IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPLICATION NO. 120/07 OF 2018

MAULIDI FAKIHI MOHAMED @ MASHAURI .....APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for Review from the Decision of the Court of Appeal of Tanzania at Mtwara)

(Munuo, Nsekela, Msoffe, JJJA.)

dated the 8th day of September, 2005
in
Criminal Appeal No. 229 of 2004

RULING OF THE COURT

23rd October, & 4th November 2019

MMILLA, J.A.:

In this application, Maulid Fakihi Mohamed @ Mashauri (the applicant), is asking the Court to review its decision in Criminal Appeal No. 229 of 2004 (Munuo, Nsekela, and Msoffe, JJJA), dated 8.9.2005. The application has been brought by way of a Notice of Motion, and is founded on the provisions of section 4 (4) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), and Rule 66 (1) (a) and (b) of the

Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by the applicant himself.

The brief background facts of this application are that, way back in 2001, the applicant was charged in the High Court of Tanzania at Mtwara with the offence of murder contrary to section 196 of the Penal Code. He was convicted and sentenced to a mandatory death sentence. Aggrieved by that decision, he unsuccessfully appealed to the Court. The present application has been predicated upon that decision of the Court.

The applicant's Notice of Motion has raised four grounds which may be rephrased as follows; **one** that, there is a manifest error on the face of the record on the judgment of the Court because it upheld and relied on circumstantial evidence to sustain his conviction; **two** that, there is a manifest error on the face of the record on the judgment of the Court because it wrongly upheld the evidence that he failed to establish when or at what time he parted ways with the deceased, and ignored his defence that he had told PW1 that the child had expressed to him that she was returning home; **three** that, he was deprived the right to be heard in that for no apparent reasons he was not summoned to attend in Court on the day his appeal was heard, nor did he ever meet his advocate; and **four**

that, there is a manifest error on the face of the record on the judgment of the Court in that his defence was ignored.

When this application was placed before us for hearing on 23.10.2019, the appellant appeared in person and fended for himself; whereas the respondent/Republic was represented by Mr. Joseph Mauggo, learned Senior State Attorney. The latter filed an affidavit in reply in which he disputed all the grounds raised by the applicant.

In his brief submission before us, the applicant emphasized that the circumstantial evidence on which his conviction was anchored was wanting; therefore the Court wrongly upheld it. He added that this is a manifest error on the face of the record supposed to be rectified.

In addition to that, the applicant submitted that the High Court improperly disbelieved his testimony that he safely parted ways with the deceased who told him that she was going home, and that this Court wrongly upheld the findings of the lower court on the point, hence his argument that his defence was not properly considered. That again, he said, is a manifest error on the face of the record.

On another point, the applicant maintained that there was no reason why he was not given the opportunity to appear before the Court on the

day his appeal was heard. Worse more, he said, he did not even communicate with his advocate. He contended therefore that that was injustice, demanding the Court to vacate its previous judgment.

On his part, Mr. Mauggo hastened to inform us that he was opposing the application which he said was totally devoid of merit.

To begin with, Mr. Mauggo submitted that grounds 1, 2 and 4 fall under Rule 66 (1) (a) of the Rules which entails presence of an error apparent of the face of the record. He argued that looking at the illustrations given by the applicant in that respect; those are not manifest errors on the face of the record. According to him, the matters being raised now were formerly raised in his appeal before the Court. They were intensely discussed, but rejected. He urged us to dismiss those grounds because they do not qualify to be manifest errors on the face of the record.

As regards ground No. 3 which he said falls under Rule 66 (1) (b) of the Rules, Mr. Mauggo submitted that this too was baseless because all through his trial, and during the hearing of his appeal before the Court, the applicant was represented by an advocate. He added that although he was not present when the Court heard his appeal, the hearing was rightly proceeded with as such on the basis of Rule 80 (2) of the Rules. As such,

he maintained, this ground too is devoid of merit. He urged us to dismiss it. For those reasons, he pressed the Court to dismiss the application.

In his rejoinder, the applicant reiterated his request that we favourably consider his grounds and allow his application.

It is settled, and there is no storm, that in order for an application for review to succeed, a party moving the Court to grant such order must establish any of the grounds specified under Rule 66 (1) (a) to (e) of the Rules. That Rule provides that:-

> *"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;*
> *(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."*

As already pointed out, the grounds raised in this application center on clauses (a) and (b) of Rule 66 (1) of the Rules. While clause (a) refer to a manifest error on the face of the record resulting in the miscarriage of justice; clause (b) concerns deprivation of an opportunity to be heard. We desire to begin with grounds falling under clause (a) of that Rule.

Given the nature in which the first, second and fourth grounds raised by the applicant are, we need to first of all appraise ourselves on what is meant by a manifest error on the face of the record. Fortunately, this aspect has been addressed in a range of cases – See **Ghati Mwita v. Republic,** Criminal Application No. 3 of 2013, **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil Application No.17 of 2008, CAT (both unreported) and **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218.

In **Tanganyika Land Agency Limited**, the Court relied on the persuasive decision in the Indian case of **M/s Thunga Bhadra Industries Ltd v. The Government of Andra Pradesh**, AIR 1964 SC 1372 in which at page 1377 it was stated 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.*** *We do*

not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but ***it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."*** [The emphasis is ours].

At page 7 in **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal (supra),** the Court stressed that:-

"[An] error on the face of the record ***... must be 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****..."*

In the present application, we see no any manifest errors on the face of the record in grounds 1, 2 and 4. In essence, they focus on matters which were raised and discussed by the Court in the decision which is the subject of the present application. It will be observed that the applicant's

advocate before the Court (Mr. Ndolezi) had preferred only one ground of appeal namely:-

> *"That the circumstantial evidence on which the conviction was founded did not irresistibly lead to the guilt of the appellant."*

In its deliberations of this ground, the Court concluded that there was irresistible circumstantial evidence that linked the applicant with the death of the deceased. It also believed the evidence of PW1 that the applicant returned to her residence a second time and told her that he had brought back the deceased, and that soon thereafter the deceased was found at a neighbour's house on the verandah. In the course of those deliberations, they perfectly considered his defence but rejected it on the strength of the evidence of the prosecution.

From what we have just said, we reiterate the point that grounds 1, 2, and 4 do not at all constitute manifest errors on the face of the record as is being purported by the applicant. What is clear is that in these grounds the applicant has expressed his dissatisfaction with the decision of the Court. Technically therefore, he is sort of asking the Court to sit in appeal in respect of its own decision, which is not at all allowed – See the case of **Charles Barnaba v. Republic,** Criminal Application No. 13 of

2009 (unreported) which was followed in **Issa Hassan Uki v. Republic**, Criminal Application No. 10 of 2018. It was stated in **Charles Barnaba** case that:-

> *"Review is not to challenge the merits of decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party."*

Again, see **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal** (supra) in which the Court said that:-

> *"A decision that is erroneous in law is no ground for ordering review."*

For reasons we have assigned, we find no merit in grounds 1, 2, and 4. We accordingly dismiss them.

Next for consideration is the third ground in which the applicant alleges that he was deprived the right to be heard. As we earlier on pointed out, his complaint is essentially that for no apparent reasons the hearing of his appeal before the Court proceeded in his absence, and that he never met his advocate.

Going by the records, it is factually true that the applicant was not there in person on the day his appeal was heard by the Court, but his

advocate one Ndolezi, was present and indeed, he argued the appeal on behalf of the applicant. However, as correctly submitted by Mr. Mauggo, proceeding in the applicant's absence in the circumstances which obtained was proper in terms of Rule 80 (2) of the Rules. That Rule provides that:-

> *"(2)* ***Where an appellant is represented by an advocate*** *or has lodged a statement under Rule 74 or is in prison* ***it shall not be necessary for him to attend personally at the hearing of his appeal, unless the Court orders his attendance;*** *but if an appellant is on bail he shall attend at the hearing of his appeal or with the leave of the Registrar, shall before the time of the hearing attend at the High Court at the place where the bail bond was executed and submit himself to the order of that court pending disposal of the appeal."*

It should similarly be pointed out that because the appeal before the Court proceeded on the basis of the Record of Appeal, it cannot for sure be said that since the applicant did not communicate with his advocate, then his advocate was in a disadvantaged position. It is presupposed that his advocate dutifully read the record, understood his client's case, and adequately represented him. Surely, nothing important was amiss. In the circumstances, the applicant's complaint that he was deprived an

opportunity to be heard is baseless. This ground too is devoid of merit and we dismiss it.

For reasons we have assigned, we find that the application was filed without sufficient cause; we therefore dismiss it.

Order accordingly.

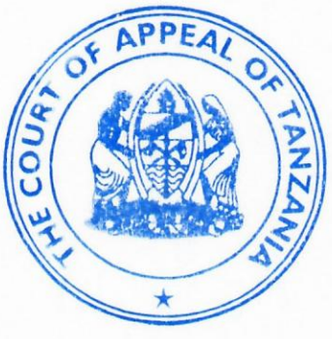
DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of the Applicant present 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



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL