IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUSA J.A., MUGASHA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPLICATION NO. 5 OF 2012

1. HABYALIMANA AUGUSTINO
2. MIBURO ABDULKARIM @ NEPO ..... APPLICANTS
VERSUS

THE REPUBLIC ..... RESPONDENT

(Application from the conviction of the High Court of Tanzania At Bukoba)

(Luanda, J.) (as he then was)

Dated 30th day of May, 2007
In
Session Case No. 179 of 2017

RULING OF THE COURT

27th November & 7th December, 2017

MUSSA, J.A.:

In the High Court of Tanzania, Bukoba registry, the two applicants were arraigned and convicted of murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. Upon conviction, they were handed down the mandatory death sentence (Luanda, J., as he then was.) Dissatisfied, they preferred an appeal to this Court which was, however, dismissed in its entirely in a verdict that was pronounced on the 2nd March, 2012 (Msoffe, Bwana and Mjarisi, JJ.A.).

On the 7th April, 2012 the applicants lodged the present application through which they would wish the Court to review its own decision on a variety of grounds. The application is by way of a Notice of Motion which was taken out under Rule 66(1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by a joint affidavit duly sworn by the applicants. To appreciate the gist of the applicant's complaint, it may be necessary to recite the factual setting which is easily discernible from the judgment of the Court which is sought to be reviewed as well as the trial proceedings.

As already hinted, the allegation before the High Court was that on or about the 8th May 1999, at Ngara, the appellants murdered the deceased, namely, Adela Shirima, by the use of a sub-machine gun (SMG). The deceased used to operate a grocery where she actually was on the fateful day till around 10.00 pm when she closed business and geared herself towards departing for home. At the grocery, there were three other persons, that is, the deceased's son, namely, Emmanuel Shirima (PW1) as well as Nibogora John (PW7) and Wilson William (PW8) who were security guards. From the testimonies of the eye witnesses, just as the deceased was departing, two attackers emerged from a trench. More particularly,

whereas one of the attackers was tallish, wore a long coat and was holding an SMG and a torch, the other culprit was shortish. Soon after, the short assailant held PW8 by the neck whilst his tall coallegue rushed to where deceased was and shot her twice. The deceased seemingly died there and then. Upon a post mortem examination, her death was attributed to severe haemorrhage secondary to a gunshot wound. Incidentally, the autopsy report (exhibit P1) was adduced into evidence by the prosecution at the preliminary hearing stage, without demur from the defence.

At the scene, two spent bullet cartridges (exhibit P4) were retrieved and subsequently sent to the Police Identification Bureau (IB) for further investigation. The appellants were arrested on the morrow of the occurrence as they were about to cross Ruvuvu river. Upon arrest, they orally confessed to the killing and led their police captors to where the SMG (exhibit P7) and the magazine (exhibit P8) were retrieved. The gun and the magazine were similarly forwarded to the IB for comparison with the retrieved cartridges. As it were, the ballistic expert (PW9) who conducted an analysis on the gun and the cartridges was of the view that the fatal bullets were fired directly from exhibit P7.

In the aftermath of the arrest, the first appellant gave a cautioned statement before the police (exhibit P9) in which he confessed the offence. Likewise, both appellants confessed the offence before a justice of the peace (PW 10) in two separate extra-judicial statements (exhibits P14 and P15). In a trial within trial before the trial court, the three statements were ruled admissible. The appellants' respective defence cases took the form of *alibis* which were considered but rejected by the trial Judge in the face of what he conceived as strong prosecution evidence.

On appeal before this Court, the trial court's judgment was attacked from a variety of fronts which are meticulously summarized on pages 5 and 6 of the judgment sought to be reviewed. As it were, the attacks were centered on the validity and reliability of the confessional statements, the qualifications of the ballistic expert, as well as the circumstances under which the appellants were arrested and the manner in which exhibits P7 and P8 were retrieved.

At the end of its deliberations, the Court overruled each and every ground of attack and was satisfied that the findings of the trial court were unassailable hence the dismissal of the appeal in its entirety.

As we have already intimated, the applicants presently seek a review of our own decision upon four grounds as constituted in the Notice of Motion which may be recasted and paraphrased thus:-

(1) *The Court erred in law and facts in its reliance on exhibits P7 and P8 which were adduced into evidence without any seizure receipt.*

(2) *That the Court erred in law and facts in its reliance on the confessional statements (exhibits P9, P14 and P15) which only indicated the times when the recording commenced but did not indicate the time the recording of the respective statements ended.*

(3) *That the Court erred in law and facts in its reliance on the confessional statements (exhibits P9, P14 and P15) which were not taken through an interpreter bearing in mind that the applicants who are Burundi nationals did not know kiswahili at the time of the arrest.*

(4) *That the Court erred in law and facts in its reliance on the post mortem report (exhibit P1) which was not proved by the evidence of its maker.*

When the application was placed before us for hearing, the applicants were fending for themselves, unrepresented, whereas the respondent had

the services of Mr. Athumani Matuma, learned Senior State Attorney. As it were, the applicants fully adopted the grounds for review as comprised in the Notice of Motion. But they deferred their elaboration on the grounds for review to a later stage, if need be, after the submissions of the learned Senior State Attorney.

On his part, the learned Senior State Attorney was of the view that the decision of the Court is fraught by, at least, two apparent errors on its face. The first error, as he conceived it, flows from a passage of the judgment of the Court with respect to the confessional statements which goes thus:-

> *"We have examined the record and came to the conclusion that truly there is independent evidence which supports the statements. For example, where the appellants were apprehended; where the SMG and magazine were recovered; two spent cartridges recovered from the scene of crime and the Ballistic expert report that those cartridges were fired from the very SMG that the appellants were found in possession of. And the like.* ***Therefore even if the said statements may be expunged from the***

record, there would still be sufficient evidence in support of the prosecution case."

[Emphasis supplied].

We have supplied emphasis on the bolded portion of the extracted passage to postulate Mr. Matuma's criticism on it to the effect that the Court should have explicitly expressed as to whether or not it had determined that the confessional statements be expunged from the record. The absence of such determination, he said, constitutes a manifest error on the face of the decision.

Mr. Matuma conceived the second manifest error from another passage of the judgment of the Court where it was observed:-

> *"Regarding the circumstances under which the appellants were arrested and the SMG and magazine were recovered, we see no fault in the trial judge's findings and there was no illegality occasioning prejudice on the part of the appellants"*

The learned Senior State Attorney criticized the Court for not venturing into a determination of the circumstances under which the appellants were arrested as well as the retrieved gun and magazine. To

him, the observation, as it stands, is a mere conclusion which is unsubstantiated by any reasoning. With so much from the submissions of the learned Senior State Attorney, the appellants, quite understandably, did not wish to make any rejoinder.

Addressing now the contentious issues, if at all there are any and, given the fact that the quest by the applicants attracts sympathy from the submissions of Mr. Matuma, we propose to preface our determination with the background and an overview of the cherished jurisdictional canons governing the subject of review in our country.

In this regard, a prefatory remark is, perhaps, well worth that of recent, this Court became endowed with statutory jurisdiction of review through section 4(4) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. The provision was introduced into legislation through Act No. 3 of 2016. Previously, the Court's exercise of review jurisdiction was derived of case law as pioneered by the unreported Civil Application No. 26 of 1989 – **Felix Bwogi v. Registrar of Buildings**; which held that the Court is enshrined with inherent jurisdiction to review its own decisions. Against this backdrop, Rule 66 (1) was promulgated and, in its present

face, the Rule categorically restricts the Court's exercise of its inherent jurisdiction thus:-

> ***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.***

Thus, on account of its nature and upbringing, the Court's power of review is a jurisdiction which is exercised very sparingly and with great circumspection. Such is the stance which this Court has all along heeded ever since it assumed the jurisdiction and; no wonder, in its present

standing, a review only avails in the rarest of situations which meet the specific benchmarks prescribed under the referred Rule 66 (1). On the premises, it should always be borne in mind that whilst the Court has an unfettered discretion to review its own judgment or order but the anchorage of the Court's discretion is not on the basis of "the sky is the limit". On the contrary, the Court is strictly barred from granting an order of review outside the five grounds enumerated under Rule 66 (1). The restriction was clearly spelt out in the unreported Civil Application No. 62 of 1996 – **Tanzania Transcontinental Co. Ltd. V Design Partnership** thus:-

> *"The Court will not readily extend the list of circumstances for review, the idea being that the Court's power of review ought to be exercised sparingly and in most deserving cases, bearing in mind the demand of public policy for finality and for certainty of the law as declared by the highest Court of the land."*

As regards the finality of a judgment of final Court of the country, we are obliged to pay particular focus on the unreported Civil Application No. 21 of 2012; i.e, - **Blue line Enterprises Ltd. Vs East African**

Development Bank, where this Court paid homage and totally subscribed to the conventional wisdom inherent in the decision of the Federal Court of India comprised in **Raja Printhwi Chand Lall Chaudhary v Sukhraj Rai** (AIR 1941 SCI):-

> *"This Court will not sit as Court of appeal from its own decisions nor will it entertain applications for review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would, in our opinion, be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard: 'There is a salutary maxim which ought to be observed by all courts of last resort....' (it concerns the state that there be an end of law suits)'.... Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunals as this."*

More particularly, where the ground for review happens to be a manifest error on the face of the record, it is, undoubtedly, very difficult to

define a "*manifest error apparent on the face of the record.*" It is, however, settled that such error must be manifest or self-evident and not one which requires an examination or argument to establish it. (See **Chandrakant Joshubhai Patel vs The Republic** [2004] TLR 218). Thus, an error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions, can hardly be said to be a manifest error apparent on the face of the record.

To cull from the highlighted general principles, it must be emphasised that the review jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases.

All said and, relating the established canons to our factual setting, it is as clear as pike stuff that, in the Notice of Motion, the applicants predicated their quest under Rule 66 (1) (a) which relates to "*a manifest error on the face of the record resulting in the miscarriage of justice.*" Nevertheless, none of the four grounds raised in support of the application

fall within the purview of a "manifest error" and, for that matter, neither falls under any of the other bechmarks for review itemized under Rules 66 (1) (b) to (e). More particularly, the grounds, in a nutshell, seek to challenge the admissibility and reliance on the prosecution exhibits P1, P7, P8, P9, P14 and P15 upon grounds which were not at all canvassed during the trial. The grounds are, so to speak, a back door method by which the applicants agitate this Court to sit as a Court of appeal from its own decision which is intolerable. To this end, we are not in a difficulty finding that we could not read any manifest error in the decision sought to be reviewed on account of the grounds raised by the applicants. And neither could we read from them any other ground for review as enumerated in Rule 66 (1) (b) to (e) of the Rules.

Turning now on the alleged "manifest errors" pointed out by the learned Senior State Attorney we cannot, in the first place, resist a remark that the alleged manifest errors pointed out by Mr. Matuma are barely related to the grounds raised by the applicants. If anything, we are afraid to say, the manifest errors pointed out were self-conceived by the learned Senior State Attorney. If we may, all the same, address his criticism which was drawn from the first extract from the Court's judgment, we did not

read from it any suggestion to the effect that the Court expunged to confessional statements from the record. All what the Court stated by way of an assumption was that even if the statements were to be expunged, the remaining evidence would have sufficed to sustain the conviction. To us, such was quite an ordinary pronouncement which does not, in any way, qualify to a manifest error on the face of the decision.

On the second passage, the Court merely expressed its agreement with the findings of the trial court in the manner in which the applicants were arrested as well as the manner in which the gun and the magazine were retrieved. To demand more elaboration, as seems to be the expectation of Mr. Matuma, is to expect the Court to venture into another round of, pre-evaluation of the evidence which is, rather, the mandate of an appellate court. As was held in the unreported Criminal Application No. 25 of 2012 – **Karim Ramadhani Vs. The Republic**:

> *"It is not sufficient for purposes of paragraph (a) of Rule 66(1) of the Rules, for the applicant to merely allege that the final appellate decision of the Court was based on a manifest error on the face of the record if his elaboration of those errors disclose*

grounds of appeal rather than manifest error on the face of the decision."

It is appropriate to point out, in this regard, that in both arguments, Mr. Matuma has neither successfully expounded any manifest error on the face of the record, nor has he established any linkage between those purported grounds of review with the resulting miscarriage of justice, if there was any, to come to terms with the requirement under Rule 66(1) (a) of the Rules. In the end result, this application is devoid of merit and is, accordingly, dismissed.

DATED at BUKOBA this 5th day of December, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

P.W.BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL