IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA J.A., MWANGESI J.A., And WAMBALI J.A.)

CRIMINAL APPLICATION NO. 46/06 OF 2019

EX F. 5842 D/C MADUHU ----------APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ---------- RESPONDENT

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

(Massati, Mussa, and Mugasha, JJ.A.)

dated the 3rd day of September, 2015

in

CAT Criminal Appeal No. 26 Of 2015

RULING OF THE COURT

10th &17th June 2020

MWANGESI J.A.:

By way of Notice of Motion made under the provisions of Rule 66 (1) (a) (c) (e) of the Tanzania Court of Appeal Rules 2009 (**the Rules**) as amended, the applicant herein, has preferred the instant application moving the Court to review its judgment which was handed down on the 3rd day of September, 2015 dismissing the appeal which he had lodged to challenge the judgment of the High Court dated the 19th November,

2014 in which he was convicted of the offence of murder, and condemned to death by hanging.

Three grounds have been raised as to why the judgment should be reviewed namely *verbatim* that; **one**, the decision was based on manifest error on the face of the record in that the finding that the death of the deceased was caused with malice aforethought is erroneous for no preparation is proved; **two**, the Court's decision is nullity by singling out me the applicant out of 4 other patrol members, c/s 22 (1) (a) (b) (c) and (d) Cap 16 R.E. 2002 of the Penal Code. Also the doubtful and hesitant decision toward the death sentence; **three,** the judgment was procured by fraud and perjury c/s 34 B (2) (C) of the Evidence Act R.E. 2002.

In support and amplification of the grounds of the Notice of Motion, the applicant lodged his sworn affidavit containing sixteen (16) paragraphs and appended with three annexures. On the other hand the respondent/Director of Public Prosecutions strongly resisted the application and lodged an affidavit in reply to that effect sworn by Lugano Mwakilasa, a Senior State Attorney. Moreover, the respondent

lodged a Notice of Preliminary objection arguing that the applicant's application was incompetent and bad in law for being time barred.

On the date when the application was called on for hearing before us, the applicant was linked to the Court from Ruanda Prison through video conference, whereas the respondent/Director of Public Prosecutions, was represented by Ms. Zena James learned State Attorney.

In compliance with the cherished practice of the Court, we had to dispose of the preliminary objection which had been raised by the respondent first, before we could proceed with the substantive application. Nonetheless, after a brief dialogue between the Court and Ms. James, the learned State Attorney noted that the raised preliminary objection was not maintainable and as such, she prayed to withdraw it and pave way for hearing of the substantive application. We marked the preliminary objection withdrawn as prayed.

Upon the applicant being invited by the Court to expound his grounds of the Notice of Motion, he submitted in respect of the first ground that the Court erred in holding that he killed with malice

aforethought, while there was no evidence to establish that he intended to kill the deceased; because at the material time he was just performing his official duties. Relying on the decision of the Court in **Chandrakant Joshubhai Patel Vs Republic** [2004] TLR 218, he urged us to find that our holding that he killed the deceased with malice aforethought, was an apparent error on the face of the record and hence, had to be reviewed.

With regard to the second ground, which is supported by paragraph 6 of his affidavit, the applicant submitted that our judgment was a nullity because it singled him out as the person who killed the deceased, while on the fateful night they were four of them all of whom were on patrol to maintain peace and security under the command of one Detective Station Sergeant Manasse.

On the third ground of the Notice of Motion, the applicant argued that our judgment that he was guilty of the offence of murder, was procured by fraud and perjury because the evidence led against him and relied upon by the Court in convicting him was false. To fortify his argument, he referred us to annexures 'A3' and 'C17' to his affidavit.

When he was asked if those annexures were part of the evidence relied upon by the prosecution during his trial at the High Court, his answer was in the negative. Basing on the foregoing submission, the applicant implored us to find merit in his application and be pleased to either reverse or modify our judgment.

The response by Ms. James to the submission of the applicant, she in the first place asked to adopt the contents of the affidavit in reply and proceeded to submit that in all the three grounds of the Notice of Motion which have been raised by the applicant, there was none which fell within the requirement stipulated in Rule 66 (1) of **the Rules**. To support her argument reliance was placed on the holding in **Masudi Said Selemani Vs Republic**, Criminal Application No. 92/07 of 2019 (unreported).

The learned State Attorney argued further that from the contents of the sworn affidavit of the applicant in support of his application, he is inviting the Court to re-evaluate the evidence which was applied in upholding his conviction to the charged offence, which is not the essence of Rule 66 (1) of **the Rules.** Relying on the decision of **Karim Kiara Vs**

Republic, Criminal Application No. 8 of 2010 (unreported), she argued that there must be a difference between grounds of appeal and grounds for review. Since the grounds which have been raised by the applicant in his application are grounds of appeal, it was her view that the application by the applicant was misconceived and she urged us to dismiss it for want of merit.

What stands for our determination in view of the submission from either side above, is the issue as to whether or not the application by the applicant is merited. To start with, we reproduce the provisions of Rule 66 (1) of **the Rules** under which the application by the applicant has been preferred. It reads that: -

> *"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 to 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."

[Emphasis supplied]

The applicant has pegged his Notice of Motion under paragraphs (a), (c) and (e) of the above quoted provision. The question which we had to ask ourselves is whether or not the applicant has managed to establish that the named errors are indeed contained in our judgment sought to be reviewed. Beginning with manifest error on the face of the record, for it to exist in a judgment, it must be obvious and easily noticeable by anyone going through it. We held in **Chandrakant Joshubhai Patel's** case (supra), where we adopted Mulla's Commentaries 4th Edition that: -

"An error 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 ..."

Since the applicant in expounding his first ground failed to show the alleged error on the face of the judgment and instead, faulted the Court in holding that he killed with malice aforethought, evidently his ground failed to meet the requirement needed by the provision of Rule 66 (1) (a) of **the Rules,** as well as the holding in the above quoted case. As submitted by the learned State Attorney, the move by the applicant was aimed at inviting us to re-evaluate the evidence which is not the essence of a review. As we held in **Karim Kiara's** case (supra), a review is not an appeal in disguise. To underscore it we cited the Indian case of **Thungabhadra Industries Vs Andra Pradesh** (1964) S.C. 1372 wherein Mulla's Commentaries 14th Edition, were referred to that;

> *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected... In a properly functioning legal system, litigation must have finality, thus the Latin maxim of debet esse finis litum."*

In view of the foregoing position, it cannot be doubted that the first ground of the Notice of Motion by the applicant is misconceived and it fails.

As regards the second ground of the Notice of Motion, the argument by the applicant that the judgment of the Court was a nullity because it singled him out from the rest of his colleagues with whom they were together on patrol on the fateful night; is again with no basis. What caused the applicant to be singled out from his colleagues was the evidence that was placed before the trial Court. The same pointed out to the guilt of the applicant in exclusion of the others implying that; even though during the commission of the offence the applicant was in the company of his workmates, there was no common intention which was established among them. To that end, there was no question of nullity in the decision of the Court which renders the second ground of the Notice of Motion a mere misconception. We dismiss it.

In the third ground of the Notice of Motion, the applicant referred us to annexures which have been appended to his affidavit in support of the Notice of Motion to substantiate that our decision was procured

illegally or by fraud, or by perjury. To this, we would in the first place, wish to point out that the practice of appending annexures to the affidavit in support of an application for review is improper and unacceptable. This is so for the reason that in an application for review, there is no room for the Court to receive evidence. As stipulated in Rule 66 (1) of **the Rules** above, an application for review is confined to the grounds stated therein only and that is why the word **'shall',** has been used to imply that compliance is mandatory.

We understand that the applicant may with genuine reasons believe that there were things which were not considered by the Court in the way he expected. Nevertheless, the decision given by the Court remains to be final. In the case of **Peter Ng'homango Vs Gerson A. K. Mwanga**, Civil Application No. 33 of 2002 (unreported) the Court stated;

> *"It is no gainsaying that no judgment, however elaborate it may be can satisfy each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment these errors would only justify a review of the*

Court's judgment if it is shown that the errors are obvious and patent."

The above exposition renders the third ground of the Notice of Motion also to lack merit. Consequently, the entire application is bereft of merit and we accordingly dismiss it.

It is so ordered.

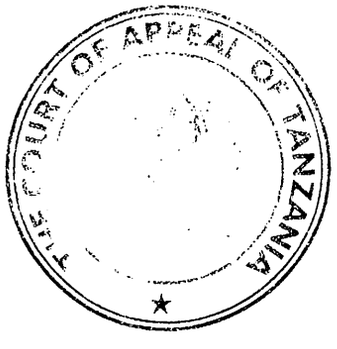
DATED at **MBEYA** this 16th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

The ruling delivered this 17th day of June, 2020 in the presence of applicant in person and Ms Hannarose Kasambala, State Attorney for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL