IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPLICATION NO. 6/08 OF 2017

EDISON SIMON MWOMBEKI ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review of the judgment of the Court of Appeal of Tanzania at Mwanza)
(Rutakangwa, Massati, Mugasha JJ.A.)

dated the 18th day of October, 2016
in
Criminal Appeal No. 94 of 2016

.....

RULING OF THE COURT

2nd & 11th July, 2018

MWANGESI, J.A.:

In the instant application which is by way of notice of motion taken out under the provisions of Rule 66 (1) of the Court of Appeal Rules, 2009 (**the Rules**), the applicant is moving the Court to review its judgment which was delivered on the 18th day of October, 2016. There have been raised two grounds as to why the said judgment has to be reviewed that is, **firstly**, that there were manifest errors on the face of the record which were ignored by the Court, but which tend to vindicate the applicant namely, the conduct of the complainant (PW1), in failing to report the

alleged rape in time and improper way the case was investigated; **secondly**, that the Court ignored that doubts surrounding the credibility of the prosecution witnesses in particular, failure to call the doctor who examined PW1 and/or failure to tender his report to support the alleged offence of rape.

The notice of motion is supported by an affidavit which was sworn by one Anthony Karaba Nasimire, who happens to be the learned counsel representing the applicant in this application. On the other hand, the application was strenuously resisted by the respondent vide the affidavit in reply, which was sworn by Subira Mwandambo learned State Attorney.

On the date when the application was called on for hearing, Mr. Anthony Nasimire learned counsel, entered appearance for the applicant whereas, the respondent had the services of Ms Subira Mwandambo, learned State Attorney. In his oral submission before us to amplify the grounds of the notice of motion, Mr. Nasimire sought leave of the Court to recast his first ground of the notice of motion so that it could read:

"That there were manifest errors on the face of the record which were ignored by the Court that, there was improper way in which the case was investigated"

Additionally, the learned counsel abandoned the second ground of the notice of motion and proceeded to address us on the ground which he did recast only. His submission was to the effect that, the applicant is seeking the Court to review its judgment because it misdirected itself, in failing to note that, the evidence tendered by PW4 one E. 6968 Detective Corporal Joseph, which was highly relied upon by the court in holding the applicant culpable to the charged offence of rape, was illegally procured.

In clarification of the alleged illegality on the evidence of PW4, Mr. Nasimire argued that, this witness was the police officer who investigated the case alleged to have been committed by the applicant. Nonetheless, while the offence was alleged to have been committed at Sumayi Hotel which is situated along Rufiji Street within Nyamagana District in the City and Region of Mwanza, PW4 the investigator of the case, was at the material period of time stationed in Shinyanga Region. Since there was no evidence to establish in the way he was imported from Shinyanga Region to come and investigate an offence which was committed in another

Region, his evidence ought to have been doubted. And so far as things were taken by the Court to the contrary that, his testimony constituted the basis of conviction to the applicant, there was merit in the application that, it has to be reviewed. He strongly implored us to do so.

The response from Ms Mwandambo was to the effect that, the application by the applicant was unfounded. Adopting the content of the affidavit in reply and in particular paragraphs 3 and 5, the learned State Attorney argued that, there was no error apparent on the face of the record which has been exhibited by the applicant in his application. To the contrary, the applicant has raised grounds of appeal, inviting the Court to re-evaluate the evidence, which does not fall within the ambit of Rule 66 (1) of **the Rules**. She referred us to the decisions in **Mirumbe Elias @ Mwita Vs. the Republic**, Criminal Application No. 4 of 2015 and **Ghati Mwita Vs. the Republic**, Criminal Application No. 3 of 2013 (both unreported), where the Court set out the guidelines as to where and when an application for review can be made. Since such guidelines were wanting in this application, she urged us to dismiss it in its entirety.

From the submission of the learned counsel above, the issue that stands for the determination of the Court, is whether or not the application by the applicant is sound.

The provisions of Rule 66 (1) of **the Rules**, which govern application for review bears the following wording that is;

> *"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 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; or*
>
> *(d) The court had no jurisdiction to entertain the case; or*
>
> *(e) The judgment was procured illegally, or by fraud or perjury."*
>
> [Emphasis supplied]

Our task therefore in line with the stipulation under the above quoted provision, is to gauge as to whether or not, the application by the applicant falls within the ambit of the above provision. As earlier on hinted above,

the sole and only ground which has been retained and relied upon by the applicant in the application, is the failure by the Court to note that, the evidence tendered by PW4 was procured illegally. The subsequent question which crops up, is whether such an error, even if it were to be established, amounts to an error apparent on the face of the record as envisaged under paragraph (a) of Rule 66 of **the Rules**.

In the case of **Chandrakant Joshubhai Patel Vs. Republic** [2004] TLR 218, the Court adopted the reasoning in Mulla 14th Edition in defining as to what is meant by an apparent error on the face of the record, where it stated that:

> *"An error apparent on the face of the record must be such that can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two options. A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not ground for ordering review. It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."*

The foregoing definition has been taken by the Court to be the clear import envisaged under Rule 66 (1) (a) of **the Rules** See among many: **East African Development Bank Vs Blueline Enterprises Tanzania Limited,** Civil Application No. 47 of 2010, **Mirumbe Elias @ Mwita Vs. Republic**, Criminal Application No. 4 of 2015, **Ghati Mwita Vs. Republic,** Criminal Application No. 3 of 2013.

Reverting to the application before us, when Mr. Nasimire was required by the Court to exhibit the error apparent on the face of the record in the impugned decision, he was unable to do so other than merely arguing verbally that, the law does not permit an officer of the police from one Region to go and perform duties in another Region without complying with the requirement of law of which, unfortunately on his part, he was unable to even name it.

In any event, we are satisfied that, even if Mr. Nasimire could have a sound point in his argument, the same could not pass the test of being an apparent error on the face of the record, because it is not self-evident. It would require an elaborate explanation to make one appreciate his contention that, Detective Corporal Joseph had no automatic right to investigate the offence of rape which faced the applicant and thereby,

going against the spirit envisaged under Rule 66 (1) (a) of **the Rules.** Or else, the Court will be reopening the case and receiving fresh evidence.

In view of what has been traversed above, we are of the settled position that, the applicant in this application has failed to sufficiently demonstrate before us that, there is any error apparent on the face of the record that calls for us to review. Consequently, we are constrained to dismiss the application for want of merit.

Order accordingly.

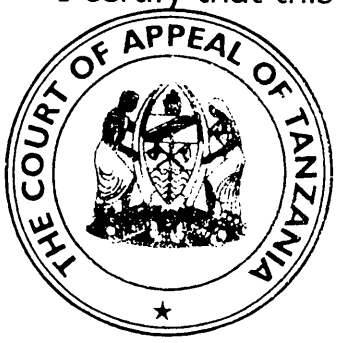
DATED at **MWANZA** this 9th day of July, 2018

B. M. MMILLA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL