

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: RUTAKANGWA, J.A., ORIYO, J.A., And MMILLA, J.A.)

CRIMINAL APPLICATION NO. 7 OF 2011

SAID SHABANI APPLICANT
VERSUS
THE REPUBLIC RESPONDENT

**(Application for Review from the judgment of the
Court of Appeal of Tanzania at Dodoma)**

(Kileo, J.A., Bwana, J.A., Oriyo, J.A.)

**dated the 6th day of April, 2011
in
Criminal Appeal No. 88 of 2009**

RULING OF THE COURT

18th & 25 March, 2013

ORIYO, J.A.

Saidi Shabani, the applicant in these proceedings has, by a Notice of Motion, supported by his own affidavit, lodged in terms of Rule 66(1) (a) and (e) of the Tanzania Court of Appeal Rules, 2009, (the Rules), together with Article 13 (3) and (6) of the Constitution of the United Republic of Tanzania as amended from time to time applied for a Review of the judgment of the Court in Criminal Appeal No. 88 of 2009. The applicant's complaint against the decision of this Court is that it **was**

based on a manifest error on the face of the record which resulted in injustice to him, the judgment was procured illegally and by perjury. He did not elaborate.

The respondent Republic lodged an Affidavit in Reply affirmed by Farhat Seif, learned State Attorney with a single ground:-

"THAT, the content of paragraph 4 of the applicant's affidavit are denied. The applicant should further prove whether the judgment based on a manifest error on the face of the record resulting in the miscarriage of justice, or they were wrongly deprived of their right 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."

The background to the application can be traced to the District Court of Singida at Singida where the applicant was charged with and convicted of Rape contrary to Section 130 of the Penal Code, Cap. 16, as read together with sections 5 and 6 of the Sexual Offences (Special Provisions) Act, No. 4 of 1998. He was sentenced to a prison term of thirty (30) years and an order of paying compensation of shillings

50,000/= to the victim. Aggrieved by the decision, he unsuccessfully appealed to the High Court sitting at Dodoma. Still aggrieved he came to this Court for a second appeal in Criminal Appeal No. 88 of 2009. The Court found the appeal lacking in merit and dismissed it.

The applicant was further dissatisfied by the Court's dismissal order and has now come back, this time with an application for Review, as indicated above. The applicant prays for orders in the Notice of Motion:-

- (a) To review its judgment in Criminal Appeal No. 88 of 2009;
- (b) To quash the proceedings and judgments in the courts below;
- (c) To quash the conviction and sentence by the trial court and order for his immediate release.

The grounds for the application are as already stated, but for a better understanding of the predicament the Court found itself, we reproduce the relevant part of the application hereunder:-

"THE GROUNDS, for this application which are manifest on the face of the record resulting in the miscarriage of justice and the judgment was procured illegal (sic), and perjury to the applicant are:-

1. THAT, the Court erroneously overlooked the fact that the evidence of PW1 was not enough to warrant a conviction of 30 years due to the fact that was not corroborated and it was very easy to the (sic) PW1 to be coached (sic) and give evidence which was planted so as to implement (sic) appellant into the alleged offence."

When the application was called on for hearing, the applicant had no legal representation. He appeared in person. Ms. Farhat Seif, learned State Attorney appeared for the respondent/Republic.

We invited the applicant to address us first on the matter before the Court. In essence, he repeated what we have reproduced above. His main anchor was the evidence of the victim of rape, (PW1), which, according to the applicant was not corroborated and formed the basis of his conviction in the trial court. He further complained that the absence of the evidence of a doctor to prove that PW1 was raped and the lack of a birth certificate to prove that PW1 was below the age of 18 years was another ground which led to his being unfairly convicted of rape of PW1.

He asked us to review not only the Court's decision in Criminal Appeal No. 88 of 2009 but the decisions of the lower courts as well.

Then we invited Ms. Farhat Seif, learned State Attorney, to respond. Ms. Seif did not hesitate, in her brief, but focused submissions to controvert the application. She stated that the Republic did not support the application basically because none of the grounds set out under Rule 66 of the Rules is applicable in the matter before us. Ms. Seif further submitted that what the applicant submitted as a ground of review was insufficiency of the evidence which is synonymous to the grounds of appeal he raised in Court in Criminal Appeal No. 88 of 2009. The learned State Attorney prayed for its dismissal.

The law on reviews is now well settled in our jurisdiction. Rule 66 of the Rules provides:-

" 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; or*
- (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."*

The principles governing a review stated in rule 66 are in addition to case law principles which were in existence before the Tanzania Court of Appeal Rules, 2009, came into operation in February, 2010.

The basic principle underlying review is that:-

"The Court would not have acted as it had if all the circumstances had been known."

See **Chandrakant Joshubhai Patel v R.** [2004] TLR 218 and **Mashaka Henry v R.** Criminal Application No. 2 of 2012 (unreported).

The origins of the legal position of the Court on Reviews, dates back to the defunct Court of Appeal of East Africa in the case of **Lakhamshi Brothers Ltd vs R. Raja and Sons** [1966] 1EA 313 where the East African Court of appeal was called upon to review its

own judgment. Though the particular application was struck out for reasons not relevant here, but in the course of the discussions, the East African Court of Appeal made reference to its earlier decision in the case of **Raniga v Jivraj** [1965] E.A. 700, where it stated the following:-

"A court will of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt as to the order which it would have made had the matter been brought to its attention."

According to the applicant, he was convicted on insufficient evidence which, to him calls into play Rule 66 (1) (a) (supra), in that it constituted an obvious and patent error on the face of the Court's judgment which upheld the lower courts decisions. The complaint on insufficiency of evidence was raised in the two grounds of appeal before this Court and both grounds were adequately dealt with. The mere fact that the Court did not agree with the appellant on the grounds of appeal cannot constitute an error apparent on the face of the record to justify a review. The application, in our view, amounts to an appeal in disguise

where an erroneous decision is reheard and corrected, which is not allowed – see **Thungabhadra Industries Ltd vs State of Adhra Pradesh**, (1964) SC 1372, **Lakha mishi Brothers**, (supra), **Kari m Kiara v R**, Criminal Application No. 4 of 2007, (unreported).

Our decision will not be complete if we do not consider the aspect of **certainty** and **finality** in the administration of justice in the society.

In Lakhamishi Brothers Ltd (supra), the Court emphatically stated:

*"There are circumstances which this **court will exercise jurisdiction and recall its judgment, that is only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter."***
(Emphasis ours).

The Court did not end there. It provided a caution on the necessity of having **certainty** as to the end of litigation. It said:-

"There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation."
(Emphasis ours).

As was the Court of Appeal for East Africa, this Court is the highest Court of the land. It is in the interest of the public that the decisions of the Court in any proceedings mark the end of the litigation process in the particular proceedings and establish the legal position of the parties except for limited circumstances, such as in Review. This principle was echoed by the Court in **Marcky Mhango and 84 Others vs Tanzania Shoe Company Ltd and Another**, Civil Application No. 90 of 1999 (unreported). Commenting on the effect of the Court's order in appeal in disguise for a review, whereby an erroneous decision is reheard and corrected, the effect of the ensuing Court's order, is stated to be as follows:-

"...is to reopen a matter otherwise lawfully determined. There should be certainty of judgments...a system of law which cannot guarantee the certainty of its judgments and their enforceability is a system fundamentally flawed. There can be no certainty where decisions can be varied at the pressure of the losing party and the machinery of justice as an institution would be brought into question."

*See also **Karim Kiara**, (supra).*

In conclusion, we find no merit in the application for Review. It is accordingly dismissed.

DATED at DODOMA this 25th day of March, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

Malewo M.A.
DEPUTY REGISTRAR
COURT OF APPEAL