IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPLICATION NO. 6 OF 2009

ANDREW AMBROSE ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review from the Decision of the Court of Appeal of Tanzania, At Dar es Salaam.)

(Msoffe, Mbarouk, Oriyo, JJJ.A.)

Dated the 29th day of May, 2009
in
Criminal Appeal No. 141 of 2007

.....

RULING OF THE COURT

6th & 16th July, 2015

MMILLA,J.:

This is an application for review. It is brought by notice of motion under Rules 3(1) (a) of the Tanzania Court of Appeal Rules, 1979 (the old Rules) and Article 13 (3) and (6) (a) of the Constitution of the United Republic of Tanzania. The applicant one Andrew Ambrose is moving the Court to review its decision in Criminal Appeal No. 141 of 2007. It is supported by an affidavit sworn by him in person. The notice of motion has raised four grounds as follows:-

1. That the Court erroneously convicted and sentenced the applicant basing on the evidence of PW2 without taking into consideration that PW2 as a complainant had denied his former statement which was recorded at police station on 11.6.2003 according to the provision of section 9 of the CPA 1985.
2. That the Court misdirected itself by relying on the testimony of PW2 in the absence of the former statement which was recorded at police station on 15.4.2003 when he went to report the matter contrary to section 166 of Evidence Act Cap 6 of the Revised Edition 2002.
3. That the Court erred in law when it convicted the applicant based on evidence of PW2 and PW5 while the record shows that they gave contradictory testimonies on where the applicant was arrested and who arrested him.
4. That the Court erred in law in disregarding the defence of ***alibi*** raised in court under section 194 (4) and (5) of the CPA.

On 6.7.2015, the applicant filed a supplementary affidavit in which he raised one more ground that the sentence which was imposed by the trial court and upheld by both the first appellate court and this Court was illegal because it was against the law on the point then in place before the 2004.

Before us, the applicant appeared in person and was not represented, while Mr. Salim Mohamed represented the respondent Republic. He hastened to inform the Court that he was opposing the application.

Upon being informed of his right to begin, the applicant elected for the Republic to begin, intimating to say something thereafter if need there be.

While noting that the present application was founded on the old Rules, Mr. Mohamed submitted, relying on Rule 130 of the Tanzania Court of Appeal Rules, 2009 (the Rules), that any such application is required to raise any of the grounds stipulated under Rule 66 (1) of the Rules, adding that none of the grounds he raised came closer to that. He elaborated that while some of the grounds raised by the applicant refer to evidence, others recapture the grounds which were raised and determined in the appeal to this Court in a decision which is the subject of this review. Mr. Mohamed urged the Court to dismiss this application.

On his part, the applicant submitted that the sentence of 30 years which was meted on him by the trial court and upheld by both, the High Court and this Court was illegal in that, before 2004 the charge under sections 285 and 286 of the Penal Code Cap. 16 of the Revised Edition, 2002

attracted the sentence of 14 years, adding that the charged incident was alleged to have been committed in 2003. He pressed the Court to allow this application.

It is beyond argument that this application stands or falls on the basis of Rule 66 (1) of the Rules which provides that:-

"66 (1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds namely that:

(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;

(d) the court had no jurisdiction to entertain the case;

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

To begin with, we agree with Mr. Mohamed that in the present case the grounds raised by the applicant refer to evidential, legal and factual matters; most of which recapture the grounds which were raised and determined in the appeal to this Court. This is what the first four grounds

are all about. While grounds 1, 2, and 3 assert that his conviction was erroneously based on the evidence of PW2 and PW5, the applicant challenges in the fourth ground that his defece of ***alibi*** was improperly rejected. In essence, to re-raise them in this way is tantamount to asking the Court to sit on appeal against its own decision.

We feel it is important to observe that as often stressed by this Court, the review jurisdiction should be exercised in the rarest of cases and in the most deserving ones which meet the specific benchmarks provided under Rule 66 (1) of the Rules – See the case of **James @ Shedrack Mkungilwa and Another v. Republic**, Criminal Application No. 1 of 2012, CAT (unreported). In that case, the Court emphasized that:-

> *"A review application, therefore, should not be lightly entertained when it is obvious that what is being sought therein is disguised re-hearing of the already determined appeal . . ."*

This culminates/sums up to saying that in a review the Court should not sit on appeal against its own judgment in the same proceedings. Indeed, this is why we find and hold that grounds 1, 2, 3 and 4 lack merit and are dismissed.

As already pointed out, the applicant's additional ground alleges that the sentence of 30 years which was meted on him by the trial Court and upheld by both, the High Court and this Court was illegal. In our view, in a fit case, this could be regarded to fall under ground 66 (1) (a) of the Rules referring to a manifest error on the face of the record. We are saying so because where the trial court could have awarded an illegal sentence which was not corrected by the higher courts on appeal, ***ipso facto***, that may constitute an error apparent on the face of the record.

In our present case, the applicant was charged, along with two other persons with three counts, the second of which was armed robbery contrary to sections 285 and 286 of the Penal Code. Facts alleged that a pistol was employed in order to obtain the stolen property. Upon conviction on this count, the applicant was sentenced to 30 years imprisonment. This is the essence of the complaint under focus.

Mr. Mohamed submitted on the point that the sentence was not illegal as is being alleged by the applicant because the offence of armed robbery under sections 285 and 286 of the Penal Code carries the minimum sentence of 30 years imprisonment. Once again, we agree with him.

The offence of robbery is under the Minimum Sentences Act Cap. 90 of the Revised Editions, 2002. Before the 1994 amendments, the Minimum Sentences Act prescribed the minimum sentence to be fifteen (15) years. This was brought about by the 1989 amendment vide Act No. 10 of that year. Then, there was section 5 (b) of that Act without more. However, with the 1994 amendment vide Act No. 6 of that year, the minimum sentence in circumstances where a dangerous or offensive weapon would be used, or where the offender is in company with one or more persons, among other things, was prescribed to be a term of not less than thirty years. That is the essence of section 5 (a) (ii) of the said Act which provides that:-

> *"S.5 (a) (ii):* ***if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery****, he wounds, beats, strikes or uses any other personal violence to any person,* ***he shall be sentenced to imprisonment to a term of not less than thirty years."***
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> [Emphasis provided]

See the cases of **Kombo Omari v. Republic**, Criminal Appeal No. [illegible] 2005, CAT, **Adam Ally v. Republic**, Criminal Appeal No. 121 of 2002, CAT, and **Ngela Machibya v. Republic**, Criminal Appeal No. 69 of 2013, CAT (all unreported). In the final analysis, this ground too does not carry a day for him for reasons we have assigned.

In view of the above, it is certain that the allegation of illegality of the sentence of 30 years in the circumstances of count No. 2 does not merit. Thus, this ground too fails.

For reasons we have covered above, we find that the application lacks merit and we dismiss it.

DATED at **DAR ES SALAAM** this 9th day of June, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL