IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPLICATION NO. 69/08 OF 2019

1. CHACHA JEREMIAH MURIMI
2. METHEW JEREMIAH DAUD
3. PASCHAL LIGOYE MASHIKU ..... **APPLICANTS**
4. ALEX JOSEPH @ BUGWEMA
SILOLA LYANGALO

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mbarouk, Mziray and Mwambegele, JJA.)

dated the 5th day of April, 2019
in
Criminal Appeal No.551 of 2015

.....

RULING OF THE COURT

29th November & 5th December 2019

MWANDAMBO, J.A.:

The applicants are before the Court for the second time in this year. The first time was 27th March, 2019 during the hearing of Criminal Appeal No. 551 of 2015 in which they appeared as appellants challenging the decision of the High Court sitting at Mwanza in Criminal Sessions Case No. 231 of 2014. That court had convicted the applicants of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 followed by the

mandatory death sentence by hanging. On 4th April, 2019, this Court (Mbarouk, Mziray and Mwambegele JJ.A) handed down its judgment which dismissed the applicants' appeal upholding conviction and sentence upon being satisfied that appeal had no merit.

Believing that the Court wrongly dismissed their appeal, the applicants surfaced for the second time before this Court in May challenging the Court's decision by way of review. They have accordingly moved the Court by way of notices of motion supported by affidavits of each of them. Despite the fact that each applicant lodged his notice of motion separately, it became convenient to combine all of them in one application because they all stem from the same decision. Largely, the notices of motion have been preferred under section 4(4) of the Appellate Jurisdiction Act, Cap. 141[R.E. 2019] (the AJA) and rule 66(1) (a), (b) and (e) of the Court of Appeal Rules 2009, GN. No. 368 of 2009 (the Rules).

Considering the manner in which the applicants have lodged their notices of motion, we find it appropriate to set out the grounds relied upon by each of them.

The first applicant has preferred two grounds predicated under rule 66(1) (a) and (b) of the rules. He contends that there is manifest error on

the face of the record resulting in a miscarriage of justice and wrongful deprivation of the opportunity to be heard in respect of some of the grounds in the memorandum of appeal and all grounds in the supplementary memorandum. He avers in paragraph 4 of the affidavit that his conviction upheld by the Court was flawed because, (a) the cautioned statements relied upon by the trial court were recorded outside the basic period, (b) he was not implicated in the evidence of visual identification and, (c) there was improper reliance on the doctrine of recent possession. On that basis, the first applicant urges the Court to re-hear the appeal through an advocate of his own choice.

The second applicant's grounds as discerned in the affidavit are; **one,** weak evidence of visual identification, **two** failure by the Court to consider grounds 3 and 4 in the memorandum of appeal, **three,** unwarranted reliance on the identification parade, **four,** improper invocation of the doctrine of recent possession, **five,** conviction based on illegally admitted caution statements of co-accused, **six,** questionable credibility of the evidence of the arresting officer (PW6) and, **seven,** omission to consider the grounds in the supplementary memorandum of appeal. He likewise prays for an order granting the application and/or re-

hearing the appeal on grounds which were not considered by the Court through an advocate to be appointed by the Court.

For his part, Paschal Ligoye Mashiku, the third applicant, has made a prayer similar to that of the second applicant on the same grounds, that is to say; manifest error on the face of the record resulting in the miscarriage of justice and wrongful deprivation of opportunity to be heard. His affidavit cites several aspects claimed to have been the basis of his conviction namely; **one**, contradictory, implausible and improbable evidence, **two**, irregular admission of the illegally recorded caution statement, **three**, failure to consider some of the grounds in the memorandum of appeal and all grounds in the supplementary memorandum.

Finally, Alex Joseph @ Bugwena has raised four grounds predicated under rule 66(1) (a), (b) and (e) of the Rules that is, **one**, manifest error on the face of the decision by reason of the Court failing to hold that there was non-compliance with section 299 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), **two**, irregular admission into evidence of the caution statements and seizure certificate, **three**, judgment procured illegally, by fraud or perjury for non-compliance with the provisions of the

CPA, and **four**, insufficiency of the evidence against him warranting his conviction for murder.

In the totality, the applicants' application is predicated on, manifest error on the face of the decision resulting in the miscarriage of justice, wrongful deprivation of the opportunity to be heard and, judgment was procured illegally, fraud or perjury in terms of rule 66(1) (a), (b) and (e) of the Rules. In amplification all applicants contend in unison that there was non-compliance with s. 299 of the CPA, the Court sustained conviction which was a result of irregular admission of caution statements and seizure certificate, weak evidence of visual identification, improper reliance on the doctrine of recent possession and contradictory evidence of the prosecution witnesses. In support of the ground based on wrongful deprivation of the opportunity to be heard, the applicants contend that the Court denied them that opportunity by failing to consider some of the grounds in their respective memorandum of appeal as well the additional grounds in the joint supplementary memorandum.

Not amused, the respondent Republic filed an affidavit in reply resisting the application.

At the hearing of the application, the applicants appeared in person fending for themselves whereas, Ms. Angela Nchalla, learned Senior State Attorney appeared for the respondent Republic opposing the application. When the Court invited them to elaborate on the application, the applicants, being lay persons adopted their grounds in their respective notices of motion and affidavits. Each of them opted to let the Senior State Attorney submit first deferring any argument for rejoinder if such need arose.

Ms. Nchalla kicked off her submissions by a general remark that the application before us was misconceived for failure to meet any of the grounds set out under rule 66(1) of the Rules. The learned Senior State Attorney contended that in effect, the applicants are asking the Court to rehear their appeal through the back door which is not what review is all about.

In amplification, counsel drew our attention to the Court's previous decisions including, **Mirumbe Elias Mwita vs. Republic**, Criminal Application No. 4 of 2015 (unreported) in which it was held that to warrant a review of its decision on account of manifest error, such an error must be obvious not involving a process of reasoning.

Regarding the ground predicated on rule 66(1) (b) that is, wrongful deprivation of the right to be heard, counsel argued that the applicants were duly heard by the Court in both the High Court and this Court through their advocates. With specific complaint against the Court's alleged failure to consider additional grounds in the supplementary memorandum, Ms. Nchalla argued that in so far as the appellants were ably represented by counsel at the hearing of the appeal, the complaint is baseless.

With regard to the Court's failure to hold that the High Court had contravened section 299 of the CPA, the learned Senior State Attorney argued that the same was equally misconceived because, the proceedings of the trial Court clearly indicate full compliance with the law as evident at page 16 and 18 of the record of appeal. On the whole, she invited us to find the application devoid of merit and dismiss it.

When it was their turn to address the Court in rejoinder, each of the applicants took exception to the Court's failure to consider their supplementary grounds allegedly filed in Court few days before the date of hearing of the appeal. According to them, that constituted a wrongful deprivation of the opportunity to be heard falling within the ambit of rule 66(1) (b) of the Rules. The second applicant had an additional argument

contending that the evidence of visual identification was not properly considered, for, had it been the case, the Court should have held that he was not identified at the scene of crime. The second applicant was adamant that the Court should review its decision and revisit the evidence in line with the previous decision in **Muhidin Ally@Muddy and 2 others vs. The Republic**, Criminal Application No. 2 of 2006 (unreported).

We have heard arguments for and against the application. Apparently, the arguments focused on the grounds under rule 66(1) (a) and (b) of the Rules. Despite the fourth applicant alleging that the judgment was procured illegally by fraud or perjury, he did not elaborate in what way that judgment could have been so procured. The remotest he could say was that there was non-compliance with the provisions of the CPA but he did not go further to elaborate which provision of the CPA was contravened by the Court resulting in our judgment being illegally procured by fraud or perjury. It is no wonder Ms. Nchalla saw no reason to spend her energy on it. With these remarks, we will now proceed to a discussion on the two grounds on which the applicants predicated the application with the scanty details in the notices of motion and the founding affidavits.

We shall begin our discussion with the obvious, namely; an examination of the law upon which the applicants have predicated the application. There is no dispute the Court's power to review its own decisions under section 4 (4) of the AJA is not open ended. That power 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".*

As seen above, the applicants predicated their application on two grounds prescribed in rule 66 (1) (a) and (b) of the Rules. More often than not, ground (a) has been a subject of litigation in such applications. This is

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 exemplified by the cases cited by the learned Senior State Attorney, namely; **Mirumbe Elias @ Mwita vs. The Republic,** (supra) **Ghati Mwita vs. The Republic,** Criminal Application No. 3 of 2013 (unreported) bear us out on this. Other cases include; **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218 and **John Kashindye vs. Republic,** Criminal Application No. 16 of 2014, **Patrick Sanga vs. Republic,** Criminal Application No. 8 of 2011, **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, **Tanganyika Land Agency Limited and 7 others Vs. Manohar Lal Aggrwal, Civil Application No. 17 0f 2008** (all unreported) to mention but a few.

The position expressed in **Chandrakant's** case (supra) cannot be more appropriate to illustrate the scope of review. We 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].

In **Patrick Sanga vs. Republic,** Criminal Application No. 8 of 2011 (unreported) the Court made the position more lucid when 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].

To make it even more clearer, in **Blue Line Enterprises Limited vs. East African Development Bank,** Civil Application No. 21 of 2012 (unreported) we quoted with approval an old decision in **Haystead vs. Commissioner of Taxation** [1920] A.C 155 at page 166 whereby Lord Shaw observed:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present so as to what should be a proper apprehension, by the Court of the legal result...* ***If this were permitted litigation would have no end except when legal ingenuity is exhausted"***
> *(Emphasis added).*

The above cases are just a few of the cases showing that the law is well settled as it were on what it entails to invoke the Court's power of review based on the ground that there is manifest error on the face of the impugned decision. We shall thus subject the applicants' complaints to the proper scrutiny against the requirements of the law as stated in the cited cases.

We shall start with the complaint raised by the fourth applicant alleging that there was non-compliance with the provisions of the CPA which constituted manifest error on the face of the decision resulting in miscarriage of justice. Ms. Nchalla submitted that the complaint regarding non- compliance with section 299 of the CPA was one of the grounds of appeal determined by the Court on appeal. The Court addressed the ground and had the following to say:

> *"This ground should not detain us. A close look at the record of appeal and as rightly submitted by the learned Principal State Attorney, the trial judge at page 50 considered and addressed the appellants in terms of section 299 (1) and (2) of the CPA. He also expressed to them their right to recall witnesses but the appellants opted and acceded for the judge to proceed with the case. That being the case, we are satisfied that section 299 of the CPA was fully complied with by the trial judge." [At page 15]*

Having addressed the ground as demonstrated above, we see no justification for the complaint. That ground cannot be raised again in review on the pretext that there is a manifest error on the decision. At the risk of repetition, the mere disagreement with the view of the judgment cannot be a ground for invoking the Court's power of review. It is equally settled law that as long as the point is already dealt with and answered,

the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction in line with what the Court said in **Blue Line Enterprises Ltd. vs. East African Development Bank** (supra) cited in **Mirumbe Elias @ Mwita** (supra). The applicants have not gone beyond mere allegations on this complaint. Consequently, we hold that the complaint is devoid of merit and we reject it. Next we shall address the complaints regarding deficiencies in the evidence resulting into the applicants' conviction.

It would not have been necessary to delve into this issue any further considering the clear legal position reflected in the cases cited above but we think we can go an extra mile. It is plain that all aspects cited by the applicants as consisting manifest error on the face of the decision are matters which formed the appellants' grounds of appeal which were adequately addressed by the Court. Such matters fall outside the purview of the Court's power of review. The fact that the applicants harbor a different opinion on the Court's determination of the grounds of appeal cannot warrant a review as a rightly submitted by the learned Senior State Attorney. Indeed, the applicants are seeking a rehearing of the appeal by revisiting evidence contrary to the scope of the Court's power of review.

The applicants have sought refuge from our previous decision in **Muhidin Ally @ Muddy and Others** case (supra) to support the preposition that the Court can, in review go as far as reviewing evidence. However, as far as we are concerned, the bottom line is whether there is an error manifest on the decision. We appreciate the Court in the said decision went as far as looking at the evidence but that must have been a result of existence of an obvious error on the decision particularly the issue of visual identification. With respect, that is not the position in the instant application. The admission into evidence of the caution statement, seizure certificate was adequately addressed by the Court as well as the evidence of visual identification and the invocation of the doctrine of recent possession. It is the totality of the entire evidence which the Court upheld to have been sufficient to found conviction rather than individual pieces of such evidence. In our view, the case relied upon by the applicants is distinguishable to the instant application. It appears to us that it was obvious in that case that there was an error in accepting the evidence of visual identification and hence the route the Court took to correct it. There is no such error in the judgment the applicants have invited us to review and so we decline the invitation to review the impugned decision in the manner prayed by the applicants.

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, they were appropriately in the 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 errors is nothing less than an appeal in disguise which is contrary to the settled principle in many of its decisions including the cases we have referred to in this ruling. For instance, in **Tanganyika Land Agency Limited and 7 others vs. Manohar Lal Aggrwal** (supra) the Court aptly 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. As it is obvious that the applicants are asking the Court to rehear the appeal, their application premised on manifest error on the decision must fail.

The second ground is predicated on the complaint that the Court omitted to consider some of the ground in the memoranda of appeal as well as the additional grounds in the joint supplementary memorandum.

We agree that in the ordinary course of things that would qualify to be a valid ground justifying review of the impugned decision. However, the position in this application suggests otherwise. As submitted by the learned Senior State Attorney, the applicants were ably represented by Counsel who argued the grounds that they found to be fit for the Court's determination in the appeal. It is possible that the said advocates did not pursue the alleged grounds because they were untenable or that they were not briefed at all prior to or during the hearing of the appeal. That being the case, there can be no valid ground faulting the Court that it wrongfully deprived the applicants of the opportunity to be heard. That opportunity was there but was not utilized for reasons which we are unable to comprehend.

The foregoing aside, we have critically looked at the matter and we are convinced that it is highly unlikely that the said additional grounds were indeed before the Court on the date the appeal was called for hearing. We have seen no trace of any such copy from the record. Indeed, the photocopies annexed to the affidavits do not indicate that they were lodged in Court at any moment prior to the hearing. This is so because we have not only been unable to see any signatures by the applicants on the said copies but also there is no indication that they were endorsed by the

Court staff. In such circumstances, we are firm that the complaint predicated on the alleged wrongful deprivation of the opportunity to be heard has been unjustifiably raised and so we reject it for being misconceived.

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.

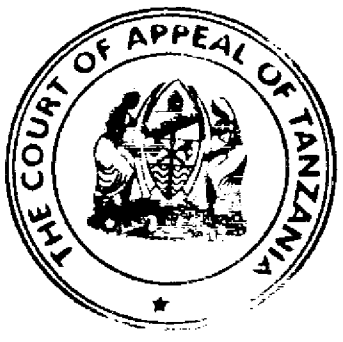
DATED at **MWANZA** this 4th day of December, 2019.

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEA

This Ruling delivered on this 5th day of December, 2019 in the presence of the applicants in person and Ms. Magreth Mwaseba, 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