IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUSSA J.A., LILA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPLICATION NO. 4 OF 2013

DAMIAN RUHELE ..... APPLICANT
VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Msoffe, Bwana And Mjasiri, JJ.A.)

Dated the 2nd day of March, 2012
In
Criminal Appeal No. 501 of 2007

RULING OF THE COURT

5th & 11th December, 2017

MUSSA, J.A.:

This is an application for a review of the judgment of the Court of Appeal (Msoffe, Bwana and Mjasiri, JJ.A.) comprised in Criminal Appeal No. 501 of 2007. The factual background giving rise to the application may briefly be recapitulated thus:-

In the District Court of Karagwe, the applicant was arraigned and convicted of attempted rape and sentenced to thirty years imprisonment. During the trial, the alleged victim, namely, Mariantonia (PW1), told the court that on the fateful day, that is, on the 23rd March 2002, around 12:00 noon, she was working on her farm. Just then, the appellant emerged, drew himself closer to her and pronounced: "*Leo utanipa kuma yako*". Next, he pinned her to the ground and undressed her, just as he also undressed himself. As the applicant geared towards lying on her top, PW1 raised an alarm, whereupon, within a while, a certain Deogratius Mibamoko (PW2) attended the scene. Apparently frustrated by PW2's arrival at the scene, the applicant recoiled from the act and desperately retorted: "*Chukua lakini utakapokufa kitaoza*" and then cleared himself from the scene.

On his part, the applicant asserted that PW1's version was fabricated on account of existing grudges between him and Mariantonia's husband. His version did not, in the least, appeal to the trial court which convicted him and sentenced him to the extent we have already intimated. On his first appeal, the High Court (Lyimo, J.) found no cause to disturb the

conviction and sentence and the appeal was, accordingly, dismissed in its entirety.

Dissatisfied, the applicant lodged the already referred Criminal Appeal No. 501 before this Court through which he sought to impugn the verdicts of the two courts below. The applicant preferred four grounds of appeal through which he raised the following grounds of grievance as summarized in the judgment of the Court thus:-

> *"**One**, the charge was defective for failure to disclose the essential elements of the offence of attempted rape. **Two**, there was variance of dates between the charge and the evidence on the date the offence was said to have been committed. **Three**, the introduction in evidence of the PF3 offended the provisions of Section 240 (3) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act). **Four**, the totality of the evidence did not establish the offence of attempted rape."*

Addressing the first point of the grievance, whilst conceding that the charge was not explicit on the element of a threat to the victim, the Court, nevertheless, was of the view that the evidence clearly demonstrated the threat in the applicant's utterance: *"Leo utanipa kuma yako."* To that

extent, the Court held that the deficiency on the charge sheet was not fatal and curable under section 388(1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA).

Similarly, the Court upheld the applicant's second grievance to the effect that there was variance between the date of the commission of the offence alleged on the charge sheet with that disclosed by the adduced evidence. Nonetheless, the Court was of the view that the variance was immaterial in the light of the provisions of section 234(3) of the CPA which stipulates:-

> *"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for institution thereof."*

As regards, the applicant's third grievance, the Court was of the view that the PF3 was as good as a useless document much as it was not used by the two courts below in convicting and upholding the conviction.

Finally, on the applicant's fourth grievance the court was of the view that, in essence, the applicant sought to impugn the evidence of PW1 on the alleged occurance. On this, the Court proceeded:-

> *"The tenor, essence and cornerstone of his evidence was that he did not commit the offence, without more. Yet the evidence of PW1 was exactly to the opposite. Inspite of this, when PW1 testified he did not cross-examine her on this damning evidence against him. We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence – See this Court's decision in* ***Cyprian Athanas Kibogoyo v Republic****, Criminal Appeal No. 88 of 1992 (unreported)."*

In the upshot, having discounted each and every grievance raised by the applicant, in a judgment pronounced on the 1st March 2012, the Court dismissed the appeal in its entirety as we have already hinted.

Undeterred, the applicant presently seeks an order for us to review and vacate our own decision which we pronounced on the 1st of March.

The application is by a notice of motion which was taken out under Rule 66 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit which was duly sworn by the applicant. In the Notice of Motion, the applicant raises two grounds for review which may conveniently be recasted and paraphrased thus:-

> *"1 The learned Justices of Appeal seriously erred in law by failing to consider the applicant's defence with respect to ill blood between him and the complainant.*
>
> *2. The learned Justices of Appeal erred in law and facts in holding that the variance between the charge and evidence did not materially prejudice the applicant."*

When the application was placed before us for hearing, the applicant was fending for himself, unrepresented, whereas the respondent Republic had the services of two learned State Attorneys, namely Ms. Chema Maswi and Mr. Nestory Nchiman. The applicant fully adopted the Notice of motion and deferred its elaboration to a later stage, if need be, after the submissions of the Republic.

On her part, Ms. Maswi resisted the application on account that the same did not, at all, disclose any of the circumstances for review which are enumerated under Rule 66(1) of the Rules. That being so, she concluded, the application is bereft of any merits and urged us to dismiss it. When asked to rejoin, the applicant simply reiterated the grounds which he raised in the Notice of Motion.

Addressing the rival contentions, we propose to restate our well settled stance that the Court's power of review is a jurisdiction which is exercised very sparingly and with great circumspection. No wonder, in its present standing, a review only avails rarely and, in any event, in terms of Rule 66(1) of the Rules, 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*
>
> *(b) the court's decision is a nullity; or*

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

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

Thus, in review, the Court does not sit as a court of appeal from its own decision; nor will it sit for the purpose of re-agitating arguments already considered by the Court. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants seek to re-argue their cases (See the unreported Criminal Application No. 3 of 2011 – **Peter Kidole Vs The Republic**).

All said, we should express at once that the first ground for review was canvassed by the court in the course of determining the applicant's fourth point of grievance at the hearing the appeal. As it were, the Court criticized the applicant for not faulting PW1's testimony by way of cross-examination which, obviously, included putting the alleged grudge to the witness which he did not. To re-open the argument by way of review, as the applicant seemingly tries to urge us to, will be to re-agitate an argument already considered. A similar fat e, we would say, befalls on the

second ground for review which was just as well considered and determined at the hearing of the appeal.

To this end, we are of the settled view that this application does not yield to any of the benchmarks for review and the same is without a semblance of merit. It is, accordingly, dismissed.

DATED at BUKOBA this 8th day of December, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
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