IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., SEHEL, J.A, And KHAMIS, J. A.)

CRIMINAL APPLICATION NO. 50/01 OF 2021

ALEXANDRIS ATHANANSIOS.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Mwarija, Sehel And Fikirini, JJ.A.)

dated the 25th day of October, 2021
in
Criminal Appeal No. 362 of 2019

.....

RULING OF THE COURT

18th July & 11th August, 2023

SEHEL, J.A.:

In this application the Court is asked to review its decision in Criminal Appeal No. 362 of 2019 dated 25th October, 2021. The application is brought by notice of motion and it is supported by an affidavit of the applicant, himself. The application is made under the provision of Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules of 2009 as amended (the Rules).

Briefly, on 23rd February, 2014, a police officer, one John Daudi Qamara (PW4) who was on duty at Julius Nyerere International Airport (JNIA) arrested the applicant who was travelling to Athens, Greece via Zurich aboard Swissair. He was arrested while he was passing through the screening area as his luggage was noticed to have unusual substance. Upon search, PW4 found in the luggage a black plastic package, exhibit P1 suspected to contain narcotic drugs. The plastic luggage was smeared with coffee and zipped at the bottom of the luggage. There and then, PW4 prepared a written seizure certificate, exhibit P7 and indicated therein that he seized 'flower'. He then took exhibit P1 to the Anti-Drugs Unit (ADU) where the plastic bag was wrapped and sealed by Assistant Inspector of Police, Wamba (PW8), in the presence of PW4, the applicant and an independent witness, one Amina Mwinjuma Shoko (PW7), a ten-cell leader in the area. The box that was used to wrap exhibit P1 was admitted as exhibit P2.

On 24th February, 2014, the exhibit keeper, one Neema Mwakaganda (PW6) took exhibit P2 containing therein exhibit P1 to the Chief Government Chemist (CGC), Bertha Fredrick Mamuya (PW1) for analysis. The analysis established that the suspected powdered substances were narcotic drugs, namely, heroin hydrochloride weighing 5.43 kilograms.

The High Court tried the applicant for the offence of trafficking in Narcotic Drugs contrary to the provisions of section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 9. At the end of the trial, he was found guilty as charged. Accordingly, he was convicted of the offence charged with and sentenced to twenty years imprisonment and fined to pay TZS. 977,400,000.00 which is three times the value of the drugs.

Aggrieved by the conviction and sentence, the applicant appealed to the Court vide Criminal Appeal No. 362 of 2019. The Court upheld the conviction but set aside the illegal sentence and substituted for it with a proper sentence of life imprisonment. Following the dismissal of the appeal, the applicant has now preferred the present application for review on grounds that the decision of the Court was based on a manifest error on the face of record resulting in miscarriage of justice, the applicant was deprived of a right to be heard and the decision of the Court was a nullity for convicting the applicant on unreliable evidence.

The applicant also filed written arguments whereby he abandoned the complaints regarding a right to be heard and the decision of the Court was a nullity. He remained with one ground of manifest error on the face of the record resulting in miscarriage of justice. The alleged errors are:

a) The Court did not effectively deal with the reliability of the exhibits which were put in evidence at the trial which were very crucial for determination of appeal, but it proceeded to determine the appeal basing on the unreliable evidence and hence it arrived at wrong conclusion:

i) The Court erred by failing to notice that exhibit P1 was not completely opened in trial court during hearing, only box was opened but the said two nylon bags and khaki envelope which were in the box were not opened to see what was in them, the Court determined appeal without a properly evaluation of evidence on record of appeal.

b) The Court ignored the fatal defectiveness of the charge sheet and proceeded to enhance the 20 years sentence of the applicant to life sentence instead of ordering for a retrial or an acquittal.

c) The Court failed to notice the option of retrial raised by the prosecution in their defence against the fatally defective charge.

d) The Court wrongly and uprocedurally enhanced the applicant's sentence to life sentence by failing to consider mitigation factor of the applicant's advocate at the trial court after being misdirected by the prosecution.

e) The Court acknowledged the irregularities and errors on the court record during hearing of the appeal, but failed to accord the applicant the benefit of doubt due to him.

f) That, there has been travesty of justice in that the Judgment of the Court based thoroughly its determination on exhibit P7

obtained unlawfully and unprocedurally as the said search and seizure conducted upon prior information, were contrary to section 38 (3) of the CPA, section 3 of the Police Services Act and Police General Orders (PGO) 272."

At the hearing of the application, Ms. Lucy Nambuo and Mr. Felix Makene, learned advocates, appeared for the applicant, whereas, the respondent/Republic was represented by Mses. Salome Assey and Sabina Ndunguru, learned State Attorneys.

Ms. Nambuo first adopted the motion, the affidavit in support and the applicant's written arguments filed earlier on. She then let Mr. Makene to highlight few salient issues.

Mr. Makene emphasized that there are manifest errors apparent on the judgment of the Court because the Court failed to properly deal with the reliability of exhibits, particularly exhibit P1. He referred us to page 30 of the judgment where the Court acknowledged that the record of the trial court was not explicit as to whether exhibit P1 was completely opened. He argued that the box was opened during trial but its contents, namely, the yellow plastic bag, black plastic bag and khaki paper/envelope were not opened to establish what was inside them.

He added that there were contradictions and inconsistencies on the seized substance and such contradictions were also noted by the Court. He pointed out that PW7 who seized the alleged narcotic drug wrote flower in the seizure certificate but, in his evidence, he said that he seized flour.

Mr. Makene went ahead to point out that PW1 said the substance was cream in colour whereas PW7 said it was light brown. The contradictions, he said, go to the root of the case but the Court upheld the conviction and enhanced the sentence while the prosecution failed to prove its case beyond reasonable doubt. It was his submission that the Court made apparent error by basing its decision on suspicion. He cited to us the case of **The Republic v. Kerstin Cameron** [2003] T.L.R. 84 where it was held that suspicion however strong can never be a basis of criminal conviction or a substitute for proof beyond reasonable doubt.

Mr. Makene also contended that another apparent error was on the charge laid before the applicant which was defective as the statement of offence cited the law which does not exist and the Court, at pages 22 to 23 of its judgment, acknowledged the same but went ahead to label it as a minor omission. According to Mr. Makene, a charge sheet being a foundation of any criminal trial, must contain sufficient particulars including proper citation of the law in order for the applicant to understand

the nature of offence which he was charged with and mount a meaningful defence. It was his submission that since the applicant was found guilty on defective charge based on a nonexistence provision of the law, it cannot be said that, the applicant was fairly tried. To support his submission that the applicant did not receive a fair trial because of the defective charge, he referred us to the case of **Jafari Mohamed v. The Republic**, Criminal Appeal No. 495 of 2016 (unreported).

Connected to that, Mr. Makene took us to page 14 of the Court's judgment where the learned Senior State Attorney invited the Court to consider the option of retrial in case it finds the charge was defective. He contended that despite such invitation, the Court left undetermined the issue of retrial.

Mr. Makene further argued that there is a manifest error in the judgment of the Court because exhibit P7 which was acted upon by the Court was illegal. He clarified that it was made under irrelevant law, that is, section 38 of the Evidence Act, Cap. 6 which deals with maps and plans and not search and seizure. He further contended that the search itself was also illegal as it was not an emergency because the searching officer (PW4) had prior knowledge of the arrival of the suspected bag hence PW4 had ample time to ensure compliance with the law.

Lastly, it was Mr. Makene's submission that a patent error was on the enhancement of the sentence as there was no cross-appeal by the respondent/Republic.

On her part, Ms. Ndunguru opposed the application. She generally responded to all grounds which were labelled as manifest errors on the face of record. She contended that the grounds raised by the applicant do not qualify to be errors manifest on the face of record because they are not self-evident but rather, they require long drawn process of reasoning. A manifest error on the face of record, she explained, must be easily seen when someone runs and reads it. It does not require a long-drawn process of reasoning. To fortify her submission, she referred us to the case of **Maulid Fakhi Mohamed @ Mashauri v. The Republic**, Criminal Application No. 120/07 of 2018 [2019] TZCA 376 (4 November, 2019; TANZLII) where the Court cited the case of **Tanganyika Land Agency Limited & 7 Others v. Manohar Lai Aggrwal**, Civil Application No. 17 of 2008 (unreported) that an error on the face of the record must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points which there may conceivably be two opinions.

The learned State Attorney responded further that the grounds raised matters which were dealt with and determined by the Court in the appeal. To bring again the same complaints, she argued, it is like an appeal in disguise whereby the applicant is indirectly seeking the Court to re-hear the appeal and come to a different conclusion. To support her submission that an application for review is not an appeal in disguise, Ms. Ndunguru referred us to the decision of this Court in **Lilian Jesus Fortes v. The Republic**, Criminal Application No. 77/01 of 2020 [2021] TZCA 484 (14 September, 2021; TANZLII).

In rejoinder, Mr. Makene insisted that the grounds raised are grounds for review and do not seek to the Court to sit again on appeal. He thus beseeched us to consider the grounds and allow the application.

We have stated earlier, the applicant argued that there are manifest errors in the judgment of the Court in that; exhibit P1 was not fully opened before the trial court to know its contents, the charge was defective, exhibit P7 was obtained unlawfully and the Court wrongly entertained the submission of the respondent while there was no cross appeal. Mr. Makene tried to impress upon us to find that these complaints fall within the ambit of Rule 66 (1) (a) of the Rules which entails presence of

manifest error apparent on the face of record resulting in miscarriage of justice.

It is settled law that a manifest error on the face of the record must be apparent and obvious such that it strikes in the eyes immediately after looking at the records and does not require a long-drawn process of reasoning on points where there may be possibly two opinions. It is an error which is self-evident such that it does not require any extraneous matter to show its existence and it must have resulted into miscarriage of justice. We are guided in this position by our decision in the case of **Chandrakant Joshubhai Patel vs. Republic** [2004] T.L.R. 218 that:

> *"An error apparent on the face of the record must be such that 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 be two options...Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record...But it is no ground for review that the judgment proceeds on an incorrect exposition of the law...A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not ground for ordering review. It must further be an*

error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."

Relating the above to the application at hand, we failed to go along with Mr. Makene's submission that there was a manifest error on the face of the record. The argument that exhibit P1 was unreliable as it was not completely opened to know its contents is not a manifest error. Equally untenable are the complaints that the charge was defective, exhibit P7 was obtained unlawfully and unprocedurally, contrary to dictates of law and that, there were contradictions on the prosecutihon witnesses. All these complaints are grounds of appeal which the applicant properly raised in Criminal Appeal No. 362 of 2019 and adequately argued them during the hearing of appeal and, at the end, the Court made a finding on them. To advance them again in the application for review is a serious misconception of the underlying principles for review.

The power of the Court in review is limited to re-examination and reconsideration of its judgment with a view to correct or improve it if it is proved by an applicant that the judgment was arrived as a result of a

manifest error on the face of record which resulted in the miscarriage of justice; or a party was wrongly deprived of an opportunity to be heard; or the court's decision is a nullity; or the court had no jurisdiction to entertain the case; or the judgment was procured illegally, or by fraud or perjury-see: Rule 66 (1) of the Rules. It does not extend into re-considering its own decision on merit or else it would amount to the Court sitting in appeal against its own decision which is not permissible-see: **James Sharifu v. The Republic**, Criminal Application No. 1 of 2015 [2017] TZCA 248 (6 July, 2017; TANZLII). Consequently, it was a total misconception by the applicant to advance at the review stage the same grounds and expected the Court to arrive to a different conclusion.

The applicant has no right to raise the same grounds in the review as if a review is a second bite. It is the position of the law that a review is not an appeal or '*a second bite*' by a party in the aftermath of the dismissal of his/her appeal -see, for instance, **Miraji Seif v. The Republic**, Criminal Application No. 2 of 2009 and **Robert Moringe @ Kadogoo v. The Republic**, Criminal Application No. 9 of 2005 (both unreported).

The applicant has also complained under paragraph 1 (b) on the enhancement of sentence. For a start, we concur with the applicant and it

is on record that the propriety or otherwise of the sentence imposed by the High Court to the applicant was raised by the learned Senior State Attorney in her reply submission. Mr. Makene urged us to find that the Court unprocedurally acted upon the prayer made by the Senior State Attorney as there was no cross appeal. In order to grasp the applicant's complaint, we let the decision of the Court speak for itself. At page 40 of the judgment the Court said:

> *"Aside from the grounds of appeal raised and dealt with, there was* ***a legal issue raised by Ms. Matlkila*** *on sentence. She contended that the sentence meted out to the appellant was illegal considering that the offence was committed after Written Laws (Miscellaneous Amendments) (No. 2) Act, 2012, had become operational. Mr. Kipeche admitted that the amendment changed the sentence to a minimum of life imprisonment.*
>
> *In the light of what we have just expressed, we hereby enhance the sentence to life imprisonment."*

From the bolded parts, it is patently clear that the Court took cognizant of the fact that the propriety of sentence was a legal issue that was raised by the learned Senior State Attorney during the hearing of the appeal. The question that follows is whether dealing with a legal issue

raised at the appeal stage where there was no cross appeal is akin to an error manifest on record that would have entitled the applicant to seek an application for review. In our considered view, it is not. We say so because a legal issue can be raised at any time even in the appeal stage. Further, the same could have been raised by the Court, *suo motu* given that the Court could not shut its eyes on an illegal sentence.

In addition, we are increasingly of the view that there was no miscarriage of justice because the learned counsel for the applicant was given a chance to respond to the submission made by Ms. Matikila and the learned counsel readily conceded that the sentence was not in compliance with the law. It was only after hearing the submissions from both parties, the Court proceeded to quash the illegal sentence of twenty years and substituted thereof with an appropriate sentence, prescribed by the law, that is, life imprisonment. Therefore, we find this complaint baseless.

In the end, we wish to echo that a review of the judgment of the highest Court of the land is only exercised in the rarest of cases which meet the specific benchmarks stipulated in Rule 66 (1) of the Rules. In the present application, it is obvious that what is being sought is a re-hearing of the already determined appeal which we cannot do. In that respect, we are constrained to find that there is nothing in the present application

which would warrant the exercise of our review powers under Rule 66 (1) of the Rules.

In the upshot, we find the application has no merit. We therefore dismiss it.

DATED at **DAR ES SALAAM** this 10th day of August, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 11th day of August, 2023 in the presence of applicant in person, and Ms. Dorothy Massawe, learned Principal State Attorney, for the respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL