IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPLICATION NO. 90/07 OF 2019

EMMANUEL KONDRAD YOSIPATI..APPLICANT

VERSUS

THE REPUBLIC ....RESPONDENT

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

(Mwarija, Mziray and Wambali, JJA.)

dated the 21st day of February, 2019

in

Criminal Appeal No. 296 of 2017

RULING OF THE COURT

21st & 25th February, 2020

MWANDAMBO, J.A.:

The applicant stood charged with and convicted of murder contrary to section 196 of the Penal Code Cap. 16 [R.E. 2002]. The High Court meted out to him the mandatory death sentence. Unlucky as he was, his appeal against that decision was barren of fruits, for the Court upheld the decision of the trial court and dismissed the appeal.

Luckily, the applicant had still one more life line jacket in his hands by invoking section 4(4) of the Appellate Jurisdiction Act, Cap. 141 [R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. That section vests the Court with power to review its decision subject to an aggrieved party satisfying it that there are grounds for doing so set out under rule 66(1) of the Tanzania Court of Appeal Rules, 2009 as amended by G.N. 344 of 2019 (the Rules). Aggrieved, the applicant has moved the Court to review its decision made on 18 March, 2017, dismissing his appeal.

Through his notice of motion, the applicant has raised three grounds which he believes are sufficient for the Court to review its decision. The grounds are premised respectively on rule 66(1)(a)(b) and (c) of the rules that is to say; the decision is based on manifest error on the face of the record resulting in the miscarriage of justice, the applicant was wrongfully deprived of an opportunity to be heard and that the decision was a nullity.

Paragraphs 3 and 4 of the supporting affidavit deal with the alleged errors whilst para 5 is dedicated to the claim that the applicant was wrongly deprived of his opportunity to be heard. To be more specific, in

para 3, the applicant faults the Court's decision for not taking into account the issue regarding causation of the death of the deceased whereas in para 4, he contends that there was an error in the decision because the trial court omitted to direct the assessors properly on the essential ingredient of malice aforethought. The ground based on wrongful derivation of opportunity to be heard is predicated on two aspects. Firstly, the omission to consider the grounds of appeal the applicant had lodged and instead, it only considered the grounds lodged by his advocate. Secondly, despite being represented by an advocate, the Court should have given the applicant chance to explain his grounds of appeal. On the basis of the foregoing, the applicant urges the Court to grant the application.

The respondent Republic opposes the application through an affidavit in reply sworn by Kauli George Makasi, learned Senior State Attorney. Essentially, the deponent of the affidavit denies that any of the grounds relied upon by the applicant exist warranting the Court to exercise its power of review.

During the hearing, the applicant who was unrepresented adopted the contents of his affidavit with nothing more to add to it after letting the Senior State Attorney to submit ahead of him.

Addressing the Court, Mr. Makasi reiterated his stance in the affidavit in reply and argued that the applicant has not shown any error manifest on the face of the record as required by rule 66(1)(a) of the Rules. His bone of contention was that the averments in the affidavit fall short of grounds in an application for review, for they are aimed at calling upon the Court to revisit the evidence at the trial which is not what review is all about. He submitted that in effect, the alleged error cannot qualify as a ground for review but one fitting in an appeal which is contrary to the dictates of the law. Submitting further, Mr. Makasi argued that in any case, the complaint directed against the alleged failure by the trial court to direct the assessors properly on the issue of malice aforethought did not feature as a ground of appeal and so the Court did not consider it at the hearing of the appeal.

In relation to the claim that the applicant was wrongly deprived of an opportunity to be heard, Mr. Makasi had two related responses. **Firstly**, the applicant could not have been wrongly deprived of an

opportunity to be heard when he prosecuted his appeal through a Mr. Hussein Mtembwa, learned advocate. **Secondly**, the applicant had filed a memorandum of appeal containing grounds which were canvassed along with the grounds in the supplementary memorandum lodged by his advocate. On the basis of the foregoing submissions, Mr. Makasi urged the Court to dismiss the application.

Having heard the submissions, it is now our turn to consider them in the light of the established principles in applications for review.

We shall begin our discussion by examining what constitutes an error manifest on the face of the record resulting in the miscarriage of justice within the ambit of rule 66(1)(a) of the Rules. Apparently, this ground has not been a rare recipe in all applications before the Court and so there is no dearth of authorities in that regard. Though it was decided prior to the enactment of rule 66 of the Rules, the case of **Chandrakant Joshubhai Patel vs. Republic** [2004] TLR 218 cannot be more apt on the point. That decision has been referred in many of the applications for review to stress the point that to constitute as reviewable error, such error must be patent on the record and not one which can be established by a long drawn process of argument with the

potential of two different opinions. To put it clearer, in **Chandrakant's** case (supra) 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].*

The above position was reiterated later in **Patrick Sanga vs. Republic,** Criminal Application No. 8 of 2011 (unreported) whereby the Court stressed that there must be an end to litigation and discouraged ingenuity of the parties in using review as an attempt to appeal through the back door by calling upon the Court to re-assess the evidence as if the Court was sitting on appeal over its own judgments.

An examination of the impugned judgment shows that causation of the death of the deceased was not among the grounds of appeal but at page 19 of the judgment, the Court took into account the applicant's admission that he had wounded the deceased which was corroborated by the post-mortem report. Likewise, the alleged error based on the failure to address the assessors properly on malice aforethought did not feature as a ground of appeal. Instead, the applicant's advocate chose to challenge the conviction on account that the trial was conducted without the aid of assessors because the trial Judge did not address them on the failure to have the contents of the confessional statement (Exhibit P2) read out in Court after admission. The learned advocate did not challenge the trial court's decision on the alleged improper address to the assessors on the issue of malice aforethought the applicant has now brought to the fore as a reviewable error. Fortunately, we have dealt with similar instances in the past and we think we can do no better than repeat our stance here. 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 v. 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]

See also: **Chacha Jeremia Murimi & 3 Others**, Criminal Application No. 69 of 2019 (unreported) and **Patrick Sanga v. R** (supra).

We have also said that there must be a distinction between an error on the face of the record resulting into the impugned decision and an erroneous decision. If established, the former warrants a review but the latter does not it being the law that an erroneous decision is amenable to appeal and not a review. See for instance: **Charles Barnaba v. Republic**, Criminal Appeal No. 13 of 2009(unreported) cited recently in **Godfrey Gabinus @Ndimba & 2 Others v. R,** Criminal Appeal No. 91/07 of 2019 (unreported). But that is not all about manifest error on the face of the record. It is plain from rule 66(1) (a) of the Rules and the authorities cited that establishing an error is just one precondition

which an aggrieved litigant has to establish. The other condition is that such an error must have resulted in the miscarriage of justice.

There can be many instances of errors which may warrant review but a few examples of patent errors amenable to review may serve to illustrate the position in this application. One, convicting an accused in a case where the court has not found him guilty of an offence and vice versa. Two, having allowed a criminal appeal and substituted a lesser offence with capital offence of murder and maintaining a sentence on the capital offence. Surely, such errors are both manifest and capable of resulting in the miscarriage of justice.

As submitted by Mr. Makasi, an examination of paragraphs 3 and 4 of the affidavit will clearly show that the applicant is asking the Court to re- assess evidence and sit as an appellate court on its own decision, because the errors complained of do not fall within the scope of reviewable errors but grounds of appeal. The applicant has not satisfied the Court that its decision dismissing the appeal was based on a manifest error be it on the causation of the death of the deceased or the alleged failure to properly direct the assessors on malice aforethought. Accordingly, we reject this ground.

Regarding alleged wrongful deprivation of the right to be heard, we equally find it to be baseless. The applicant does not deny that he was represented by an advocate. All what he says is that his grounds of appeal were not considered and that the Court should have allowed him to canvass his grounds of appeal. A similar claim was made during the current session in **Godfrey Gabinus @ Ndimba & 2 Others v. R** (supra) and this is what we said:

> *"...In any event, since the applicants were all present in Court during the hearing of the appeal, they had the right to bring to the Court's attention to their grounds of appeal had they wished to canvass them. In so far as they did not express their wish to do so, their complaint cannot qualify to be a ground for invoking the Court's jurisdiction to review its decision on the alleged wrongful deprivation of the opportunity to be heard.* [at page 11]

The judgment of the Court shows clearly that the applicant had lodged 12 grounds of appeal whilst his advocate lodged a supplementary memorandum containing 8 grounds. It is also clear from the judgment (page 8) that the learned advocate abandoned the applicant's grounds and argued the grounds in the supplementary

memorandum upon being satisfied that they covered the grievances stated in the applicant's memorandum. At the risk of making this ruling unduly long, we feel compelled to repeat ourselves on what we said in **Godfrey Gabinus @ Ndimba & 2 Others v. R** (supra) addressing a similar complaint thus:

> *"...we are settled in our minds that the advocate who acted for the applicants in the appeal was entitled to canvass the grounds of appeal the applicants had lodged together with those he himself filed according to rule 73(2) of the Rules. The fact that the learned advocate chose to canvass the grounds he filed after the appeal had been assigned to him by the Court in accordance with rule 73(2) of the Rules could not have amounted to a wrongful deprivation of the opportunity to be heard as claimed by the applicants."*
> *[at page 11 and 12)*

The only difference from the instant application lies in the fact that in that case, there was no indication that the advocate had abandoned the grounds of appeal lodged by the applicant. All the same we found that omission to be immaterial. Accordingly, we find no semblance of merit in the applicant's complaint and we reject it.

Lastly, the claim that the decision was a nullity has not been supported by any material on the affidavit neither did the applicant seek to pursue it during the hearing and so we reject it.

In the upshot, having found no merit in any of the grounds warranting review, the application fails and we dismiss it accordingly.

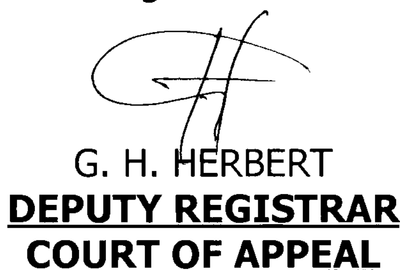
DATED at **MTWARA** this 24th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 25th day of February, 2020 in the presence of the applicant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL