IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: JUMA, Ag. C.J., MUGASHA,J.A. And MWANGESI,J.A.)

CRIMINAL APPLICATION NO 2 OF 2012

ABDI ADAM CHAKUU.....APPLICANT
VERSUS

THE REPUBLIC..... RESPONDENT

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

(Munuo , J.A., Kileo, J.A. and Mandia, J.A.)

dated the 20th day of February, 2012
in
Criminal Appeal NO. 157 of 2009

RULING OF THE COURT

15th & 19th May, 2017

JUMA, Ag. C.J.:

The applicant for review, Abdie Adam Chakuu, was convicted by the trial High Court of Tanzania at Moshi of the offence of murder contrary to section 196 of the Penal Code, Cap 16. He was sentenced to suffer death by hanging. The Court of Appeal dismissed his appeal holding that the prosecution had proved his guilt beyond reasonable doubt. Although the dismissal of his appeal ostensibly marked the end of this Court's appellate

jurisdiction, the applicant has come back to the Court to seek a review under Rule 66 (1) of the Court of Appeal Rules, 2009 (the Rules). In his Motion for Review, which we reproduce verbatim, the applicant is moving the Court:

> *"...to decide which is correct position of the law between the Applicant and the Respondent especially when taking consideration that three major points of law were violated namely:*
>
> *1. That, the Honourable Justice of Appeal and their Lordships, the Justice of Appeal in their final analysis concerning the entire issue and relied on cautioned statement to convict the appellant on the charge he was charged with when no trial within trial was conducted to prove beyond reasonable doubt that the said cautioned statement was given voluntarily, as much leaving many authorities of the Court of Appeal hanging on a thin line for e.g.*
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> *(1) REPUBLIC V YONASARI & OTHERS (1942) E.A.C.A. 65*
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> *(2) HANDO S/O AKUNAY V REPUBLIC (1954) 18 E.A.C.A. 307*
>
> *(3) WACHIRA S/O WAMBAGA (1954) 21 E.A.C.A. 396.*

2. That, the Honourable Justice of Appeal and their Lordships, the Justice of Appeal in their final analysis concerning the entire issue and relied on prosecution witnesses who are not credible and it was wrong for the trial Court to rely on them to convict the Appellant.

3. That, the omission on law and procedure of inquiring render the Appellant convicted on charge he was charged with when the charge was preferred against the appellant was not proved beyond reasonable doubt.

4. Unless conclusively resolved by the Bench of the Court, Decision of the High Court in the land brings about uncertainty and prejudiced the smooth and effective Administration of Justice in the Country."

Although the supporting affidavit which the applicant filed is scant in terms of background facts, the judgment of the Court subject of this application is more forthcoming. It was in the evening at Tarakea village setting in Rombo District of Kilimanjaro Region. In preparation for the night, one Flora Ngowi sent out her daughter, Clara Albert, to close down the gate leading to a nearby shed where the family kept their pigs. More than thirty minutes passed, and Clara had not returned. Her worried

mother went to find out. She met the applicant who happened to be her neighbor. He was cycling, fast away. A short distance on, she stopped when she spotted a body. It was a lifeless body of her daughter, lying on its back surrounded by pieces of broken bottle and a dressing table on top of her body.

It is apparent from this application that applicant brought his Notice of Motion under the provisions of Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), and he takes exception against the final appellate decision of the Court on complaint of manifest errors on the face of the record resulting in the miscarriage of justice.

A total of four grounds can be discerned from the Notice of Motion and the supporting affidavit by which the applicant is moving this Court to review its own final appellate decision. **First,** he faults the appellate Court for placing reliance on cautioned statement to convict him without so much as conducting trial within a trial before believing the same. **Second,** he faulted the appellate Court for relying on prosecution witnesses who the applicant regarded as not credible. **Third,** he contends the charge which the prosecution leveled against him was not proved to the required

standard of proof beyond reasonable doubt. **Finally**, the applicant invites the Court to intervene; at very least to remove uncertainty and prejudice which is bound to affect the smooth and effective administration of justice in the country.

At the hearing of the motion on 15/05/2017, the applicant was represented by learned counsel, Mr. John Shirima. The respondent Republic was represented by Ms Elizabeth Swai, learned Senior State Attorney and Ms Grace Madikenya, learned State Attorney.

Mr. Shirima began by explaining why he thought the first three grounds in the Notice of Motion are sufficient for this Court to order a review of the decision of the Court. He submitted that the reliance which the Court sitting on appeal placed on the applicant's cautioned statement without so much as trial within a trial, amounted to an error on the face of the record and the appellate decision of the Court should be quashed. In this regard, Mr. Shirima relied on the support of three authorities: **(1) Republic vs. Yonasani Egalu & Others** (1942) E.A.C.A. 65; **(2) Hando s/o Akunay vs. Republic** (1954) 18 E.A.C.A. 307; and **(3) Wachira s/o Wambaga** (1954) 21 E.A.C.A. 396.

Mr. Shirima next contended that the reliance which the Court placed on prosecution witnesses who were not credible, was an error on the face of the record of the decision of the Court sitting on appeal. All these errors, he submitted, led to the third ground of review that it was an error on the face of the decision of the Court to sustain the conviction of the applicant in circumstances where the charge was not proved beyond reasonable doubt. He concluded his submissions by contending that the Court should resort to its power of review because the applicant faces capital punishment which requires vigilance of the Court.

In reply submissions, Ms Swai, resisted the application, arguing that the grounds of review in the Motion do not disclose any ground of manifest error on the face of the record resulting in the miscarriage of justice required under Rule 66 (1) (a) of the Rules.

On the ground of review regarding the cautioned statement, Ms. Swai faulted Mr. Shirima for re-opening what are essentially grounds of appeal which were exhaustively dealt with by the Court sitting on appeal. She referred us to page 6 of the judgment of the Court where the voluntariness of the applicant's cautioned statement was raised as the

second of the two grounds of appeal. She further referred us to page 11 of the judgment where the Court disposed of this ground of appeal and insisted that the applicant should not be allowed to resurrect this same ground in his application for review.

On the similar vein, learned Senior State Attorney urged us to reject the attempt to introduce the issue of credibility of witnesses, which neither featured in the Court's judgment nor was it part of that judgment. The applicant, she submitted, should not be allowed to bring a new ground of appeal which is at any rate outside the purview of Rule 66 (1) (a) of the Rules. Ms. Swai exhorted us to dismiss the ground for review which claims that the charge of murder, for which the applicant was convicted and his appeal dismissed by the Court, was not proved beyond reasonable doubt.

The learned Senior State Attorney referred us to page 6 of the judgment of the Court where the appellant raised this as his ground of appeal, and on page 11 where the Court decidedly concluded that the prosecution had proved its case beyond reasonable doubt. To cement her position that grounds of appeal cannot be raised as grounds of review, she cited the decision of the Court in **Karim Ramadhani vs. R.,** Criminal

Application No. 25 of 2012 (unreported) where the Court referred to its earlier decision, by restating:

> *"...In* ***Abel Mwamwezi vs. The Republic,*** *Criminal Application No. 1 of 2013 (unreported) the Court had an occasion to reiterate that a ground of review inviting the Court to reconsider any evidence afresh amounts to inviting the Court to determine an appeal against its own judgment. This shall not be allowed."*

The Senior State Attorney concluded her submissions by urging us to find that the applicant has not only failed to bring his application within the parameters for review under Rule 66 (1) (a) of the Rules, but also brought what were grounds of appeal in their essence.

On our part, we think that Rule 66 (1) not only strictly limits what this Court may review, but it also sets down strict categories of the grounds under paragraphs (a) to (e) for review. This Rule states:

> *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 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.
[Emphasis of what this Court may review is provided].

It is apparent from the plain reading of Rule 66 (1) of the Rules governing review; the jurisdiction of the Court is firstly very limited to **"review its judgment or order"** and it neither extends to reviewing the charge sheet, the applicant's plea during his trial nor to the record of trial and appellate proceedings. This means, it is out of jurisdictional bounds for an applicant, to ground a Motion seeking a review on complaints based on charge sheet or what may be apparent on the record of proceedings.

This Court has oftentimes stated that grounds for review are not so open ended beyond those provided for under the paragraphs of Rule 66

(1). The Court said as much in **Patrick Sanga vs. R.,** IR. Criminal Application No. 8 of 2011 (unreported):

> *"**No order of review can be granted by the Court outside the five grounds stipulated therein**. The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court in the land is final and its review should be an exception. That is what sound public policy demands. This is the cherished stance of not only this Court but also Courts of other foreign jurisdictions."* [Emphasis is added].

In the instant application before us, it is common ground that the applicant is pursuing the remedy of review under the provisions of Rule 66 (1) (a) of the Rules. What remains at issue from submissions of the two learned counsel, is whether the application before us complies with the parameters set under paragraph (a) of Rule 66 (1). In **1. Efficient**

International Freight Ltd., 2. Dr. Gideon Hosea Kaunda vs. Office Du The Du Burundi, Civil Application No. 23 of 2005 (unreported) the Court explored the scope of the phrase "*...manifest error on the face of the record,*" and found that the scope had been highlighted in its earlier decision in **Chandrakant Joshubhai Patel v Republic** [2004] T.L.R. 218 where the Court restated that a manifest error—

> "*...must be obvious, self-evident, etc., but not something that can be established by a long drawn process of learned argument.*"

From the settled position this Court has taken in **Chandrakant Joshubhai Patel v Republic** (supra) regarding what amounts to a "*manifest error on the face of the record*" which was re-enacted under Rule 66 (1) (a) of the Rules, we must determine whether the applicant's complaints over proof of the charge sheet, voluntariness of his cautioned statement, credibility of prosecution witnesses, and alleged lack of proof beyond reasonable doubt of the offence of murder, constitute errors on the face of the record.

Ms Swai learned Senior State Attorney has correctly censured the applicant for bringing up the issue of credibility of witnesses which was not covered on the face of the Judgment of the Court subject of review and the review Court cannot stretch back to the record of proceedings to discern the credibility of the prosecution witnesses. She is correct in submitting that the issue regarding whether the offence of murder was proved to the required standard and the one on cautioned statement were raised as grounds of appeal and the appellate Court determined both. On page 6 of its Judgment on appeal the Court stated:

> *"In this appeal, Dr. Ronlick Eli Kasambala Mchami, learned advocate represented the appellant. He filed two grounds of appeal namely:*
>
> *'1. That the trlal court erred in law when it convicted the appellant on the charge he was charged with when* ***the charge preferred against the appellant was not proved beyond reasonable doubt****.*
>
> *2. The trial court erred in law and in fact when it* ***relied on the caution statement to convict the appellant on the charge he was charged with when no trial within a trial***

was conducted *to prove beyond reasonable doubt that the said caution statement was given voluntarily."*[Emphasis Added].

There is no doubt from the grounds of review that the applicant is challenging the merits of the judgment of the Court that had earlier dismissed his appeal. This Court has always taken a position that; grounds of appeal cannot be relied up on as grounds of review: see— **Patrick Sanga vs. R.** (supra), **Karim Ramadhani vs. R.** (supra), and **Abel Mwamwezi vs. The Republic** (supra). In **Charles Barnabas vs. Republic,** Criminal Application No. 13 of 2009 (unreported) the Court restated this position stating that:

".... Review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party. Further to Justice Mandia's observation, I will add two other matters by way of emphasis. ***One,*** *a review is not an appeal. It is not "a second bite", so to speak. As it is, it appears the applicant intends to "appeal" against the aforesaid decision through the back door. Our legal system has no provision for that.* ***Two,*** *with the coming into force on 1/2/2010 of the* ***Tanzania***

Court of Appeal Rules, 2009, *rule 66 (1) thereof sets out the grounds for review."*

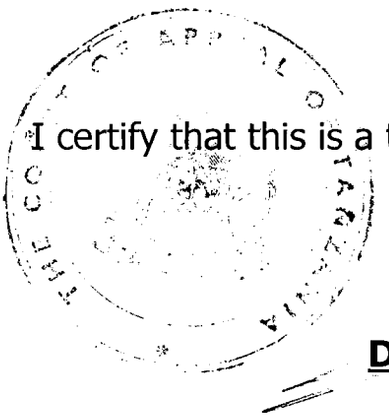
In the upshot of our finding that the Motion before us resurrects what were otherwise grounds of appeal that were earlier before this same Court, the Court cannot be moved to exercise its power of review. The application is as a result dismissed.

DATED at **ARUSHA** this 17th day of May, 2017.

I. H. JUMA
ACTING CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL



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

E. Y. MKWIZU
DEPUTY REGISTRAR