IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CONSOLIDATED CRIMINAL APPLICATION
NOs. 117,118 & 119 /07/ OF 2018

1. **OMARI MUSSA @SELEMANI@ AKWISHI.....1ST APPLICANT**
2. **SAIDI ALLY MAJEJE@ RICO@ KADETI.....2ND APPLICANT**
3. **HUSSEIN SAID MTANDA@NGOFU .....3RD APPLICANT**

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

(Munuo, Mbarouk and Bwana, JJ.A.)

dated the 29th day of September, 2011
in
Criminal Appeal No. 342 of 2008

RULING OF THE COURT

6th & 8th November, 2019

MWANDAMBO, J.A.:

Omary Musa @ Selemani @ Akwishi, the first applicant, was among the four appellants in Criminal Appeal No. 342 of 2008 challenging the decision of the High Court at Mtwara which convicted him of murder together with Saidi Ally Majeje @ Rico @ Kadeti, second applicant, Hussein Said Mtanda @ Ngofu, third applicant and Omary Ally @ Juma @ Dedi. The latter did not join hands with his fellow appellants in the application. That appeal arose from Criminal Sessions Case No. 45

of 2004. The Court (Munuo, Mbarouk and Bwana, JJA), found that appeal wanting in merit and dismissed it in a judgment dated 29th September 2011. Believing that the Court did not do them justice, the applicants have sought to invoke the Court's power of review under section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (the AJA) and Rule 66 of the Court of Appeal Rules, 2009 (the Rules).

On 8th June 2018 each applicant filed his respective application by way of notice of motion supported by an affidavit. The three applications were registered as Criminal Application Nos. 117/7, 118/7 and 119/7 all of 2018 for the first, second and third applicants respectively. Except for the names of the applicants, the contents of notices of motion and the supporting affidavits are identical to each other. Each applicant has raised five grounds in his notice of motion but, essentially, the grounds for seeking review revolve around Rule 66 (1) (a) and (b) that is; manifest error on the face of the record causing injustice and denial of the right to be heard. A large part of the paragraphs contain amplifications pointing out the alleged errors in the impugned judgment. Striped of inherent grammatical errors, the applicants' main grounds can be rephrased as follows:

(a) *That there is a manifest error on the face of record because the Court upheld the conviction and sentence ignoring the fact that section 192(3) and (4) of the Criminal Procedure Act, Cap 20 and rule 6 of the Accelerated Trial and Disposal of Cases Rules (GN. No 192 of 1988) were not complied with.*

(b) *The Court wrongly upheld conviction and sentence against the applicants relying on documents which were discounted from the record.*

(c) *The trial court and the Court erred when they ignored and failed to take into account the defence case.*

All applications were called on for hearing on 6th November 2019 during which the applicants appeared in person to prosecute them. The respondent/Republic in each application was ably represented by Mr. Abdulrahman Msham, learned Senior State Attorney.

At the very outset, considering that the identical applications stemmed from the same judgment, the learned Senior State Attorney moved the Court to consolidate them under Rule 4 (2) (a) of the

Tanzania Court of Appeal Rules, 2009 (the Rules). There being no objection from the applicants, and upon the Court being satisfied that the prayer was appropriate in the circumstances, acting under Rule 4 (2) (a) of the Rules, we granted the same and ordered the consolidation of the three applications into Criminal Application No.117/7/2018. Having consolidated the applications, Omary Musa @ Selemani @ Akwishi became the first applicant whereas Saidi Ally Majeje @ Rico @ Kadeti and Hussein Said Mtanda @ Ngofu are the second and third applicants respectively.

At the applicants' election, the learned State Attorney was the first to address us on the application. Mr. Msham kicked off his submissions by urging us to dismiss the application for failure to meet the requirement under Rule 66 (1) of the Rules. Despite the applicants' failure to indicate in the notices of motion the specific paragraphs under Rule 66 (1) of the Rules, Mr. Msham invited us to disregard it in the light of the proviso to Rule 48 (1) of the Rules.

He took that position having regard to the grounds in the notices of motion indicating that they are predicated under Rule 66 (1) (a) and (b) of the Rules, that is; one, the decision was based on a manifest error on the record resulting in the miscarriage of justice, and; two, the applicants were wrongly deprived of an opportunity to be heard. We had similar understanding and so we proceeded with the hearing on that basis.

Submitting on the merits, Mr. Msham began with the ground in relation to the alleged manifest error on the face of the record within the ambit of Rule 66 (1) (a) of the Rules. He pointed out that contrary to grounds one and two in the notices of motion alleging existence of manifest error on the face of the record, none exist to warrant a review. As to what constitutes a manifest error, Mr. Msham referred us to our previous decision in the case of **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218, quoting with approval an excerpt from **Mulla**, 14th edition to mean an obvious and patent mistake which upon reading, will not involve a long drawn process to come to a conclusion that there is an error.

The learned Senior State Attorney argued that the applicants' complaint on the alleged non-compliance with section 192 (3) (4) of the Criminal Procedure Act, Cap. 20 [R.E 2002] (the CPA) is not an error justifying a review. This is because, he argued, much as the Court itself found that there was an irregularity in admitting exhibits during the preliminary hearing stage and expunged them, it upheld the trial court's decision on the doctrine of recent possession rather than on the irregularly admitted exhibits. Relying on **Chandrakant's** case (supra) and **John Kashindye vs. Republic,** Criminal Application No. 16 of 2014 (unreported), the learned Senior State Attorney argued, correctly so, that a ground may be sound but may not qualify as a valid ground warranting a review. In the latter case, the Court dismissed an application in which the applicant had moved the Court to reassess evidence in the exercise of its power to review its own decision as if it was sitting on an appeal from the trial court for the second time.

According to him, the ground canvassed by the applicants are essentially grounds of appeal from its own judgment which is not permitted consistent with the Court's decision in **Karim Kiara vs. Republic**, Criminal Application No. 4 of 2007(unreported). Concluding,

Mr. Msham invited the Court to hold that the applicants have not exhibited any manifest error on the face of the record from which the impugned decision has arisen and thus, grounds one and two should be rejected.

Regarding ground three, Mr. Msham was unequivocal that it is equally misconceived. In his understanding, the applicants appear to be complaining that they were wrongly deprived of an opportunity to be heard within the context of Rule 66 (1) (b) of the Rules. However, the learned Senior State Attorney pointed out that it is inconceivable that the applicants could complain that they were wrongly deprived an opportunity to be heard. He argued that the applicants who were the accused persons in the High Court were heard in defence ably represented by counsel. Whereas Mr. Mlanzi represented them before the trial court as defence counsel, Mr. John Mapinduzi acted for them in this Court in an appeal against the trial court's judgment. It was Mr. Msham's contention which we think is correct, that the claim that their defence was not considered is baseless because it was not a ground of appeal before the Court and so it cannot constitute a valid ground of review.

On the basis of the foregoing submissions, the leaned Senior State Attorney invited us to dismiss the application for being legally untenable.

When the Court called upon the applicants to respond, they had no significant input on both grounds in response to the submissions canvassed by the learned Senior State Attorney. However, each of them requested the Court to grant the application on the basis of the grounds in their respective notices of motion. In particular, the first applicant contended that despite the submissions canvassed on behalf of respondent/ Republic, he invited us to hold that there was no basis for the conviction for murder upheld by the Court after the expunction of the postmortem report.

The second and third applicants for their part had similar arguments in relation to the existence of manifest error on the face of the record. Although each had his own time to address us, the gravamen of their argument can be conveniently combined. Their focus was on the Court's order expunging the exhibits admitted at the preliminary hearing stage without due regard to the provisions of section 192 (3) and (4) of the Criminal Procedure Act, Cap. 20 [R.E. 2002] (the CPA) and rule 6 of

the Accelerated Trial and Disposal of Cases Rules (GN. No 192 of 1988). They contended that the Court had satisfied itself that the admission of the exhibits at the preliminary hearing was irregular and expunged them from the record particularly the postmortem report which was relied upon by the trial court that the death of the deceased was not natural.

According to them, since the very exhibit proving the death of the deceased had been expunged, there was no more evidence to prove the cause of death which could have linked it with the armed robbery and the applicants' involvement in it. On that basis, if we understood them correctly, the second and third applicants' argument was that there was a manifest error on the face of the record warranting a review because the Court upheld the trial court's decision in the absence of proof of the cause of death of the deceased said to have been resulted from the armed robbery.

Having heard the arguments for and against the application we now proceed to examine its merits and demerits guided by the law governing applications for review. It is to be noted at this stage that the Court's power to review its own decisions under section 4 (4) of the AJA

is not open ended. It is exercisable in accordance with Rule 66 (1) of the Rules which provides 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,'*
>
> *(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 applicants have predicated their application under two grounds prescribed in Rule 66 (1) (a) and (b) of the Rules. Admittedly, the application of ground (a) has not been free from difficulties notwithstanding the fact that the law on what is meant by the phrase; manifest error on the face of the record is very well settled. Our previous

decisions in a number of cases exemplified by **Chandrakant** and **John Kashindye** cases (supra) bears testimony to that fact.

It would not have been necessary to get into much detail on this but we are constrained to go an extra mile for the benefit of the litigants who, despite the unequivocal definition accorded to the phrase, still harbor feelings that Rule 66 (1) (a) covers each and every aspect of dissatisfaction from the Court's decisions.

Our position expressed in **Chandrakant's** case (supra) cannot be more appropriate to illustrate the position. The Court quoted with approval an excerpt from the learned authors of Mulla, 14th edition as follows:

> *An error apparent on the face of the record must be such as 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 opinions... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law.... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for*

ordering review.... It must further be an error apparent on the face of the record..." [at page 225].

It is the applicants' claim that there is a manifest error on the face of the record exhibited by the Court upholding conviction on the information of murder in the absence of proof the cause of death of the deceased. That claim is intensified by the fact that the postmortem report on the basis of which the trial court relied in finding the applicants guilty was no longer part of the record after its expunction. The nagging question though is, whether the cause of death of the deceased was an issue before us in the appeal. The answer is, unavoidably a negative one. We say so because, upon examination of the judgment, the cause of the deceased's death does not appear to have been in dispute except the culprit(s) behind it. Indeed, there is no slightest reference in the grounds of appeal and/or the arguments by the applicants' advocate during the hearing of the appeal challenging the trial court's finding regarding the cause of death of the deceased. This, to our mind, explains why the Court upheld the trial court's findings regarding the murder of the deceased based on circumstantial evidence together with

the doctrine of recent possession linking the applicants with the murder of the deceased.

Having regard to the foregoing, we are unable to see any error manifest on the record warranting this Courts' intervention by way of review. As rightly submitted by the learned Senior State Attorney, that ground may have been appropriate in an appeal rather than in an application for review. Going along with the applicants' arguments would be tantamount to the Court sitting as an appellate court from its own decisions which is not what review is all about under our law. Put it differently, the applicants' invitation to review our decision on the alleged error is nothing less than an appeal in disguise which is contrary to the settled principle in many of its decisions. For instance, in **Tanganyika Land Agency Limited and 7 others Vs. Manohar Lal Aggrwal, Civil Application No. 17 0f 2008** (unreported) the Court was very categorical. It stated that an application for review is by no means an appeal through a back door whereby an erroneous decision is reheard and corrected at the instance of a litigant who becomes aggrieved by such a decision.

Subsequently, in **Patrick Sanga vs. Republic,** Criminal Application No. 8 of 2011(unreported) the Court made the position more lucid. It stated:

> *"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].

See also; **Maulidi Fakihi Mohamed @ Mashauri vs. Republic,** Criminal Application No. 120/07 of 2018 and **Issa Hassan Uki vs. Republic**, Criminal Application No. 122/07 of 2018 (both unreported). In the upshot, we are inclined to endorse Mr. Msham's submission that the applicants have not exhibited any error manifest on the face of the

record in the impugned decision on ground one and two within the confines of Rule 66 (1) (a) of the Rules. In consequence, we reject both grounds.

The remaining ground predicated under Rule 66 (1) (b) of the Rules should not detain us. Apparently, the applicants did not say anything on it. Be it as it may, as rightly submitted by Mr. Msham, this ground is baseless. The complaint that the applicants' defence was not considered by the trial court cannot be a ground warranting a review. It was not one of the grounds of appeal neither was it canvassed in the appeal. On the contrary, the judgment of the Court bears us out that the applicants defended themselves in the High Court ably represented by counsel in the trial court. The fact (if any), that the applicants' defences/arguments were not given weight as alleged could not have constituted wrongful deprivation of an opportunity to be heard by the Court in its decision the subject of the application. Likewise, the applicants who were the appellants in the impugned judgment prosecuted their appeal represented by an advocate as evident from the judgment. Like the learned Senior State Attorney, we have seen no semblance of merit in that ground and we reject it.

In the event and for the foregoing reasons, we are constrained to dismiss the application as we hereby do for being untenable in law.

It is accordingly ordered.

DATED at **MTWARA** this 8th 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 8th day of November, 2019 in the presence of the applicants in person, unrepresented and Mr. Meshack Lyabonga, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL