a) is concerned with a decision with a manifest error on the face of the record resulting in a miscarriage of justice. In the notice of motion and affidavit in support before us, the complaint is that the error is on the face of the record of Criminal Appeal No. 96 of 2018 decided by this Court on 29th January, 2021 and has resulted in miscarriage of justice to the applicant. However, our perusal of the notice of motion and its

supporting affidavit has not been able to see any averment or statement providing a description or detail of the said error. There being nothing expounded in the notice of motion on the apparent error, we find it pertinent to reproduce one excerpt from paragraph 9 of the affidavit in support of the notice of motion relied by the applicant:

> *" 9. That when I was going through the judgment of this Court I found that the decision of this Court was based on manifest error on the face of record as the Court relied on weakness of the defence testimonies on record which was among the basis of conviction of the applicant in the trial court and proceeded to dismiss the applicant appeal."*

Plainly, when the impugned judgment is revisited what has been expounded by the applicant as a manifest error is the finding of the Court after having analysed the submissions of both sides in the appeal. Thus, the applicant in paragraphs 9,10,11,12,13 and 14 of the affidavit has only presented his dissatisfaction with the holding of the Court. This is clearly discerned from the wording in the last lines of those paragraphs of the affidavit where it is concluded thus:

> *" ... and proceeded to dismiss the applicant appeal."*

The above statement is clearly in the language of grounds of appeal, showing dissatisfaction with the holding of the Court. Since the Court dealt with the appeal, undoubtedly the applicant is inviting us to revisit our findings. It appears to us that undertaking the invitation by the applicant will entail rehearing the grievances, which we cannot accept since as clearly demonstrated, we have no jurisdiction to do so.

In the case of **Minani Evarist v. Republic**, Criminal Application No. 5 of 2012 (unreported), the Court while interpreting the applicability of rule 66 (1) of the Rules stated that:

> *"We are settled in our minds that the language of Rule 66 (1) is very clear and needs no interpolations. The Court has unfettered discretion to review its judgment or order, but when it decides to exercise this jurisdiction, should not by any means open invitation to revisit the evidence and re-hear the appeal."*

The second ground is predicated under rule 66 (1) (b) of the Rules, where the applicant claimed that he was deprived of an opportunity to be heard in full because his written statement of arguments was not considered by the Court, we do not think that this ground should detain us even a bit. First, it seems that this complaint was not loudly averred in the affidavit in support of the application as required. Second, there is no

indication in the affidavit that the applicant filed skeleton arguments. Third, in any case, the ground is baseless because the applicant was represented by an advocate who presented all the arguments on his behalf.

For the foregoing, we are constrained to find that the application is wanting in merit. It thus stands dismissed. Order accordingly.

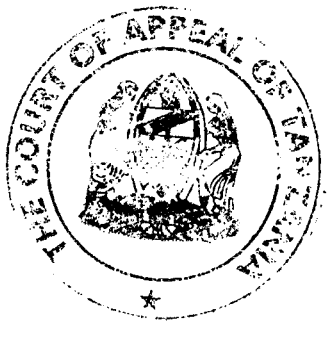
DATED at **DAR ES SALAAM** this 4th day of August, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 7th day of August, 2023 in the presence of Mr. Bryson Shayo, learned advocate for the Applicant and Ms. Salome Matunga, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL