IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KILEO, J.A., MUSSA, J.A. And MMILLA, J.A.)

CRIMINAL APPLICATION NO. 22 OF 2014

OMARY MAKUNJA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kileo, Bwana, Mjasiri, JJJ, A.)

dated the 09th day of May, 2007
in
Criminal Appeal No. 250 of 2013

RULING OF THE COURT

24th July, 2015 & 2nd January, 2016

KILEO, J.A.:

The application is made under Rule 66 (1) and (3) of the Court of Appeal Rules 2009. The applicant is moving the Court to review its own decision in Criminal Appeal No. 250 of 2013 whereby the applicant's appeal

against the High Court Decision in Criminal Appeal No. 142 of 2011 was dismissed.

The applicant appeared before us in person. He did not say much apart from asking us to adopt his Notice of Motion and affidavit and grant the application.

Ms Tumaini Mfikwa, learned State Attorney appeared for the respondent Republic. Referring to Civil Application No 17 of 2008 between **Tanganyika Land Agency Ltd & Others and Manohar Lal Aggrwal,** (unreported) she argued that the criteria for grating a review had not been met and for that reason she asked us to dismiss the application.

For better understanding of the matter before us it befits that we reproduce the grounds for seeking review as they appear on the Notice of Motion. It is stated as hereunder:

"**NOTICE OF MOTION**

(Under Rule 66 (1) (a) (3) Tanzania Court of Appeal rules, 2009 and any other enabling provision of laws)

TAKE NOTICE that on..... day of ..... 20..... At o'clock in the morning/afternoon or as soon, thereafter as he can be heard, Mr. OMARY MAKUNJA the above named applicant will move the court for an order that:-

(i) Review the court's judgment / decision dated 19th day of August 2014 dismissing the Appeal.

(ii) Allow the application and order an acquittal of the applicant (original appellant).

On the grounds that: -

1. *That, thereafter, having enthusiastically studded the court's judgment, I, (applicant) have observed that the Honourable learned justices of Appeal gravelly misdirected/non-directed themselves upon relying their decision on a manifest error on the face of the record resulting in the miscarriage of justice/unfair judgment, hence the court's judgment deserves to be reviewed.*

   i. *They gravelly omitted to consider the failure of the prosecution to produce ballistic evidence which was of the most paramount importance, particularly to substantiate the allegations of PW1 that he possessed a fire-arm (exh. P.1) and subsequently shot at the applicant's leg at Locus in Quo on the material date.*

2. *The learned justices of Appeal completely omitted to consider the significance of vital evidence on record concerning the question of visual identification by the prosecution witnesses who failed to squarely give sufficient details as to how they were able to properly identify the applicant in the midst of village vigilantes while they were at a distance from locus in quo.*

3. *The learned justices of Appeal misdirected themselves to conclude as the learned trial magistrate and the first appellate judge did, that the caution statement (Exh. P.2) was admitted without objection, yet the lower courts before acting the alleged caution statement did not satisfy themselves if the statement was freely obtained the mater ought to be dealt holistically including reflecting to the pre-objection against fact No. 5 laid in the filed memorandum of facts as regard the said confession apparently, the alleged non-objection to the tendering of the statement at the trial ought/should be treated as a mere misapprehension of fact."*

This matter need not detain us. We need to point out right away that review is not an automatic right. It is available only in exceptional situations which are listed under rule 66 (1) of the Court of Appeal Rules, 2009. The Rule provides:

"66.-(1) The Court may review is 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.

Of the five situations above where the Court may review its own decision the applicant is basing his application on the first situation which is that there was an obvious error on the face of the record.

The question is; was there an obvious error on the face of the record which resulted in miscarriage of justice?

What constitutes *"an obvious error on the face of the record"* was discussed at great length by the Court in **Tanganyika Land Agency Limited and 7 Others v. Manohar** (supra) in which the Court was persuaded by the decision of an Indian case of **M/s Thunga Bhadra**

Industries Ltd v. The Government of Andra Pradesh, AIR 1964 SC 1372 where it was stated that:

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. .....it would suffice for us to say that where without any elaborated argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."*

In Criminal Application No. 8 0f 2000 between **Chandrankat Joshubhai Patel and the Republic** having examined a number of Indian decisions the Court stated:

> *"... Such an error 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. That a decision is erroneous in law is no ground for ordering review. Thus the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third, the error must have resulted in miscarriage of justice.".*

Though the two cases cited above were decided in the backdrop of the 1979 Court of Appeal Rules, however, the principles laid therein were the ones that were restated in Rule 66 of the 2009 rules under which the current application was brought.

In as far as the present case is concerned we must confess that we have failed to see any error on the face of the record let alone a manifest one that resulted in miscarriage of justice.

The judgment of the Court is impugned on three grounds- firstly, that the Court did not address itself to the failure by the prosecution to produce ballistics evidence, secondly, that the Court failed to properly evaluate the evidence on visual identification and thirdly that the Court misdirected itself to hold that the cautioned statement was admitted without objection. These grounds are obviously grounds of appeal, moreover, the question of visual identification was discussed by the Court as well the cautioned statement which was indeed, as the record certifies (at page 7), was admitted without objection. Ballistics evidence was not an issue that was raised at the trial or on appeal. The applicant never denied that the injury he sustained was a result of being shot at by the victim of the armed robbery. We have already stated earlier that a review is not an appeal and

it is granted only under exceptional circumstances as listed under Rule 66 of the current Rules. This application does not meet any of the circumstances listed. In the result we find the application to be wanting in merit and for this reason we dismiss it.

DATED at **DAR ES SALAAM** this 13th day of January, 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL