IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPLICATION NO. 104/05 OF 2019

CHRISTOPHER RYOBA .... APPLICANT

VERSUS

THE REPUBLIC ....RESPONDENT

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

(Mroso, Nsekela And Msoffe, JJ.A.)

dated 30th day of September, 2005
in
Criminal Appeal No. 26 of 2002

RULING OF THE COURT

19th & 26th August, 2020

MWANDAMBO, J.A.:

By a notice of motion predicated under rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules (the Rules), the applicant moves the Court to review its decision made on 30th September, 2005 dismissing his appeal in Criminal Appeal No. 26 of 2002.

To appreciate the essence of the application, a brief background will be necessary. The applicant was tried and convicted of the offence of

murder by the High Court of Tanzania sitting at Moshi in Criminal Sessions Case No. 19 of 1997. Upon such conviction, he was accordingly sentenced to suffer death by hanging. Aggrieved, he preferred an appeal to this Court in Criminal Appeal No. 26 of 2002 on a sole ground of appeal predicated on the alleged non-compliance with the provisions of section 192 (3) of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA). In a judgment dated 30th September, 2005, the Court (Mroso, J.A., Nsekela and Msoffe, JJA) dismissed the applicant's appeal having been satisfied that the alleged non-compliance with section 192 (3) of the CPA had no bearing on the proceedings of the High Court. The effect of the Court's decision was that the applicant's conviction and sentence remained intact. However, the applicant did nothing to challenge the Court's decision presumably because by that time the Court had no statutory power to review its own decisions although he could have resorted to the Court's inherent jurisdiction to review the decision in line with its decision in **Transport Equipment Ltd. v. Devram P. Valambhia** [1998] T.L.R. 89. As luck would have it, the promulgation of the Rules in 2009 brought with them a procedure for the review of the Court's decisions vide rule 66 thereof. That notwithstanding,

it was not until July 2016 when the parliament saw it fit to vest the Court with power of review vide The Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. Perhaps that explains why the applicant sought to move the Court to exercise its jurisdiction to review its judgment through a notice of motion lodged in Court on 2nd October, 2019 after obtaining an order extending the time within which to do so.

As alluded to earlier, the applicant has predicated his application on rule 66 (1) (a) and (b) of the Rules contending that, one, the decision of the Court was based on manifest error on the face of the record resulting in miscarriage of justice and two, he was wrongly deprived his opportunity to be heard in that he was not informed of his right to demand the attendance of the doctor who conducted the postmortem of the deceased for cross examination contrary to section 291 (3) of the CPA.

Paragraphs 9 and 10 of the affidavit are crucial for the purposes of the application in the applicant aver as follows:

> *"9. That, the decision of the court was based on number of wounds inflicted to the deceased as a proof of murder notwithstanding that the doctor who examined*

and performed postmortem examination was not called for testimony and no Postmortem Examination Report was listed in the memorandum of agreed matters.

10. That, as a result of the above I state that I was denied of equal and fair opportunity of hearing. Further to the above, I state that there has been miscarriage of justice resulting or they may dealt with evidence on record (sic!)."

Not amused, the respondent/Republic resists the application through an affidavit of Ignas Joseph Mwinuka, learned State Attorney in reply urging the Court to dismiss it.

At the hearing of the application, the applicant who is unrepresented, was connected through a video link facility from prison whilst the respondent/ Republic had the services of Ms. Verdiana Mlenza and Ms. Lucy Kyusa both learned State Attorneys. Earlier on, the applicant had filed his written submissions which he prayed to adopt along with the grounds in the notice of motion and the affidavit. However, he seized the opportunity to say something in addition which was basically a repeat of what he had stated in his notice of motion and affidavit.

The substance of the applicant's written submissions is as follows: in relation to the first ground, the applicant faults the Court for abdicating its duty as a first appellate court by failing to re-evaluate the whole evidence on record and instead, it confined its decision to the only ground predicated on the non-compliance with section 192 (3) of the CPA. According to the applicant, that constituted manifest error on the face of the decision resulting in miscarriage of justice, for had the Court discharged its duty properly, it should not have arrived at the decision dismissing his appeal. In amplification, the applicant contended that despite the non-objection to the admission of the postmortem report, it was wrongly relied upon by the trial court in convicting him for several reasons. One; the trial court omitted to address him in terms of section 291 (3) of the CPA to have the attendance of the medical witness for the purposes of cross-examination; two, the contents of the said report were not read out during the preliminary hearing; three it was admitted contrary to section 192 of the CPA and finally, it was not listed as one of the undisputed matters. To reinforce his arguments, the applicant sought reliance from the Court's previous decisions in **Juma Salum Singano v. R.,** Criminal Appeal 172 of

2008 cited in **Mengi Joachim @ Malisao & 2 Others v. R.** (unreported), Consolidated Criminal Appeal No. 84 of 2010 and 190 and 251 of 2016 (unreported) for the proposition that failure to read out the contents of the documents admitted during the preliminary hearing and explanation to the accused to state which of the facts or documents he admits is a fatal irregularity. Regarding non-compliance with section 291 (3) of the CPA, the applicant argued that the same was fatal resulting into the discarding of the postmortem report on the authority of **Abubakari Hamisi & Others v. R.,** Criminal Appeal No. 54 of 2012 (unreported) and **Mangi Joachim A. Malisao & 2 Others'** case (supra).

From the above, the applicant contends that failure to re-evaluate the evidence was a fatal error manifest on the face of the Court's decision which resulted into miscarriage of justice because, had the Court discharged its duty, it should have found the applicant guilty of the lesser offence of manslaughter.

The applicant's submission in the second ground was that the Court had a cursory glance of section 192 (3) of the CPA in determining the sole

ground before it as a result of which it failed to appreciate whether there were misdirection and non-directions on the substance of evidence or violation of some principle of law. To the applicant, the Court's determination of the appeal on the basis of the sole ground was an abdication of its duty in the exercise of its jurisdiction as a final Court of the land which had the effect of denying the applicant his equal and fair opportunity of hearing. Winding up his submissions, the applicant implored the Court to review its decision and order that he was only guilty of manslaughter instead of murder and make an appropriate order having regard to the long period he has been in prison.

For her part, Ms. Lucy Kyusa the learned State Attorney who argued the application on behalf of her colleague, urged the Court to dismiss the application for being misconceived. The learned State Attorney pointed out that this application is nothing less than a disguised appeal aimed at asking the Court to sit as an appellate court on its judgment contrary to the true intent of the review jurisdiction. The learned State Attorney argued that the applicant's grounds for review in the notice of motion are at best grounds in an appeal which are beyond the scope of the grounds in an

application for review under rule 66 (1) of the Rules. Ms. Kyusa submitted and in our view rightly so, that none of the grounds in the notice of motion was taken as a ground in the appeal and so raising them at this stage was contrary to the dictates of rule 66 (1) of the Rules in so far as doing so will entail the Court examining evidence to determine the application. She reinforced her argument by our previous decision in **Mirumbe Elias @ Mwita v. R.,** Criminal Application No. 4 of 2015 (unreported).

The learned State Attorney had similar arguments in the second ground. Specifically, she argued that whether or not the applicant was not addressed in terms of section 291 (3) of the CPA to express his position to have a medical doctor appear for cross- examination was not one of the grounds of appeal determined as such by the Court. Under the circumstances, she argued that it cannot be raised in an application for review because the Court is not sitting for the second time to determine an appeal from the High Court. On the whole, the learned State Attorney urged the Court to dismiss the application for lack of merit.

Before resting her submissions, we invited the learned State Attorney to express her views in relation to the propriety of the notice of motion citing section 66 (1) (a) (b) alone in an application for review. Ms. Kyusa was quick to concede that section 4 (4) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] henceforth the AJA which vests the Court power to review its decisions should have been cited as well along rule 66 (1) of the Rules.

The applicant had nothing useful in his rejoinder. He reiterated his stance in the written submissions and beseeched the Court to examine the judgment and satisfy itself whether the trial court adhered to the law. Particularly, the applicant invited us to determine whether his rights were violated.

After hearing the submissions for and against the application, we will now turn our attention to a discussion on the merits or demerits thereof. However, we feel compelled to address the issue we sought views from learned State Attorney before resting her address. The issue relates to the omission to cite section 4 (4) of the AJA in the notice of motion. As alluded to earlier, until 2016, the Court determined applications for review on the

basis of rule 66 (1) of the Rules. This is because the AJA had no provision vesting the Court with jurisdiction to review its own decisions. The Court exercised such power through case law and that is why at that time it was quite in order to cite rule 66 (1) of the Rules in the notice of motion. Following the amendment to section 4 of the AJA as aforesaid, a party seeking to have the Court review its decisions is enjoined to cite section 4 (4) of the AJA conferring it with such jurisdiction along with rule 66 (1) of the Rules. However, we are alive to the proviso to rule 48 (1) of the Rules which enjoins the Court to order the insertion of a correct provision where there is an omission to do so if the Court has jurisdiction to entertain a matter before it. All the same, we take the view that it is desirable that litigants cite section 4 (4) of the AJA in all applications for review as the correct provision conferring power on the Court to review its decisions. It is for the foregoing, we did not find the omission to cite the relevant section fatal and proceeded to the determination of the application on its merits. We shall now proceed on our discussion on the merit of the application on the grounds set out in the notice of motion.

To start with, we think it is incumbent upon us to state at this juncture that the law is well settled with regard to the Court's scope of the power to review is own decisions. The Court has expressed itself on this in an unbroken chain of its decisions so much so that one need not cite a specific authority. All the same, we find it appropriate to cite a few to illustrate the point specifically: **Chandrakant Joshubhai Patel v. R.** [2004] TLR 218, **Mirumbe Elias @ Mwita v. R.** (supra), **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil application No. 17 of 2008 and **Charles Barnaba v. R.** Criminal Application No. 13 of 2009 (unreported). In **Patrick Sanga v. R.,** Criminal Application No. 8 of 2011(unreported) the Court reiterated frowning upon litigants using review process as an appeal in disguise. It stated:

> *"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].

We made more or less similar sentiments in **Blue Line Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported) quoting with approval an old decision in **Haystead vs. Commissioner of Taxation** [1920] A.C 155 at page 166 thus:

> *"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).*

It has been the Court's position that a party who seeks to have the Court review its decision, must benchmark his application within the grounds set out under rule 66(1) of the Rules which stipulates:

"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 application is premised under rule 66(1) (a) and (b) of the Rules. The question which remains for our determination is whether the applicant placed himself within the parameters of the Court's power to review the impugned judgment. With respect, we have no lurking in stating that the answer is in the negative being satisfied that the application is misconceived as rightly submitted by the learned State Attorney. In our view, the submissions made by the applicant and the

authorities relied upon have no relevance to this application rather in an appeal. The applicant has not placed himself within the parameters in application for review be it on account of manifest error apparent on the face of the decision or the alleged wrongful deprivation of the opportunity to be heard. It is common ground as correctly submitted by the learned State Attorney, the appellant's appeal was predicated on only one ground involving the alleged non-compliance with section 192 (3) of the CPA. The Court found no merit in that ground and dismissed it and so the appeal. Having dismissed the only ground the applicant preferred against the judgment of the High Court, the Court had no jurisdiction to examine anything else for which it was not called upon to determine by the applicant in his appeal. Put it differently, since the applicant found nothing wrong with the trial court's decision in relation to its merits including the evidence on the basis of which he was convicted, the Court could not have gone into the examination of the judgment to satisfy itself whether his conviction was based on the weight of the evidence. That means, the complaint such as abdication of its duty by failure to re-evaluate the evidence are clearly out of place.

It is plain from the impugned judgment that the applicant was legally represented but found no reason to quarrel with the findings of the trial court on the merits of the judgment which convicted him. That will include the alleged errors in the admission of the postmortem report, failure to address the applicant on his right to demand the person appearance of a medical witness under section 291 (3) of the CPA for cross-examination on the contents of the postmortem report, failure to read the contents of the exhibit (Postmortem report) etc. These were, at best, grounds of appeal against the decision of the trial court on appeal to the Court. Since the applicant did not raise them in his appeal and in so far as the Court made no determination on them, the complaint against the decision be it on account of the alleged error apparent on the decision or wrongful deprivation of the opportunity to be heard predicated under rule 66 (1) (a) and (b) falls outside the Court's power under section 4 (4) of the AJA to review its decisions.

We have no doubt in our mind that the applicant's application is nothing less than an attempt to begin a fresh litigation by way of a

disguised appeal from the trial court's decision which is contrary to the dictates of section 4(4) of the AJA as well as rule 66(1) of the Rules.

All said and done, this application is misconceived and it stands dismissed in its entirety.

DATED at **ARUSHA** this 25th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 26th day of August, 2020 in the presence of the Applicant in person through video conference facility and Mr. Kassim Nassir, State Attorney for the respondent is hereby certified as a true copy of the original.

E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL