IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPLICATION NO. 92/08 OF 2018

DISMAS BUNYERERE ---------- APPLICANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

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

(Msoffe, Kimaro and Juma, JJA.)

dated the 29th day of July, 2013

in

Criminal Appeal No. 102 of 2011

RULING OF THE COURT

5th & 11th December, 2019

MWANGESI, J.A.:

Dismas s/o Bunyerere who happens to be the applicant herein alongside one Sadick s/o Magambo @ Misosi who is not a party in this application, were convicted by the District court of Sengerema at Sengerema of the offence of armed robbery contrary to the provisions of section 285 and 287A of the Penal Code, CAP 16 R.E 2002 (**the Code**). Subsequent to their conviction, each of them was sentenced to the mandatory term of thirty (30) years' imprisonment. Their efforts to

challenge both the conviction and the sentence in the first appeal to the High Court of Tanzania at Mwanza and later in their second appeal to this Court, proved futile.

The applicant has preferred the instant Notice of Motion under the provisions of rule 66 (1) (a) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended by Government Notice No. 362 of 2017 (**the Rules**), supported by his sworn affidavit, moving the Court to review its judgment dated the 29th July, 2013 for the reason that, it was based on a manifest error on the face of the record resulting in the miscarriage of justice. In its own words the Notice of Motion reads thus:

> *"That, the judgment/decision was based on a manifest error on the face of the record resulting in the miscarriage of justice to wit:*
>
> (a) *The doctrine of recent possession was wrongly relied upon by the court as the alleged engine (exhibit P1), was not positively proved by documentary evidence by the complainant (PW1) as the rightful owner, in as much as the applicant claimed ownership of the alleged engine (exhibit P1).*

On the other hand, the respondent/Republic in terms of rule 56 (1) of **the Rules**, lodged an affidavit in reply which was sworn by Ms. Magreth

Bernard Mwaseba, learned State Attorney from the Office of the National Prosecution Services. She strongly resisted the application by the applicant arguing that there is no any apparent error on the face of the record in the judgment of the Court, which resulted into the miscarriage of justice to the applicant and thereby, calling for review.

On the date when the application was called on for hearing, the applicant entered appearance in person legally unrepresented, whereas the respondent/Republic had the services of Ms. Magreth Mwaseba, learned State Attorney. Upon being invited by the Court to address it on the grounds of the notice of motion, the applicant requested it to adopt his written submission which he lodged on the 21st day of November, 2019 under the provisions of rule 74 (1) of **the Rules,** to constitute his oral submission in Court, with nothing more.

According to the written submissions of the applicant, the decision which was handed down by the Court on the 29th day of July, 2013, is fit for review on the ground that it upheld the judgment of the lower court, where the evidence led by the prosecution witnesses, was not analyzed well and thereby, resulting to the conviction of the applicant basing on evidence which was insufficient. It is argued that in its analysis of the

prosecution evidence, the trial court improperly invoked the doctrine of recent possession to the applicant of an engine which its ownership by the complainant was not established. The applicant has concluded his written submission by urging the Court to find merit in his application and as a result, review its decision and set him at liberty.

The response from the learned State Attorney to the submissions of the applicant, was to the effect that the move by the applicant to require this Court to reconsider the evidence of the doctrine of recent possession, which it had already considered while dealing with the appeal which was before it, is a misconception more so for the reason that, his ground does not fall among those stipulated under rule 66 (1) of **the Rules.** To support her stance, Ms. Mwaseba referred the Court to its previous decision in the case of **Mirumbe Elias @ Mwita Vs Republic,** Criminal Application No. 4 of 2015 (unreported), where a clear clarification was given in regard to the circumstances under which a review can be made by the Court.

The learned State Attorney argued further that, the complaint by the applicant in regard to the way the evidence of recent possession was analyzed and invoked, concerns the findings which was made by the trial court, which according to the law, this Court is not mandated to review. In

the circumstances, Ms. Mwaseba submitted that the application by the applicant falls outside the purview envisaged under the provisions of rule 66 (1) of **the Rules.**

The foregoing apart, the learned State Attorney submitted that, the issue of the doctrine of recent possession which is being complained of by the applicant in his application, was dealt with by this Court because it was among the grounds of appeal in the appeal by the applicant to challenge the decision of the first appellate court (the High Court). The Court was referred to page 8 of its decision, where such fact is reflected. To that end, Ms. Mwaseba implored us to find the application by the applicant to be misconceived and therefore, subject to dismissal.

What stands for our determination in view of the submissions from either side above, is whether there is anything reviewable in the judgment of the Court which was delivered on the 29th July, 2013. For a start, we reproduce the provisions of rule 66 of **the Rules** under which the application by the applicant has been anchored. It stipulates 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;

(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;

(e) The judgment was procured illegally, or by fraud or perjury.

In the light of the wording of the foregoing provision of law, it is apparent that the power of the Court to review its decision is limited in scope in that, it is only confined to the circumstances named thereunder. We note that in the application by the applicant before us, it is predicated under paragraph (a) of sub-rule (1) of rule 66 of **the Rules**, implying that the decision of the Court sought to be reviewed, was based on a manifest error. The immediate question which crops therefrom, is what does a manifest error on the face of the record mean?

The answer to the above question is obtainable from the decision in the case of **Nguza Vikings @ Babu Seya Vs Republic,** Criminal Application No. 5 of 2010 (unreported), wherein stating as to what is meant by a manifest error on the face of the record, the Court said that: -

> *"There is no dispute to what constitutes a manifest error apparent on the face of the record. It has to be such an error that is obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which may conceivably be two opinions ---"*

A further milestone was made by the Court in the case of **Angelo Amudo Vs the Secretary General of the East African Community**, Civil Application No. 4 of 2015 (unreported), in which it cited with approval the holding of an Indian case in **Ariban Tuleshwar Sharma Vs Ariban Pishak Sharma** 1979 (11) UJ 300 SC, and clarified the distinction between two statements which appeared to be confusing and thereby being construed and applied interchangeably that is, a manifest error on the face of the record and an erroneous view on the evidence on record, when it stated that: -

> *"There is a clear distinction regarding the effect of an error on the face of the record and an erroneous view of the evidence of law. An*

error on the face of the record justifies a review, while ***an erroneous view on the evidence justifies an appeal.*** *Therefore, the power of review may not be exercised on the ground that the decision was erroneous in merits."* [Emphasis supplied]

What we could gather from the sole ground of review which has been raised by the applicant in his notice of motion, is the fact that he is a victim of the confusion which was discussed in **Angelo Amudo's** case (supra). He is inviting the Court to reconsider the evidence of the doctrine of recent possession, believing that the views expressed by the Court in the impugned decision were erroneous. Nonetheless, as correctly submitted by the learned State Attorney, since the said evidence of the doctrine of recent possession was already considered by the Court in the decision, there is no way in which the Court can rehear the same matter. The law is settled that a court cannot constitute itself an appellate Court of its own decision. See: **Blue Line Enterprises Vs the East African Development Bank**, Civil Application No. 21 of 2012, **Ghati Mwita Vs Republic**, Criminal Application No. 3 of 2013 and **Shida Nsuto Vs Republic,** Criminal Application No. 14 of 2014 (all unreported).

For an application for review to stand, it has to squarely fall within the circumstances encompassed under rule 66 of **the Rules**. Time and again it has been held by the Court that, the purpose of review is just to rectify the conspicuous or patent mistakes noted on the face of the decision, and not to rehear the grounds of appeal. For instance, in **Karim Kiara Vs Republic,** Criminal Application No. 4 of 2007 (unreported), the Court stated with precision that: -

> *"The law on application for review is now settled. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. See:* ***Thungabhadra Industries Vs Andre Pradesh*** *[1964] SC 1372, as cited in* ***Mulla,*** *14th Edition Pp 2335 that: -*
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> *In a properly functioning legal system, litigation must have finality so goes the Latin maxim thus – debet esse finis litium. This is a matter of public policy.*

Having held above that the ground of application in which the applicant has moved the Court to review its previous decision is a ground of appeal, in view of what has been adumbrated above, the application is untenable. The Court endorses the submission by the learned State

Attorney, that the application by the applicant is misconceived and has to fail. We accordingly dismiss it.

It is so ordered.

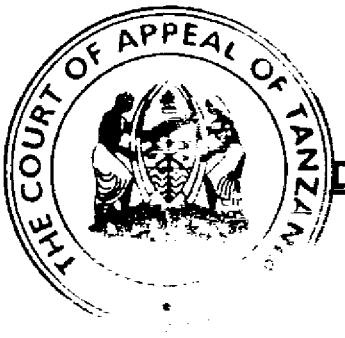
DATED at **MWANZA** this 10th day of December, 2019.

S .E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

This Ruling delivered on this 11th day of December, 2019 in the presence of the applicant in person and Mr. Emmanuel Luvinga, 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