

**IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA**

**(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)**

**CRIMINAL APPLICATION NO. 2/09 OF 2018**

**SUDY S/O MASHANA @ KASALA.....APPLICANT**

**VERSUS**

**THE D.P.P. ....RESPONDENT**

**(Application for review from the Judgment of the Court of Appeal of  
Tanzania at Mbeya)**

**(Mussa, Mziray, And Mwangesi, JJ.A.)**

**dated 9<sup>th</sup> day of October, 2017**

**In**

**Criminal Appeal No. 497 of 2015**  
-----

**RULING OF THE COURT**

**21<sup>st</sup> & 29<sup>th</sup> October, 2019**

**MKUYE, J.A.**

By a notice of motion taken under Rule 66 (1) (a) and 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is applying for review of the decision of this Court in Criminal Appeal No. 497 of 2015 dated 9/10/2017 on the ground that the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice. The notice of motion is supported by an affidavit of the applicant

Sudy Mashana in which he explains the sequence of events relating to this application and the so called grounds of review which can conveniently be paraphrased as follows:-

- (i) The conviction was based on the evidence of PW2 and PW3 in disregard of the fact that PW3 could not be summoned by the police in order to identify the applicant in the identification parade to be among the bandits who attacked them at the scene of crime.
- (ii) The Court dismissed the applicant's appeal on the basis of contradictory evidence from prosecution's witnesses.
- (iii) The Court dismissed the applicant's appeal in disregard of the fact that the identification parade register was admitted after conducting trial within trial.
- (iv) The applicant's real name is Sudy Mashana @ Kasala instead of Sudy Mashawa @ Kasala as appearing in the Court of Appeal Judgment.

The respondent Republic filed an affidavit in reply deposed by Mr. Saraji R. Iboru, learned Senior State Attorney in which he vigorously resisted the application on the ground that it did not meet the threshold for review of the decision sought to be reviewed.

Before embarking on the merits or demerits of the application, we find it apposite to narrate the facts albeit briefly, which led to the application at hand. They go thus: The applicant and another person who is not subject to this application were charged and convicted of the offence of murder and sentenced to death by hanging by the High Court of Tanzania at Sumbawanga (Sambo, J.( as he then was)) in Criminal Sessions Case No. 10 of 2013. It was alleged that on 24/1/20/2012 at Muze Village within the District and the Region of Sumbawanga did murder one Maxwed John, the deceased. At the end of the trial they were both convicted and sentenced as we have already stated above.

Being aggrieved by the said High Court's decision, they appealed to this Court which in the end, found the 2<sup>nd</sup> appellant's appeal meritorious and allowed it; whereas it upheld the trial court's decision and dismissed

the appeal against the 1<sup>st</sup> appellant (applicant). Still dissatisfied, the applicant has filed this application to this Court.

At the hearing of the application, the applicant appeared in person; unrepresented; whereas the respondent Republic was represented by Mr. Saraji R. Iboru, learned Senior State Attorney.

From the outset we wished to resolve the issue raised in paragraph 4 (iv) of the affidavit relating to the name of the applicant. We required him to explain as to which was his real name and upon confirming that his name was Sudy Mashana @ Kasala, we accordingly rectified it in terms of Rule 42 of the Tanzania Court of Appeal Rules, 2009. We ordered the name of the applicant to read Sudy Mashana @ Kasala whenever it appeals in the record of appeal, application and judgment.

The applicant in the first place sought to adopt the notice of motion and the affidavit in support thereof and urged the Court to consider it and grant the application.

On the other hand, Mr. Iboru also after adopting the affidavit in reply, indicated his stance of not supporting the application. He argued

that though the applicant relied on among others, the provisions of Rule 66 (1) (a) of the Rules, he has failed to show the manifest error on the face of the record that has occasioned miscarriage of justice to him. He pointed out that even the grounds shown in paragraph 4(i), (ii) and (iii) of the affidavit in support of the application, are grounds of appeal which essentially were dealt with in Criminal Appeal No. 497 of 2015 sought to be reviewed. He said, the applicant seems to seek this Court to re-evaluate evidence, something which this Court has no jurisdiction. For those reasons, Mr. Iboru urged the Court to find that the application is devoid of merit and urged us to dismiss it.

In rejoinder, the applicant being a layperson did not have much to add, he left the matter to the Court to decide.

Having outlined what the parties have put forward before us, we think, we are now in a position to deliberate on it.

To start with, we are aware that Rule 66 empowers the Court to review its own decision. In particular, Rule 66 (1) of the Rules provides for

the circumstances under which such review can be done. It states as follows:-

*"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; 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".*

The spirit of this rule seems to have been taken from the decision of **Chandrakant Joshubhai Patel Vs. Republic** [2004] TLR 218 which was decided before the promulgation of the Tanzania Court of Appeal Rules, 2009 where this Court stated as follows:

*"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):*

- (a) where the decision was obtained by fraud;*
- (b) where a party was wrongly deprived of the opportunity to be heard; and*
- (c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."*

Following the introduction of Rule 66 (1) in the Tanzania Court of Appeal Rules, 2009, five grounds of review were stipulated as we have already shown in Rule 66 (1) (a) to (e) of the Rules. These conditions were re-emphasized in a number of decisions of this Court. Just to mention a few, they include **Roshan Meghee & Company Limited Vs. Commissioner General of Tanzania Revenue Authority** [2017] TLS LR 482 where it was stated that:

*"This Court has time and again held that an application for review will be entertained only if it falls within the grounds stipulated under the*

*provisions of Rule 66 (1) of the Court of Appeal Rules”.*

Also in the case of **Patrick Sanga Vs. Republic**, Criminal Application No. 8 of 2011 (unreported) the Court stated as follows:

*"No order of review can be granted by the Court outside the five grounds stipulated therein."*

(See also **Jackson Godwin Vs. Republic** Criminal Application No. 68/04 of 2016 (unreported)).

But again, it is noteworthy that an application for review is not an appeal in disguise whereby a decision which is erroneous can be heard and corrected. (See **Karimu Kiara Vs. Republic** Criminal Application No. 4 of 2007 (unreported); **Patrick Sanga** (supra); **Gasper August Urrio Vs. Republic**, Criminal Application No. 3 of 2013 (A R); and **Ghati Mwita Vs. Republic** Criminal Application No. 3 of 2013 (both unreported). This is so crucial in order to restrict the Court from sitting on appeal against its own decisions so as to abide to the public policy that litigations must come to an end (See **Chandrakant Joshubai Patel** (supra).



In this case, as was rightly submitted by Mr. Iboru, though the applicant predicated his application under Rule 66 (1) (a) of the Rules in that there is a manifest error on the face of the record which has occasioned miscarriage of justice to him, he did not point out the said error. In what can be said to be the grounds for review as stated in paragraph 4 (i) – (iii) of the affidavit, the applicant assailed the evidence on identification parade register that it was not properly admitted and challenged the Court for upholding the trial court's decision depending on contradictory evidence of the prosecution. Besides that, he attacked the Court in disregarding the fact that the trial Court allowed the trial within trial to be conducted in respect of the admissibility of the identification parade Register (PF 186) Exh. A.

However, having examined the alleged grounds of review, we agree with the learned Senior State Attorney that the applicant seems to seek the Court to re-open the appeal which was considered and determined by the Court. We say so because, in the grounds 1, 2, 3 and 4 of the appeal in the decision sought to be reviewed the applicant had complained on among other grounds, that the trial court based on the contradictory evidence of prosecution witnesses in convicting and sentencing the

appellants; improperly conducting trial within trial in respect of the admissibility of identification Register PF 186 (Exh. A); and placing reliance on PW2's evidence emanating from the identification parade not properly conducted.

We are settled in our mind that the Court considered all such grounds and dismissed them. That being the case, this Court under the law, cannot sit on the appeal against its own decision by disguise of review. The reason for this is not far fetched. When the Court was confronted with a similar situation in the case of **John Kashekya Vs. Attorney General**, Civil Application No. 480/03 of 2018 (unreported), it had this to say:

*"However, even if, for the sake of argument, we take liberty to consider the said Exhibit P15, we will end up with the decision that, the applicant wants the Court to re-open the appeal which had already been decided in the impugned decision. This is so because, in the memorandum of appeal before the Court, the applicant complained under grounds number 3 and 5 about exhibit 15 and who was the surface rights holder respectively".*

But again, we are mindful of the settled legal position of the law in respect of manifest error on the face of the record that it must be apparent and obvious incapable of drawing two opinions. In the case of **African Marble Company Limited AMC Vs. Tanzania Samji Corporation (TSC)** Civil Application No. 132 of 2005 (unreported) while quoting **Mulla Indian Civil Procedure Code**, 14<sup>th</sup> Edition, the Court stated as follows:

*"An error apparent on the face of the record must be such as can be seen by one who writes 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 which there may conceivably be two opinions".*

As indicated earlier on, the applicant has not shown such apparent error on the face of record. At most, the grounds he has raised fall within an appeal in disguise which even if we assume that they are appropriate for review to fall within the scope and purview of a manifest error on the face of the record, the same cannot be resolved without a long drawn process of reasoning, hence not befitting to be a manifest error on the face of the record.

All said and done, we agree with Mr. Iboru that the applicant has failed to show the error which is manifest on the face of the record which, indeed, occasioned miscarriage of justice to him. The application is, therefore, devoid of merit and we thus dismiss it.

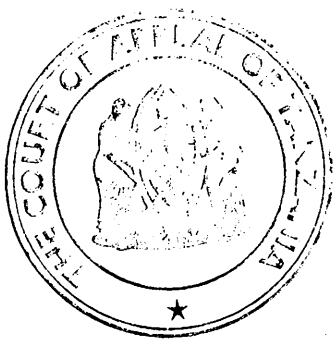
**DATED** at **MBEYA** this 25<sup>th</sup> day of October, 2019.

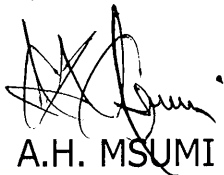
R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

The Ruling delivered on this 29<sup>th</sup> day of October, 2019 in the presence of Mr. Sudy Mashana @ Kasala, applicant in person unrepresented, and Ms. Marietha Maguta State Attorney for respondent/Republic is hereby certified as a true copy of the original.



  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**