IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, JA., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPLICATION NO. 1 OF 2015

JAMES SHARIFU.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Msoffe, Oriyo, Kaijage, JJJ.A.)

dated the 22nd day of November, 2014

in

Criminal Appeal No. 160 of 2013

RULING OF THE COURT

4th & 6th July, 2017

MUGASHA, J.A.:

This is an application for review of the Judgment of this Court (**MSOFFE, ORIYO, KAIJAGE, JJJ.A**) in Criminal Appeal No. 160 of 2013 which dismissed the appeal against the decision of the High Court in Criminal Appeal No. 9 of 2012.

The facts as can be gleaned from the impugned decision and the applicant's affidavit are to the effect that: On the material date and time, the appellant invited PW1, a boy aged eleven (11) years together with his young sister, Esha Selemani (the victim) PW2, a girl of five (5) years, to join him in collecting unripe coconuts (madafu) in his farm. At the farm, the appellant asked PW1 to keep watch over the coconuts and in the meantime; he led PW2 into a banana farm and raped her. When the appellant returned PW2, she was walking with difficulty, bleeding from her private parts and was holding her underwear in one hand. She told PW1 that, the appellant did bad things to her in the farm and she complained of stomach pains. After some investigations, the appellant was arraigned for having raped a child who was below the age of ten (10) years.

At the trial, the applicant denied the charge and claimed that the charges were framed up against him because of the conflicts over farms. The applicant was convicted and sentenced to life imprisonment which was upheld by the first appellate court.

Following the dismissal of his appeal by the Court in Criminal Appeal No. 160 of 2013, the applicant is seeking review in the present application

brought under Rule 66 (1) of the Court of Appeal Rules, 2009 (the Rule). In the Notice of Motion, the applicant has raised the following three grounds for review:

> *"(a). That, the decision was based on a manifest error on the face of the record resulting in miscarriage of justice because the court of appeal upheld conviction based on hearsay evidence given by PW3 and there was bias since voire dire examination was not conducted.*
>
> *(b). That, the court of appeal justices erred to uphold the conviction which was a nullity because PW1 did not witness the occurrence of the alleged offence.*
>
> *(c). That the applicant was deprived an opportunity to be heard when the appeal was called for hearing before the High Court resulting into a miscarriage of justice.*

The application is accompanied by the affidavit of the applicant who has deposed as follows:

> *1. That, I am the applicant in this application and this conversant with the fact I about to depose to the following paragraphs:-*
>
> *2. That, I was convicted in the District Court of Ruangwa at Ruangwa in original Criminal case No. 93 of 2010 in which I was charged and found guilty of Rape C/S 130 and 131 of the Penal code cap 16 R.E. 2002 and sentence to serve life imprisonment. Also to pay compensation the victim Tshs 1,000,000/=.*

3. *That, I appealed to the High Court of Tanzania at Mtwara against both conviction and sentence imposed on me by the District court of Ruangwa but my appeal was dismissed in criminal appeal No. 9 of 2012 of the High Court of Tanzania at Mtwara.*

4. *That, being aggrieved by the decision of the high court of Tanzania at Mtwara I appealed to the court of appeal of Tanzania in criminal appeal no. 160 of 2013 but my appeal was dismissed.*

5. *That, being aggrieved by the decision of both courts the high court and court of appeal of Tanzania. Do hereby humbly ask for review the decision of the court of appeal of Tanzania.*

6. *That, it will be the interest of justice if this Honourable court grant the applicant leave to file for review the decision of the court of appeal of Tanzania in criminal appeal No. 160 of 2013.*

The application is opposed by the respondent Republic through the Affidavit in Reply of **PAUL KIMWERI,** learned Senior State Attorney. He is challenging the entire application contending that, it lacks good reasons to move the Court to review its judgment.

At the hearing of the application, the applicant appeared in person and Mr. **PAUL KIMWERI** learned Senior State Attorney represented the respondent Republic.

The applicant opted to initially hear the submission of the learned Senior State Attorney.

Mr. Kimweri opposed the application on mainly two fronts: **One,** the grounds stated in the notice of motion are not amplified by the affidavit of the applicant and **Two,** the grounds are reflective of the grounds of appeal and not a subject for review. For those reasons, he urged us to find that the Court is not properly moved to invoke its review jurisdiction and as such, dismiss the application.

On the other hand, the applicant raised a new complaint that sentence was excessive. He contended that the complaint was not addressed in the impugned decision.

As earlier stated, this application is brought under Rule 66(1) of the 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:*

(a). the decision was based on a manifest error on the face of 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;

(d). the court had no jurisdiction to entertain the case.

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

[Emphasis supplied].

From the wording of Rule 66 (1) of Rules, it is clear that, this Court sparingly, exercises jurisdiction to review its decision on an appeal or application which it had already determined in order to correct wrong decisions so as to ensure justice between the litigants involved and to ensure public confidence in the administration of justice. (See **NGUZA**

VIKINGS @BABU SEYA AND ANOTHER VS REPUBLIC, Criminal Application No. 5 of 2010 (unreported).

The said limitation in invoking the jurisdiction of review is as well reflected in the principles governing the exercise of review as established by case law in our jurisdiction and from various jurisdictions. The principles include: **One,** 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 (unreported). **Two,** review 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). **Three,** the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case which is tantamount to the exercise of appellate jurisdiction which is not permissible (See **MEERA BHANJA vs. NIRMALA KUMARI CHOUDURY (1955) ISCC** India).

Guided by the principles governing the exercise of review, at the outset, we find the present application misconceived mainly on two fronts: **One,** the grounds stated in the notice of motion are completely not

supported by the applicant's affidavit which has not expounded or amplified the complaints contained in the motion which renders the affidavit not in support of the motion. **Two,** the grounds of complaints in the notice of motion constitute the applicant's dissatisfaction with the Court decision thus pressing to re-argue his case which is tantamount to the exercise of appellate jurisdiction in review which is not permissible.

Without prejudice, even if the review is properly before us, the applicant has not made out a case warranting the review due to: **One,** the grounds in the notice of motion were grounds of appeal before the first appellate court whereby issues of hearsay, *voire dire* examination and PW1 not having witnessed the offence were considered at length and rejected. **Two,** the new complaint on the sentence of life imprisonment being excessive was as well; addressed by the Court at page 7 of its judgment whereby the Court concluded that, since the victim was below the age of ten years, the statutory prescribed punishment was life imprisonment. As such, the sentence is not excessive according to the law.

It is settled that, the primary purpose of review is not to challenge the merits of a decision but rather to address irregularities of a decision

which has caused injustice to a party. (See **MIRAJI SEIF V REPUBLIC**, Criminal Application No. 2 of 2009 (unreported)). Therefore, apart from the applicant raising complaints on the impugned decision, his complaints were conclusively dealt with and answered by the Court in the impugned judgment.

We wish to add that, in the present application the applicant wished to utilize the review as a backdoor or another round of re-evaluation of the evidence and what has already been determined by the Court which is not the domain of this Court on review. Besides, the applicant has failed to show as to how the Court's determination on the alleged complaints constitute an error manifest on the face of the record or bias in adjudication of the appeal be it in the Notice of Motion or his affidavit.

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 justifying the review, the motion has not made out a case warranting for reviewing the impugned decision.

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

DATED at **MTWARA** this 5th day of July, 2017.

M.S MBAROUK
JUSTICE OF APPEAL

S.E. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL