IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUNUO, J.A., MSOFFE, J. A. And KIMARO, J. A.)

CRIMINAL APPLICATION NO. 15 OF 2008

ABDALLAH HAMISI SALIM @ SIMBA .....APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for Review from the Judgment of the Court of Appeal of Tanzania at Tanga)

(Msoffe, J.A., Mbarouk, J.A., And Mandia, J.A.)

dated the 20th day of March, 2009
in
Criminal Appeal No. 68 of 2008

JUDGEMENT OF THE COURT

22 & 23 March, 2010

MUNUO, J.A.:

The applicant, Abdallah Hamisi Salim *alias* Simba is moving the court to quash the conviction and set aside the sentence of death by hanging, imposed on him by the High Court and upheld by the Court on the 1st day of July, 2009, here at Tanga.

The facts of the case are not complicated. On the 7th day of December, 2002, the applicant and other persons including the

deceased, PW1 and PW2 attended the discotheque at Club La Casa Chica along Independence Avenue within the Municipality of Tanga. The discotheque closed down and the dancers went out of the hall. It was the evidence of PW1 and PW2 that the appellant attempted to rob a gold chain from PW1. PW2 intervened and his intervention pulled the crowd. When the appellant realized that the crowd would overpower him, he drew out his pistol and fired a bullet at the crowd. The crowd did not disperse, instead it closed in on the appellant. The appellant then fired another bullet, which landed into the head of the deceased. In no time the appellant fired a third bullet which landed in PW2's thigh. The appellant then swiftly rode off on his bicycle and disappeared into the darkness. The deceased, Yusuf Faizi was rushed to Chumbageni police and then to the hospital where he was pronounced dead.

PW1 Mohamed Saidi and PW2 Amjad Inayat Mohamed deposed that they knew the appellant before by name and by face. The shooting occurred at the scene which was well lit with electricity from the electric poles and from the security lights of the houses nearby so visibility was good and the conditions of identification favourable.

PW1 and PW2 not only knew the appellant by his first name but also by his nickname, Simba. They also identified the appellant by his scar on the face.

The Court considered the evidence of identification and concurred with the learned trial judge that the said evidence was watertight. We wish to quote the evidence on identification for clarity:

> *--- I am also satisfied, like my ladies and gentlemen assessors were, that the accused was identified at the scene of crime by PW1 and PW2. the two prosecution witnesses knew the accused by name and appearance even before the tragic incident. They used to know him by his nick name of Simba and he had a scar on his face. They used to meet frequently in disco or entertainment places. They were familiar to the accused but not close friends.*

On the conditions of identification the learned judge observed that:-

--- there was full electricity lights at the scene that definitely enabled the two prosecution witnesses to correctly identify the accused person. Furthermore, they saw the accused as he attacked, PW1 wrestled him to the ground as he wanted to rob him his chain. The ***fracas*** *that ensued made the deceased, PW2 and the crowd to intercept to rescue PW1.*

The learned trial judge further observed that:

--- On seeing that he was being over powered, PW1 and PW2 saw the accused draw up a pistol and fired a bullet to scare the crowd but to no avail. The accused then fired a second bullet that caught PW2 on his left thigh. The accused was then seen dashing away on his bicycle. Obviously the incident was not sudden as it took a duration of time that enabled PW1 and PW2 to have the accused under their observation before he disappeared.

Citing the case of **Waziri Amani versus Republic** (1980) (TLR 280 and that of **Rashid Ally versus Republic** (1987) TLR 97, the

learned judge considered the evidence on visual identification and noted that:-

> *--- the witnesses – PW1 and PW2 were no doubt consistent and honest and there is nothing to suggest that in implicating the accused with the offence, they were mistaken in identifying him at the scene of crime --- It is inconceivable that PW1 and PW2 could for n o apparent reason, collude with the police to frame up the evidence against the accused as the accused seemed to suggest. There is no evidence that the two witnesses were in bad terms or had quarreled with the accused before the incident ---*

The applicant raised a defence of *alibi* saying he was away in Dar es Salaam on the material night so he could not have been the killer of the deceased. The Court agreed with the learned trial judge that the defence of *alibi* was not probable in view of the strong identification evidence against the applicant.

In this review, the applicant filed an affidavit in support of his application. In paragraph three of his affidavit, the applicant stated

that he was aggrieved by the decision of the Court which dismissed his appeal for want of merit. At paragraph four of his affidavit the applicant faulted the conduct of the trial in High Court saying that –

> *(i) it was conducted in English, a foreign language he does not understand;*
>
> *(ii) that Mr. Sangawe, learned advocate who represented him, did not effectively defend him;*
>
> *(iii) that Mr. Sangawe, learned advocate, did not confer or get instructions from him before the commencement of the hearing of the appeal; and*
>
> *(iv) that the review be granted in the interest of justice.*

Mr. Oswald Tibabyekomya, learned Senior State Attorney, filed an affidavit in reply opposing the review. He averred at paragraph 4 of his affidavit in reply that the Criminal Session Case No. 21 of 2006 which he prosecuted from the 13th February, 2008 till the completion of the trial and the proceedings of the appeal were conducted in

Kiswahili. The Republic filed an affidavit in reply deponed to by one Mariam Lupatu, a court clerk. She deponed that she was court clerk in Criminal Sessions Case No. 5 of 2005 which was conducted in Kiswahili.

Before us the parties reiterated the contents of their pleadings as reflected in the affidavit and counter-affidavits.

The issue before us is whether there is ground for sustaining the application for review.

We wish to point out that the application was filed on the 17th August, 2009 when the Tanzania Court of Rules, 1979 were operational; that is before the current Tanzania Court of Appeal Rules, 2009 became effective on the 1st day of February, 2010. The 1979 Court Rules lacked a provision for review. However, the Court Rules, 2009 provide for review under Rule 66. Rule 66 of the Court Rules, 2009 reflects the Court's decision on principles which guide the Court in review as pronounced in the case of **Chandrakant Joshubhai Patel versus Republic**, Criminal Application No. 8 of 2002, Court of Appeal of Tanzania (unreported.) In that case, the report of the

Government Chemist was admitted as additional evidence at the hearing of the appeal because the state attorney who conducted the trial had not been aware of the existence of the Government Chemist's Report. Citing the cases of –

1. ***Felix Bwogi versus Registrar of Buildings***, *Civil Application No. 26 of 1989 (unreported);*

2. ***Transport Equipment Ltd. versus Valambhia,*** *Civil Application No. 18 of 1993 (unreported);*

3. ***Tanzania Transcontinental Co. Ltd. versus Design Partnership Ltd.*** *Civil Application No. 62 of 1996 (unreported);*

the Court held that review would be granted where there is a manifest error on the face of the record which resulted in miscarriage of justice; or where the decision was obtained by fraud; or where a party was wrongly deprived of the opportunity to be heard.

Rule 66 of the Court Rules, 2009 provides for review by stating, *inter alia:*

66 (1) The Court may review its judgement 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 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 judgement was procured illegally, or by fraud or perjury.

(2) An application for review shall, subject to necessary modifications, be instituted in the same mode as revision.

(3) The Notice of Motion for review shall be filed within sixty days from the date of judgement or order sought to be reviewed.

The applicant has made no attempt to show an apparent error on the face of the record of appeal to justify a review. His affidavit shows that he is seeking a review of the trial as well as the appeal. The trial was challenged on appeal, where he was ably represented by Mr. Alfred Akaro, learned advocate. The prosecuting learned Senior State Attorney and the court clerk deponed to affidavits in reply stating that the trial was conducted in Kiswahili. Be it as it may, the issue of language was not even a ground of appeal in the first place. It would appear to us that the applicant would like to have a retrial and a rehearing of the appeal, all in a quest to quash the conviction and set aside the sentence imposed on him. Unfortunately, there are no such procedures under our criminal law system.

All in all, we are satisfied that the review is devoid of merit. We accordingly dismiss the application for review.

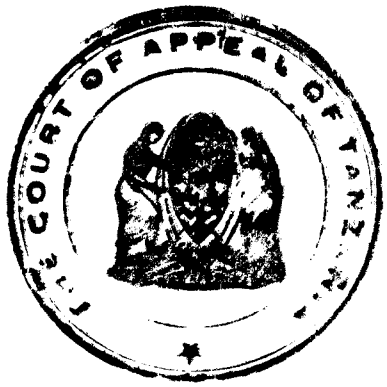
DATED at TANGA this 22nd day of March, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(N. N. CHUSI)
DEPUTY REGISTRAR