IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPLICATION NO. 4 OF 2015

MIRUMBE ELIAS @ MWITA……APPLICANT

VERSUS

THE REPUBLIC……..RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Mwanza)

(Rutakangwa, Mussa, Juma, JJJ.A.)

dated the 05th day of June, 2015

in

Criminal Appeal No. 328 of 2014

JUDGMENT OF THE COURT

24th & 28th October, 2016

MUGASHA, J.A.:

This is an application for review of the Judgment of this Court (RUTAKANGWA, JA, MUSSA, JA and JUMA, JA) in Criminal Appeal No. 328 of 2014 which dismissed the appeal against the decision of the High Court in Criminal Appeal No. 68 of 2014. The application is brought under Rule 66 (1) of the Court of Appeal Rules, 2009 and is supported by the affidavit of, MIRUMBE ELIAS @ MWITA, the applicant. In the Notice of Motion, the applicant has raised three following grounds for review:

"(a). The decision was based on a manifest error on the face of the record resulting in miscarriage of justice after the trial court refused my Alibi defence totally.

(b). A party was wrongly deprived of an opportunity to be heard during trial after defence of alibi was raised.

(c). The Court decision is a nullity because on the exhibit paragraphs 6-7 of the PF3 there is no name of the Doctor who filled the medical sheet but indicating only signature."

In paragraphs 1 and 2 of the affidavit, the applicant avers that he was convicted of the offences of armed robbery and gang rape in the trial court in Musoma and he appealed to the Court in Criminal Appeal No 328 of 2014 which is the subject of the present application. In paragraph 3, it is the applicant"s deposition that he is aggrieved by the impugned decision of the Court which contains various prominent errors on the face of record following failure by the Court to consider the defence of alibi which was earlier ignored by the trial magistrate. He further contends that, the medical evidence (exhibits P6 and P7) lacking the name of the medical practitioner were wrongly acted upon considering refusal of his defence on the existence of grudges between his elder brother, PW1, and PW2.

The application is opposed by the respondent Republic through the Affidavit in Reply of MAMTI SEHEWA KALEBI, learned Senior State Attorney.

He is challenging the entire application arguing that,it lacks good reasons to move the Court to review its judgment.

At the hearing of the application, the applicant appeared in person whereas Mr. Mamti Sehewa, learned Senior State Attorney, represented the respondent Republic. The applicant opted to initially hear the submission of the learned Senior State Attorney.

Mr. Mamti Sehewa submitted that, the grounds stated in the Notice of Motion are not sufficient for a review because the complaints on the unattended defence of alibi and discrepant medical evidence were discussed at length and determined by the Court. In this regard, he argued that, the Court is not properly moved to depart from its earlier decision. He referred us to the case of GHATI MWITA vs. REPUBLIC, Criminal Application No. 3 of 2013 (unreported) and urged us to dismiss the application.

On the other hand, the applicant apart from repeating what he stated in the grounds of motion and the affidavit, has raised a new ground of review on the enhanced sentence to life imprisonment. When reminded by the Court on his grounds of motion, he urged the Court to consider his application.

As earlier stated, this application is brought under Rule 66(1) of Rules which provides: -

> "The Court may review its judgment or order, but no application for review will be entertained except on the following grounds namely that:
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> (a). the decision was based on a manifest error on the face of record resulting in the miscarriage of justice; or
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> (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.
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> (e). the judgment was procured illegally, or by fraud or perjury."
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> [Emphasis supplied].

The only point for consideration is whether the applicant has made out a case for reviewing the judgment and satisfied the criteria for entertaining the same in the Court"s review jurisdiction.

From the wording of rule 66(1) of Rules, it is clear that the review is limited in scope to grounds stated thereunder. This is also reflected in the principles governing the exercise of review as established by case law in our jurisdiction and from various jurisdictions. These are ONE, the principle underlying a review is that the court would not have acted as it had, if all

the circumstances had been known. (See ATTILIO vs. MBOWE [1970] HCD N. 3). TWO, a judgment of the final court is final and review of such judgment is an exception. (See BLUE LINE ENTERPRISES LTD. vs. THE EAST AFRICAN DEVELOPMENT BANK, (EADB), Civil Application No. 21 of 2012. THREE, in review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for the invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction (See BLUE LINE ENTERPRISES LTD. vs. THE EAST AFRICAN DEVELOPMENT BANK, (EADB) (supra) and KAMLESH VARMA v. MAYAWATI AND OTHERS, Review Application No. 453 of 2012) EAC). FOUR, the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case. Seeking the re-appraisal of the entire evidence on record for finding the error, is tantamount to the exercise of appellate jurisdiction which is not permissible (See MEERA BHANJA vs. NIRMALA KUMARI CHOUDURY (1955) ISCC India), FIVE, the power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law (See PETER NG'HOMANGO vs. GERSON A.K. MWANGA and ANOTHER, Civil Application No. 33 of 2002 (unreported) and DEVENDER PAL SINGH v.

STATE, N.C.T. of New Delhi and Another, Review Petitions No. 497, 620, 627 of 2002 (India Supreme Court). SIX, the term „mistake or error on the face of the record" by its very connotation signifies an error which is evident perse from the record of the case and it does not require detailed examination, scrutiny and clarification either of the facts or the legal exposition. If an error is not self evident and its detection requires a long debate and process of reasoning, it cannot be treated as an error on the face of record. In other words, it must be such as can be seen by one who runs and reads: MULLA, Commentary on the Indian Code of Civil Procedure, 1908, 14th edition at pp 2335-6, STATE OF GUJARAT vs. CONSUMER EDUCATION AND RESEARCH CENTRE (1981) a Guj. 233 STATE OF WEST BENGAL AND OTHERS vs. KAMAL SENGUPTA AND ANOTHER, (2008) 8SCC 612 and CHANDRAKAT JOSHUBHAI PATEL VS REPUBLIC, Criminal Appeal No. 3 of 2013 (unreported). SEVEN, a Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. (See BLUE LINE ENTERPRISES LTD. vs. EADB (supra) and AUTODESK INC. v. DYASON (No. 2) (1993) HCA 6 (Australia).

We shall be guided by the firmly stated legal principles to determine the present application. In the present application, it is the applicant's complaint that the error is manifest on the face of the record due to non consideration of the defence of alibi which wrongly deprived him the right to be heard by the trial court. The other complaint is on the Court embarking on a nullity for considering the medical report which does not bear the name of the medical practitioner. However, in both the affidavit and at the hearing, the applicant did not elaborate as to how the discrepant medical report impacted on the refusal of his evidence on the existence of grudges between his elder brother, PW1 and PW2.

As rightly submitted by the learned Senior State Attorney, the applicant's defence of alibi and the discrepant medical report raised by the applicant in this application were considered at length by the Court. We wish to point out that, a review based on deficiencies at the trial court is not the domain of this Court and this is what makes the learned Senior State Attorney to argue, with which we entirely agree, that the Court is not properly moved. However, in the impugned judgment, the defence of alibi, was discussed at length and rejected by this Court which answers the applicant's complaint that he was denied an opportunity to be heard. Besides, the applicant has failed to show as to how the Court's

determinationon the alleged complaints constitute an error manifest on the face of record.

The complaint on the Court relying on the discrepant documentary medical evidence and that it renders the impugned judgment a nullity is also without merit. Having found the medical evidence wanting, the Court did not act on such evidence to uphold the conviction of the appellant. Instead, the Court relied on the credible evidence of the victims and gave a detailed account in that regard.

Pertaining to the complaint on the sentence of thirty years imposed for the offence of gang rape; having found that the sentence was unlawful, the Court invoked its revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE.2002], to quash the illegal sentence and substituted for it the lawful sentence of life imprisonment.

In a nutshell, apart from the applicant raising complaints on deficiencies at the trial, his complaints were dealt with and answered by the Court in the impugned judgment. Therefore, the applicant is not permitted to challenge the impugned decision in the guise that an alternative view is possible under review as we said in BLUE LINE ENTERPRISES LTD. vs. EADB (supra). Since the complaints raised in the motion and at the hearing were dealt with and answered, in our considered

view, in the present application, the applicant was all out to re-open the re- hearing and re-arguing the second appeal which falls short of constituting a ground for reviewing the impugned decision.

We entirely agree with the learned Senior State Attorney that, the applicant has not properly moved the Court to review its earlier decision. Apart from not meeting the required criteria warranting the review, the applicant has not made out a case for reviewing the Judgment. The intended re-opening, re-hearing and re-arguing of what is already determined by the Court is an abuse of the court process.

In view of the aforesaid, the application is without merit and we accordingly, dismiss it.

DATED at MWANZA this 25th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR

COURT OF APPEAL