IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPLICATION NO. 88/07 OF 2019

JUMA MZEE.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review of the Decision of the Court of Appeal of Tanzania at Mtwara)

(Juma, CJ, Mziray, J.A and Wambali, J.A.)

dated the 20th day of February, 2019

in

Criminal Appeal No. 19 of 2017

RULING OF THE COURT

24th & 27th February, 2020

KWARIKO, J.A.:

The applicant was formerly arraigned before the District Court of Lindi with the offence of armed robbery contrary to Section 287A of the Penal Code [CAP 16 R.E. 2002] as amended by Act No. 3 of 2011. At the end of the trial, he was convicted and sentenced to a statutory punishment of thirty years imprisonment. On being dissatisfied by that decision, the applicant unsuccessfully appealed to the High Court of Tanzania at Mtwara.

Undaunted, the applicant preferred an appeal before this Court which was dismissed for lack of merit.

The applicant is once again before the Court on an application for review of its decision. He has filed the application by way of a notice of motion under Rule 4(4) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the AJA) and Rules 48 (1) and 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The ground in support of the notice of motion is that: -

> *The decision was based on a manifest error on the face of the record which resulted in the miscarriage of justice to the applicant whereas it is apparent in the record at page 3 in which the charge was never read nor explained to the applicant and as a result the applicant was not fairly tried.*

The applicant's own affidavit supports the notice of motion. The following paragraphs of the affidavit explain the ground for review thus:

> *"6. That the manifest error which is apparent on the face of the record is that the charge was never read and explained to me as required by the law, and that the same is reflected at page 3 of the record.*
>
> *7. That it is also apparent on the face of record at page 5 and 6 whereas the charge was reminded to me while the same had never been read or explained to me.*

8. That these errors are manifestly clear on the face of the record and the same have caused miscarriage of justice since I could not properly understand the nature of the offence that I was charged with and as a result I could not have entered my defence properly hence I was not fairly tried."

On its part, the respondent Republic opposed this application through an affidavit in reply deposed by Ms. Rabia Selemani Ramadhani, learned State Attorney, wherein she states that there is no any manifest error on the face of the record in the impugned decision.

At the hearing of the application, the applicant appeared in person fending for himself, while Mr. Abdulrahman Msham, learned Senior State Attorney represented the respondent Republic. At the request of the applicant, the learned State Attorney was the first to address the Court.

At the outset, Mr. Msham made his stance opposing the application. He argued that paragraphs 6,7 & 8 of the applicant's affidavit do not show that the Court's decision is problematic but his complaint is against the trial court for not reading over the charge and instead, it only reminded him of the same hence denying him opportunity to properly give his defence. The learned State Attorney argued that, this being an application for review of the Court's decision, it has nothing to do with the proceedings of the trial

court. He went on to submit that had the applicant wanted the record of the trial court to be inspected, he would have made it part of his affidavit. The learned counsel was quick to admit, and rightly so, that even if that record had been made available, the Court would not have done anything concerning it because it is not sitting on its appellate jurisdiction. It was his argument that, the impugned decision does not reveal the error complained of in the first place. Otherwise, the applicant ought to have raised it as a ground of appeal during the hearing of the appeal before the Court.

Mr. Msham went on to argue that not every error fits to be a ground of review. To fortify his position, he referred us to the Court's decisions in **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218 and **Maulid Fakihi Mohamed @ Mashauri v. R**, Criminal Application No. 120/07 of 2018 (unreported). Finally, the learned counsel submitted that the Court cannot sit on its own decision as an appellate court. He thus urged us to find that the application is devoid of merit fit to be dismissed.

In his rejoinder, the applicant had nothing much to say. He insisted that the charge was not read over to him at the trial and implored us to consider this matter and do justice to him.

We have considered the opposing submissions from the parties and it is now our turn to decide whether the application has merit. The Court's power

of review of its own decisions is provided under section 4 (4) of the AJA which is exercisable subject to Rule 66 (1) of the Rules which provides 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."*

It is plain under Rule 66 (1) of the Rules that the Court cannot review its decision on grounds other than those prescribed therein. The applicant has invoked sub-rule 1 (a) of Rule 66 of the Rules complaining that the impugned decision was based on a manifest error on the face of the record which occasioned injustice to him. The applicant's complaint is that the trial court

did not read over the charge to him but only reminded it to him and so he could not properly enter his defence. The issue is whether this complaint fits as a ground of review.

What constitutes manifest error apparent on the face of the record occasioning injustice was lucidly explained in the celebrated case of **Chandrakant Joshubhai Patel** (supra) which was cited to us by Mr. Msham. In that case the Court adopted with approval commentaries by *Mulla, Indian Civil Procedure Code,* 14th Edition in the following words: -

> *"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 review....it must further be an error apparent on the face of the record."*

There is a plethora of other decisions of the Court which followed the position in **Chandrakant.** These include: **Maulid Fakihi Mohamed @ Mashauri** (supra), **African Marble Company Ltd v. Tanzania Saruji**

Corporation Limited, Civil Application No. 132 of 2005, **Said Shabani v. R,** Criminal Application No. 7 of 2011, **Mbijima Mpigaa and Another v. R,** Dodoma Criminal Application No. 3 of 2011 and **Issa Hassani Uki v. R,** Criminal Application No. 122/07 of 2018 (all unreported).

It is clear from the cited cases that for an error to warrant review, it must be apparent on the face of the record not requiring long-drawn arguments from the opposing parties. The question which follows now is whether the applicant's alleged error is apparent on the face of the impugned decision. We have gone through the impugned decision and found that the applicant raised seven grounds of appeal but the complaint that the charge was not read over to him was not one of those grounds. It is thus our considered opinion that had there been any complaint relating to the charge, the applicant ought to have first raised it before the High Court and if he was not satisfied with the decision of the High Court, he would have raised it as a ground of appeal in this Court.

Worth for what it is, this application represents many others in which applicants would wish the Court sit again as an appellate court on its own decisions. Commenting on the finality in the administration of justice, the erstwhile East African Court of Appeal in the case of **Lakhamshi Brothers Ltd v. R. Raja and Sons** [1966] 1 EA 313 said at page 314 that:

"There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation."

Likewise, this Court has emphasized that there should be a system of law which guarantees certainty of its judgments and their enforceability. In the case of **Marky Mhango and 684 Others v. Tanzania Shoe Company and Another,** Civil Application No. 90 of 1999 (unreported) which was referred in the case **Exavery Malata v. R,** Criminal Appeal No. 3 of 2013 (unreported), the Court said thus:

"There can be no certainty where decisions can be varied at any time at the pressure of the losing party and the machinery of justice as an institution would be brought into question.."

The foregoing position fits squarely in the present application because, despite the fact that the applicant has no quarrel with our decision on appeal, he resorted to raising a new matter which the Court did not even decide upon. Surely, there should be an end to litigation and parties have a duty to

abide by that principle by filing only applications which conform to the requirements of Rule 66 (1) of the Rules.

Eventually, we find the application barren of merit and it is hereby dismissed.

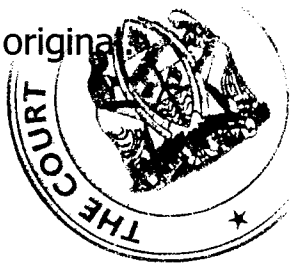
DATED at **MTWARA** this 26th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 27th day of February, 2020 in the presence of the applicant in person and Mr. Joseph Mauggo, 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