IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPLICATION NO. 11 OF 2014

(CORAM: MJASIRI, J.A., LILA, J.A., And NDIKA, J.A.)

MAJID GOA @ VEDASTUS ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kileo, Mandia And Mmilla, JJ.A)

dated 13th day of August, 2014
in
Criminal Appeal No. 303 of 2013

RULING OF THE COURT

16th & 24th August, 2017

LILA, J.A.:

This is an application for review by Majid Goa @ Vedastus, the applicant. It was brought by way of a notice of motion which was filed on 8/9/2014. The applicant is seeking this Court's decision (Kileo, Mandia, and Mmilla, JJA) dated 14th August, 2014 in Criminal Appeal No. 303 of 2013 be reviewed. In that decision, the appellant's appeal was dismissed in its entirety.

In the notice of motion the applicant raised five grounds on which his application is based. He also raised two other grounds in his affidavit in

support of the notice of motion. The supplementary affidavit by Inspector S. Mabushi, a Superintendent of Prison stationed at Butimba Central Prison Mwanza, raises no additional ground of review. For ease of reference, we wish to hereunder quote those grounds as raised by the applicant.

The grounds contained in the notice of motion are:

"i. *The decision of the Court of Appeal was/is basically mounted on a manifest errors on the face of record for its failure to determine and properly evaluate the substance, nature and quality of the entire adduced evidence thus result into miscarriage of justice.*

ii. *Had the learned justice of Appeal considered the evidence at the trial and holistic manner, they would have found that, the prosecution had failed to prove the guilty of the appellant beyond reasonable doubt and the circumstantial evidence led by the prosecution not lead irresistible of the appellant.*

iii. *They failed to consider the variance between the preliminary hearing and the adduced evidence judicially law in failing to, consider and drawing adverse or any inference from the facts as the event occurred around 7:30 P.M. but the intensity of light was not elaborated.*

iv. *The learned justice of appeal totally omitted to consider contradicted evidence of PW.1, PW.2, PW3 but the Court of Appeal discriminated the appellant by depriving the opportunity to be heard contrary to article 13 (1) (2) of the constitution of the United Republic of Tanzania of 1977 as amended time after time.*

v. *That, in the interest of fair administration of justice which among other things may require re-evaluation of the defence of ALIBI as adduced by Appellant, and it is fit and proper that the Review be heart and determined by the full court."*

The applicant's affidavit contains three paragraphs but only two grounds feature therein. These are:-

"1. *That, afterwards a typed written and certified copy of the said judgment/decision was supplied to me and on perusing the same with record of trial there is manifest error upon which the court based it's decision hence resulting into miscarriage of justice and further the judgment relating to depriving the appellant opportunity to be heard.*

2. *that, the applicant believes that to avoid serious miscarriage of justice the judgment of the Court of Appeal of Tanzania needs to be reviewed due to the fact that, there are some misdirection points of law on part of their lordships relating to*

the discrimination against the appellant, in the court the burden of proof and inconsistencies as specified in the grounds to the Notice of motion."

At the hearing of the application the applicant appeared in person, unrepresented. He fended for himself. The Respondent/Republic was represented by Miss Angelina Nchalla, learned Senior State Attorney, assisted by Mr. Moris Mtoi, learned State Attorney.

Miss Nchalla was first to submit after the applicant had opted to reply thereafter.

In her submission, Miss Nchalla preferred to argue on all the grounds raised by the applicant jointly. She, at the outset, put up her position clear that she was opposing the application on the ground that all the grounds raised by the applicant are not in conformity with the requirements of Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). She contended that the applicant has not indicated that there are errors apparent on the face of the record resulting in the miscarriage of justice, or that he was not afforded opportunity to be heard, or the Court had no jurisdiction or that the decision of the Court was procured by fraud, illegally or perjury. She added that the grounds of review raised by the applicant

are in the form of grounds of appeal. For that reason, she said, the appellant is appealing through the back door. She further said that review is not an appeal and to bolster her arguments she referred the Court to the Court's decisions in **Karim Ramadhani Vs. The Republic**, Criminal Application No.25 of 2012 and **Omary Makunja Vs. The Republic**, Criminal Application No. 22 of 2014 (both unreported). On those accounts, she urged the Court to dismiss the application.

On the other hand, the applicant, in the first place, lamented that the laws applicable in filing a review are not available in the prisons hence they are not known to prisoners. He urged the learned Senior State Attorney to avail the prisons with such law books as well as allocate time to train those who assist them in preparing their applications for review.

Submitting on the grounds of review, the applicant stated that though it is indicated at page 5 of the Court's decision the subject of this application for review that he took much time to argue his grounds of appeal, he was not accorded enough time to be heard.

Regarding the PF.3, the applicant argued that as the same was expunged then there was nothing that could prove the offence of rape. He further contended that it is only the doctor who can establish rape.

The applicant also attacked the Court's decision on the ground that it did not appreciate that the evidence adduced in Court differed from the facts adduced during the preliminary hearing hence the evidence was a cooked one. For those reasons, the applicant urged the Court to grant his application as the learned Senior State Attorney had failed to discount the grounds of review one after the other.

The question for consideration is whether the grounds of review raised by the applicant satisfy the requirements of the law. For this reason we wish to, in the first place, explore the principles governing the Court's exercise of review jurisdiction.

The Court's power of review is governed by Rule 66(1) (a) to (e) of the Rules. That Rule provides:

> *"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 the miscarriage of justice; or

(b) a party was wrongly deprived of an opportunity to be heard;

(c) the court's decision is nullity; or

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

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

The scope of the Court's power of reviewing its own decision is, on the basis of the above quoted Rule 66 (1) of the Rules, restricted to only those five grounds. This is purposely done to ensure that the Court does not sit on appeal against its own decision in the same proceedings (see **Patrick Sanga vs. The Republic**, Criminal Application No. 8 of 2011 and **Ghati Mwita vs. The Republic,** Criminal Application No. 3 of 2013 (both unreported). For if the above is allowed, that will be against the sound public policy *interestei reipublicae ut finis litium* which means litigation must come to an end (see **Chandrakant Joshubai Patel v. R** [2004] T.L.R. 218).

We are also alive to other firmly established principles governing the exercise of review jurisdiction by any court. These were well summarized and elaborated by the East African Court of Justice, Appellate Division at Arusha in the case of **Angella Amudo and The Secretary General of the East African Community**, Application No. 4 of 2015 (unreported). For clarity and avoidance of any risk of distortion we hereunder reproduce them verbatim as follows:

> *"(a) The principle underlying a review is that the Court would not have acted as it had, If all the circumstances had been known:* ***Attilio v Mbowe*** *(1970) HCD.n.3 (TzHC).*
>
> *(b) There are definitive limits to the exercise of the power of review. The review jurisdiction is not by way of an appeal. The purpose of review is not to provide a back door method to unsuccessful litigants to reargue their case. Seeking the re-appraisal of the entire evidence on record for finding the error, would amount to the exercise of appellate jurisdiction which is not permissible:* ***Meera Bhanja v Nirmala Kurnari Choudury*** *(1955) ISCC (India), independent* ***Medical Unit v Attorney General of Kenya,*** *Application No.2 of 2012 (EACJ).*

(c) *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. This is because no judgment however elaborate it may be can satisfy each of the parties involved to the full extent:* ***Peter Ng'homango v. Gerson A. K. Mwanga & Another,*** *[CAT] Civil Application No. 33 of 2002 (unreported),* ***Devender Pal Singh v. State, N.C.T. of New Delhi and Another,*** *Review Petitions No. 497, 620 and 627 of 2002 (India Supreme Court), etc.*

(d) *A judgment of the final court is final and review of such judgment is an exception:* ***Devender v. State, N.C.T of New Delhi*** *(supra),* ***Blueline Enterprises Ltd. v. The East African Development Bank*** *(EADB) [CAT] Civil Application No. 21 of 2012 (unreported), etc.*

(e) *In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for 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:* ***Kamlesh Varma v. Mayawati & Others,*** *Review Application No. 453 of 2012.*

(f) *There is a clear distinction regarding the effect of an error on the face of the record and an erroneous view of the evidence or law. An error on the face of the record justifies a review. An erroneous view justifies an appeal. Therefore, the power of review may not be exercised on the ground that the decision was erroneous on merit:* ***Aribam Tuleshwar Sharma v. Ariban Pishak Sharma****, 1979 (11) UJ 300 SC.*

(g) *It will not be sufficient ground for review that another judge would have taken a different view. Nor can it be a ground for review that the court proceeded on incorrect exposition of the law. "Misconstruing a statute or other provision of the law cannot be ground for review":* ***National Bank of Kenya Ltd. v. Njau*** *[CAK) [1995-98] 2 E.A. 231.*

(h) *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:* ***Raja Prithwi: Chand Lall Chaudhary v.***

Sukhraj Rai *(supra);* ***Blueline Enterprises Ltd v. EADB*** *(supra),* ***Autodesk Inc. v. Dyason*** *(No.2) [1993] HCA 6 (Australia), etc.*

(i) *The term 'mistake or error on the face of the record' by its very connotation signifies an error which is evident* ***per se*** *from the record of the case and does not require detailed examination, scrutiny and elaboration either of the facts or the legal position. If an error is not self-evident and detection thereof requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record. To put it differently, 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 v. Consumer Education and Research Centre*** *(1981) A. Guj.233, State of* ***West Bangal and Others v. Kamal Sengupta and Another (2008)*** *8 SCC 612."*

We will, though it is said that the litany is long and unexhaustive, consider the grounds of review raised by the applicant in the light of the aforesaid legal principles. The above quoted principles, in our view, sufficiently dispose of the present application.

Grounds of review number (i), (ii), (iv), and (v) raised in the notice of motion as well as ground 2 in the applicant's affidavit center on the allegation that the Court failed to properly evaluate the substance, nature and quality of the prosecution evidence that culminated in the applicant's conviction, contradiction in the testimonies by PW1, PW2 and PW3 and evaluation of the defence of *alibi*. Also, in the second part of ground (iii), the applicant has raised the issue of intensity of light not being elaborated. We have gone through the Court's decision subject of this application for review and we are satisfied that the evidence adduced by all the prosecution witnesses, the applicant's defence of *alibi* and how the applicant was identified were well considered by the Court at pages 6 to 10 of the printed judgment, before upholding the concurrent findings of both courts below and arriving at the finding that the applicant was properly identified. That was the view arrived at by the Court. By raising these grounds there is no doubt that the applicant is questioning the Court's view (merit) and is inviting the Court to re-evaluate the evidence all over again. This cannot be done by way of a review. We are persuaded in this view by the position set in **Angella Amudo and The Secretary General of the East African Community** (supra) where it was held that "***an error on***

the face of the record justifies a review while an erroneous view justifies an appeal. Therefore the power of review may not be exercised on the ground that the decision was erroneous on merit." These grounds raised by the applicant are, by any standard, grounds of appeal. This Court, in the case of **Karim Ramadhani vs. The Republic** (supra) rightly cited by Miss Nchalla and **Ghati Mwita vs The Republic** (supra) and **Patrick Sanga vs. The Republic** (supra), reiterated its position that this Court cannot sit in an appeal on its own decisions. To be particular, in the case of **Karim Ramadhani vs The Republic** (supra), this Court, categorically stated:

> *"Our decision in **Mbijima Mpigaa and another Vs. The Republic** (supra) which Ms. Haule referred to us, has articulated the settled position of the law that **in a review, the Court does not sit to re-evaluate the evidence all over again.** Instead, the review Court is restricted to determine if there are errors or otherwise apparent on the face of the decision subject of an application for review." (Emphasis is ours)*

In another case of **Abel Mwamezi Vs. The Republic**, Criminal Application No. 1 of 2013 (unreported) cited in the case of **Karim Ramadhani** (supra) this Court stated:-

> *". . . 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."*

We are, therefore, satisfied that these grounds do not constitute any of the exceptional situations under Rule 66 (1) of the rules which may call for the Court to revise its own decision. These grounds of review, therefore, fail.

In the first part of ground (iii), the applicant is complaining that the Court failed to consider the variance between the preliminary hearing and the adduced evidence. Though it is not clear what the applicant intended to put to us, it is a fact that facts adduced during preliminary hearing, unless admitted and so recorded, do not constitute part of the evidence upon which the conviction of the accused can be relied on. Besides, the Court's decision does not show that this ground was raised before it or before the trial court. This is, therefore, a new issue. It is improper to

raise such ground at this stage. We are fortified in this position by the Court's decision in the case of **Ghati Mwita vs The Republic** (supra) where the Court, sitting on a review and while considering the issue of non-direction raised by the applicant at the review stage for the first time, stated:-

> *"As regards the complaint of non-direction, we once again agree with Ms. Kileo that since it was not raised and it did not transpire in the Court of Appeal, to raise it now is tantamount to calling the Court to re-assess the evidence on record which is improper as it is not an appeal."*

We are, for the above reason, of a settled view that the applicant's ground of review that there was contradiction between the facts adduced during the preliminary hearing and evidence adduced in court, being a new matter, cannot be considered at this stage. This ground, too, fails.

Last is the ground that the applicant was not accorded the right to be heard. This features as ground 1 in the applicant's affidavit in support of the notice of motion. If established, this ground forms one of the grounds for review (see Rule 66 (1) (b) of the Rules). We have, however, gleaned from the judgment of the Court subject of this application and we have

realized that such ground misses legs on which to stand. Page 5 of the printed judgment, as rightly argued by Miss Nchalla, speaks out loudly that:

> *"The appellant took time to amplify the grounds of appeal in which he raised issue with the evidence on record with regard to identification, the fact that the victim's mother was not called to testify, the age of the victim and the fact that the victim was shown to be unable to measure distances in feet and meters which made her evidence unreliable."*

After making the above general observation, the Court then went on to consider the evidence on record and arguments by both sides at pages 8, 9 and 10 of the judgment. It is, therefore, plain that the applicant was heard and his arguments were well considered by the Court before giving the verdict in the appeal. He cannot be heard at this stage complaining that he was denied the right to be heard by the Court. This ground has no merit.

In the upshot, and for the foregoing reasons, we are satisfied that the applicant has not presented grounds of review which would warrant

the Court to review its final judgment in Criminal Appeal No. 303 of 2013.

This application is hereby dismissed. It is so ordered.

DATED at **MWANZA** this 23rd day of August, 2017.

S. MJASIRI
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL