IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPLICATION NO. 10/01 OF 2018

MASHAKA MUSSA.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review of the Decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mbarouk, Mwarija and Ndika, JJA.)

dated the 20th day of November, 2017

in

Criminal Appeal No. 15 of 2016

RULING OF THE COURT

15th & 30th September, 2020

KWARIKO, J.A.:

Formerly, the applicant was arraigned in the District Court of Morogoro at Morogoro charged with the offence of rape contrary to sections 130 (1) (2) and 131 of the Penal Code [CAP 16 R.E. 2002] (now R.E. 2019) (the Penal Code). He was convicted and sentenced to life imprisonment. The High Court of Tanzania at Dar es Salaam dismissed

his first appeal. Undaunted, the appellant preferred a second appeal before this Court but he was not successful.

The applicant is again before the Court by way of review of the Court's decision in terms of Rule 66 (1) (c) (d) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). He has predicated his application on two grounds set out in the notice of motion thus:

(a) The Court's decision is a nullity as the applicant was charged, tried and convicted on a defective charge.

(b) The judgment was procured illegally as the court amended the charge silently without the applicant pleading to the new charge the errors which occasioned miscarriage of justice on the part of the applicant.

The application is supported by the applicant's affidavit in which he reiterated the grounds stated in the notice of motion. On its part, the respondent/Republic did not file any affidavit in reply.

When the application was called on for hearing, the applicant did not physically appear in Court but was linked from prison through a

video conferencing facility. He was unrepresented. The respondent/Republic was represented by Ms. Sylvia Mitanto assisted by Mr. Yussuf Aboud, both learned State Attorneys.

Arguing the application, the applicant submitted firstly that the impugned decision was a nullity as it relied on a defective charge and secondly, the Court amended the charge without calling upon him to plead to it hence, he was not heard. He submitted that being a lay person he could not detect the errors and raise them before the Court when his appeal was heard. In support of his arguments, the applicant relied on the following decisions of the Court; **Mussa Mwaikunda v. R** [2006] T.L.R 387 and **Baraka Solongai v. R,** Criminal Appeal No. 261 of 2015, **Elias Deodida v. R,** Criminal Appeal No. 250 of 2012 (both unreported). He urged us to grant his application.

Ms. Mitanto for the respondent prefaced her submission by opposing the application. She submitted in relation to the first ground that the applicant did not raise the issue in relation to the defects in the charge in his appeal before the Court. Further, the learned counsel argued that this ground was a ground of appeal rather than of review. In the second ground she submitted that the Court did not amend the

charge but it exercised its powers under the law and acted on subsection (3) of section 131 of the Penal Code which relates to the punishment for rape in respect of victims aged below 10 years, like in this case where the victim was aged 9 years.

We have heard and considered the submissions for and against the application and the issue that calls for our determination is whether the applicant's grounds are sufficient to warrant the Court review the impugned decision. The Court's jurisdiction to review its decisions is provided for under section 4 (4) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019]. The procedure for review is provided under Rule 66 (1) of the Rules thus:

> *"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".

Though it was decided before the enactment of the Rules, the case of **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218 more or less reproduced the provisions of Rule 66 of the Rules thus:

> *"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):*
>
> *(a) where the decision was obtained by fraud;*
>
> *(b) where a party was wrongly deprived of the opportunity to be heard; and*
>
> *(c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."*

There are various decisions of the Court which followed after the decision in **Chandrakant Joshubhai Patel** (supra) where the Court

was called upon to exercise its powers of review. Such cases include: **Fadhili Yahya v. R,** Criminal Application No. 6 of 2011, **Mashaka Henry v. R,** Criminal Application No. 2 of 2012, **Emmanuel Kondrad Yosipati v. R,** Criminal Application No 90/07 of 2019, **Godfrey Gabinus @ Ngimba & Two Others v. R,** Criminal Application No. 91/07 of 2019 and **Juma Mzee v. R,** Criminal Application No. 88/07 of 2019 (all unreported).

Now, in the instant application, the applicant has invoked sub-rule 1 (c) and (e) of Rule 66 of the Rules, to the effect first, that the impugned decision was a nullity for it was founded on a defective charge and secondly, that the judgment was procured illegally as the Court amended the charge without him being called upon to plead thereto.

In relation to the first ground, after having gone through the said judgment we could not find any complaint in relation to the charge against the applicant. For the Court to have powers to review its own decision the alleged omission should have first been a subject of that decision.

As correctly argued by Ms. Mitanto, this complaint fits to be a ground of appeal and not a ground in an application for review. It follows thus that, had the applicant found any issue with the charge, he was at liberty to raise it in his appeal before the Court for consideration. Raising this issue at this stage is tantamount to moving the Court to sit as an appellate court on its own decision which is contrary to the law. In **Karim Kiara v. R,** Criminal Application No. 4 of 2007 (unreported) the Court was faced with similar situation. Rejecting the application, it referred to the case of **Lakhamshi Brothers Ltd v. R. Raja and Sons** [1966] 1 EA 313 in which it was held that: -

> *"In a review the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

(See also the Court's decision in the case of **Masoud Said Selemani v. R,** Criminal Application No. 92/07 of 2019.The first ground thus fails.

With regard to the second ground, we also agree with the learned State Attorney that the Court did not amend the charge but

exercised its powers according to law to correct the sentence which was meted out against the applicant. The Court found that the High Court had wrongly substituted the sentence of life imprisonment which was imposed by the trial court to thirty years. This was so because the victim of the offence was below 10 years where the legal punishment provided under section 131 (3) of the Penal Code is life imprisonment. What the Court did was to perform its duty as a superior court ensuring a correct application of the law by substituting a proper sentence in line with its decision in **Marwa Mahende v. R** [1998] T.L.R 249. Contrary to the applicant's contention, that was not the same as amending the charge but application of the proper provision in imposing a correct sentence. Accordingly, there was no any amendment of the charge by the Court and thus the applicant's complaint in the second ground lacks merit.

We have considered the authorities cited by the applicant and found that the Court dealt with those cases in its appellate jurisdiction as opposed to the instant application where the applicant is moving the Court to exercise its review jurisdiction.

For the foregoing reasons it is clear that the applicant has failed to prove his grounds for review. The application is thus devoid of merit and we hereby dismiss it.

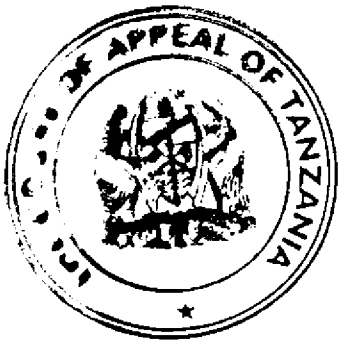
DATED at **DAR ES SALAAM** this 24th day of September, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 30th day of September, 2020 in the presence of the appellant in person via video link and Mr. Adolf Kissima, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



E.G.MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL