IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPLICATION NO. 122/07/ OF 2018

ISSA HASSANI UKI .... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mjasiri, Mmilla and Mwambegele, JJ.A.)

dated the 10th day of May 2018
in
Criminal Appeal No. 26 of 2016

RULING OF THE COURT

25th October, & 4th November, 2019

MWANDAMBO, J.A.:

Issa Hassan Uki, the applicant herein, has, by way of notice of motion preferred under Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (hereinafter to be referred to as the Rules) moved the Court for review of its decision made on 10th day of May 2018 in Criminal Appeal No. 26 of 2016. The applicant's own affidavit supports the application.

According to the applicant, the impugned judgment suffers from a manifest error on the face of the record warranting a review on two grounds, namely:-

1. *That the Court's decision is a nullity for considering that there is no evidence on record proving that the said elephant tusks were seized from the Applicant's motorcycle since there was no official receipt signed to evidence seizure of such elephant tusks which is contrary to the requirement of the law.*

2. *That the Court's decision is a nullity for departing from the Principle of chain of custody that the elephant tusks cannot easily change without taking into consideration the environment in which the alleged elephant tusks were placed.*

Briefly, the applicant was tried and convicted by the Resident Magistrate's Court of Lindi on two counts involving unlawful possession of Government Trophy contrary to section 86(1) and (2) of the Wildlife Conservation Act, No. 5 2009 read

together with paragraph 14(d) of the First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act. Cap 200 [R.E.2002]. His appeal to the High Court at Mtwara was unsuccessful, so was the appeal to this Court in Criminal Appeal No. 129 of 2017. Ground 4 in the memorandum of appeal to this Court related to a challenge on the chain of custody on which the appellant urged the Court to hold that the same was not adhered to relying on the principle laid down by the Court in **Paulo Maduka & 4 Others vs. Republic**, Criminal Appeal No. 110 of 2007 (unreported). Upon careful consideration of the rival arguments for and against the said ground, the Court distinguished the principle laid down in **Paulo Maduka** (supra) holding that the circumstances in the appeal were such that the time involved was incapable of changing hands easily unlike cases involving items such as cash which change hands easily. It thus dismissed that ground and ultimately the entire appeal, sustaining the decision of the two courts below.

Undaunted, the applicant has preferred the application, for he believes that the fact the Court limited the application of the rule in **Paulo Maduka** (supra), constituted a manifest error on the face of the record occasioning a miscarriage of justice within the ambit of Rule 66 (1) (a) of the Rules and hence the invocation of our review jurisdiction for a review on the grounds set out in the notice of motion amplified in the founding affidavit. Not amused, the respondent Republic has filed an affidavit in reply resisting the application. Essentially, the affidavit in reply disputes the averments that there is any ground warranting the courts exercise of its review jurisdiction. Put it differently the respondent contends that the issue complained of was adequately dealt with in the ensuing appeal and so it cannot constitute a ground of review.

At the hearing of the application the applicant who fends for himself appeared in person to argue the application. For the respondent Republic, Mr. Wilbroad Ndunguru, learned Senior State Attorney, entered appearance. The applicant who is a

layman had nothing in substance in addition to the grounds in the notice of motion and the affidavit which he adopted and urged the Court to consider and grant the application.

Submitting in opposition Mr. Ndunguru argued in essence that the applicant has not met the threshold under Rule 66 (1) (a) of the Rules and so the Court should dismiss the application. In amplification, the learned Senior State Attorney argued that the grounds in the notice of motion are but an attempt to reargue the appeal, for the Court had adequately dealt with the issues complained of.

In relation to the chain of custody, Mr. Ndunguru argued that the issues surrounding it were adequately dealt with by the Court in the appeal. Lending support from our previous decision in **Omary Makunja vs. Republic**, Criminal Appeal No. 22 of 2014 (unreported), the learned Senior State Attorney argued that manifest error on the face of the record should not involve a long drawn process to arrive to a conclusion. Regarding the complaint on the departure from **Paulo Maduka** (supra), Mr. Ndunguru

argued that the Court did not depart from the decision but it distinguished it and held that it did not apply to the appeal. On the basis of the foregoing argument, Mr. Ndunguru invited the court to dismiss the application.

When it was his turn for a rejoinder, the applicant maintained that his main complaint against the impugned judgment lied in the Court's non-adherence to the principle regarding broken chain of custody which meant that the case against him was not proved beyond reasonable doubt notwithstanding the fact the same was canvassed in his appeal. Having said so, the applicant urged the Court to grant the application.

Upon hearing the arguments for and against the application in the light of the grounds set out is the notice of motion, the founding affidavit and the law applicable, we have no hesitation in saying at this stage that the application was preferred in sheer misapprehension of the law. We say so because the law on the basis of which the applicant has predicated his application is well

settled. As submitted by Mr. Ndunguru referring to our decision in **Omary Makunja vs. Republic** (supra) citing **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218, an error warranting review must be both obvious and a patent mistake and not something which can be established by dram process of reasoning on points, which there may conceivably be no opinions. The court made it explicit that:-

> *"That a decision is erroneous in law is no ground for ordering review. Thus the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third, the error must have resulted in miscarriage of justice"* [at page 225]

In **M/s. Thunga Bhandra Industries Ltd Vs. the Government of Andra Pradesh,** AIR 1964 SC 1372 cited with approval by the Court in **Tanganyika Land Agency Limited and 7 others Vs. Manohar Lal Aggrwal, Civil application No. 17 0f 2008** (unreported), it was held that a review is by no

means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error without engagement in elaborated argument to establish it. In **Charles Barnaba vs. Republic,** Criminal Application No. 13 of 2009 (unreported) the court held that review is not meant to challenge the merits of the impugned decision but to address irregularities of a decision or proceedings which caused injustice to a partly.

Turning to the instant application, it will be clear that what the applicant is asking the Court to do is to sit on our judgment and rehear the appeal in the hope, mistakenly though, that the Court may come to a different decision. Quite unfortunate for him, there is no such jurisdiction for any Court worthy the name sitting on its own judgment and discuss the merits of as the applicant has asked us to do. This is plain by looking at pages 3 and 4 of affidavit which we take liberty to reproduce as under:

> *"3. That the court failed to consider that there is no evidence on record supporting the accusation that the said elephant tusks*

were searched and seized from the applicants motorcycle since there was no official receipt either singed by the applicant as the owner of the motor cycle searched, the signature of the police officer seized the items or the signature of any independent person who witnessed the search but the court proceeded to uphold the conviction against the applicant herein.

4. *That the Court was not correct in its judgment by departing from the principle of chain of custody since the elephant tasks cannot easily change while it is clear on record that the said seized items have been kept in different places including the places where other elephant tasks were kept."*

Apart from pointing out what he labels as errors in our judgment touching on evidence and the misapplication of the principle in **Paulo Maduka's** case (supra), the applicant has not cited any error on the face of the record causing injustice warranting the exercise of our review jurisdiction under section 4 (4) of the Appellate Jurisdiction Act, Cap 141 [R.E. 2002] read

together with Rule 66 (1) of the Rules. As rightly submitted by Mr. Ndunguru, the applicant has not crossed the threshold under Rule 66 (1) (a) of the Rules and it should suffer the appropriate consequences, that is to say; an order dismissing it.

Before we pen off, we find it necessary to reiterate what we have consistently said in many cases regarding the scope of review. In **Tanganyika Land Agency Limited and 7 Others vs. Manohar Lal Aggrwal** (supra) the Court aptly stated:

> *"For matters which were fully dealt with and decided upon an appeal the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the Court process, but would result to endless litigation. Like life, litigation must come to an end."* (at page 9).

Discouraging litigants from resorting to review as disguised appeals and underscoring the end to litigation, in **Patrick Sanga**

vs. The Republic, Criminal Application No. 8 of 2011 the Court stressed:

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court in the land is final and its review should be an exception. That is what sound public policy demands."* [at page 6]

As alluded to earlier, the application does nothing less than asking the Court to hear the appeal afresh which is contrary to the much cherished public policy that litigation must come to an end like life. The application is simply misconceived.

In fine, the application which we have found to be wanting in merit is hereby dismissed.

Order accordingly.

DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 4th day of November, 2019 in the presence of the applicant in person, unrepresented and Mr. Paul Kimweri, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL