IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CRIMINAL APPLICATION NO. 36/01 OF 2019

W.D.R. MACDONALD KIMAMBO @ ADEN ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kimaro, Mbarouk and Mandia, JJ.A.)

dated the 23rd day of December, 2009
in
Criminal Appeal No. 100 of 2008

RULING OF THE COURT

16th March, & 13th April, 2021

KEREFU, J.A.

Before the High Court of Tanzania at Dar es Salaam, the applicant, W.D.R. MACDONALD KIMAMBO @ ADEN was charged with four counts of murder of Vivian Zephania Mwanja, 1099 CPL Janeth Hamis, Happiness Chundu @ Chausiku and 1104 CPL Veronica Kalungula contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). Upon conviction on all counts, he was sentenced to suffer death by hanging. Aggrieved, the applicant unsuccessfully appealed to this Court vide Criminal Appeal No. 100 of 2008. Still dissatisfied, the applicant lodged this current application by way of a notice of motion made under Rule 66 (1) (a), (b) and (e) of the Tanzania

Court of Appeal Rules, 2009 as amended (the Rules) inviting the Court to review its decision on account that there is an error on the face of record resulting into miscarriage of justice. The application is supported by two affidavits deposed by the applicant. The substantive affidavit was lodged in Court on 7th June, 2019 and a supplementary affidavit on 16th March, 2021, respectively.

On the other hand, the respondent, Republic opposes the application contending that it is misconceived as all grounds relied upon by the applicant do not warrant the Court to exercise jurisdiction to review its previous decision.

It is noteworthy that during the hearing of the appeal, the applicant had the services of Mr. Peter Swai, learned counsel who was assigned by the Court to represent him under Rule 31 of the Rules. Upon being assigned, and in terms of Rule 73 (2) of the Rules, the said counsel lodged a supplementary memorandum of appeal comprised of two grounds in addition to the six grounds already lodged by the applicant in the substantive memorandum of appeal thus making a total of eight grounds. For clarity, we find it apposite to reproduce the said grounds herein below: -

The six grounds of appeal lodged by the applicant in the substantive memorandum of appeal can be conveniently paraphrased as hereunder: -

(1) *That, the honourable Judge erred in law and fact for failure to accord the appellant a right to be heard in accordance with the Constitution;*

(2) *That, the honourable Judge erred in law and fact by overlooking the abnormal character of the appellant as testified by PW1 and failure to consider the love relationship that existed between the appellant and the deceased;*

(3) *That, the honourable Judge erred in law and in fact for convicting the appellant while the prosecution failed to prove its case beyond all reasonable doubt;*

(4) *That, the honourable Judge erred in law and in fact in admitting the evidence of the lethal weapon, the gun and cartridges as the vital instrument which caused the death of the deceased without being supported by the ballistic report;*

(5) *That, the honourable Judge erred in law and in fact for failure to consider the defence of provocation which was clearly stated in testimonies of PW1 and PW4; and*

(6) *The honourable Judge erred in law and in fact by admitting the evidence of prosecution witnesses while negating both the defence of provocation and the appellant's averment that the gun exploded itself and caused deaths.*

The two grounds lodged by the applicant's counsel in the supplementary memorandum of appeal stated that: -

(1) *The trial court erred in law and in fact for not accepting the defence of provocation raised by the appellant and therefore reduced the offences charged to manslaughter;*

(2) *The honourable Court is requested to accept the said defence of provocation and set aside the conviction and sentence of the trial court and in lieu thereof convict the appellant for manslaughter.*

In its judgment the Court made reference to both memoranda and was of the settled opinion that the appeal could be determined on one main issue, that is, whether the defence of provocation was available to the applicant. After careful consideration of the evidence in the record and the applicable law, the Court found that the said defence is not available in the circumstances in which the applicant killed the four deceased persons and shot himself. Consequently, the appeal was dismissed in its entirety as indicated above.

In the notice of motion, the grounds upon which the review is sought are to the effect that: -

(a) *The applicant was wrongly deprived of an opportunity to be heard, in that; -*

(i) *When the appeal was called on for hearing the grounds of appeal which was raised by the applicant in the memorandum of appeal which he prepared himself and filed before the Court some of them were abandoned by the Court without*

applicant being consulted or asked neither by the Court nor by a counsel who was assigned by the Court to represent him;

(ii) That, the abandoned grounds of appeal were very crucial for the determination of the merit of appeal particularly ground number two which had faulted the decision of the trial Judge for convicting the applicant of a unique murder of four (4) persons in the absence of any proof of mental ability of the applicant;

(iii) That, there has been traverse of justice, in that the applicant was subjected to an unfair trial since he was not afforded with an opportunity to argue and/ or contest all grounds of appeal which he raised and filed before the Court.

(b) That, the decision of the Court was based on manifest error on the face of record resulting in the miscarriage of justice for; -

(i) from the record of appeal, the evidence of PW1 clearly shows and/or prove that the applicant is a hot-tempered person who cries when he gets angry. Had the Court, critically analysed and evaluated such evidence, we are in doubt if the Court could have come to the conclusion which it did because that is not a habit of an ordinary person;

(ii) that, sequel to the above, the act of the applicant of shooting a person allegedly to have provocated him and other three persons with whom he had no quarrel and without having provocated by them, verily suggest and/or

lead into conclusion that the applicant was of unsound mind.

(c) That, the judgment of the Court was procured illegally in that;

(i) *Since the procedure adopted by the Court in the hearing of the appeal was illegal, that is to say, abandoning of the ground of appeal raised by the applicant, then, the judgment of the Court is illegal.*

At the hearing of the application, the applicant appeared in person without legal representation whereas the respondent Republic was represented by Ms. Esther Kyara, learned Senior State Attorney. It is noteworthy that, the applicant had earlier on lodged his written submissions under Rule 106 (1) of the Rules which he sought to adopt to form part of his oral submissions. On the other part, the respondent did not file any written submissions and thus Ms. Kyara addressed the Court orally under Rule 106 (10) (b) and (11) of the Rules.

When invited to argue his application, the applicant prayed to adopt his notice of motion, affidavits and his written submission lodged in Court on 12th March, 2021.

On the first ground, the applicant contended that he was denied right to be heard as his six grounds of appeal were condensed to only one ground on the defence of provocation and other grounds were neglected. He elaborated

that, before the hearing of the appeal, there was no prior discussion with his advocate on the grounds of appeal to be argued and /or the option of condensing them into one main ground. He also stated that the Court did not accord him an opportunity to explain the grounds he filed earlier as reflected in the substantive memorandum of appeal.

On the claim that his mental health was not considered, the applicant referred to the second ground in the substantive memorandum of appeal which is referring to the testimony of PW1 who, he said, testified that the applicant is a hot-tempered person. He submitted that since the said ground was abandoned, he was denied the right to be heard. He thus cited Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [Cap.2 R.E. 2019] (the Constitution) and argued that the right to a fair hearing is not only a fundamental procedural aspect in the court proceedings, but also a fundamental constitutional right. To bolster his proposition, he referred us to **Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.R.L 251 and **Tayantkumar Chandubhai Patel @ Jeetu Patel and 3 Others v. The Attorney General and 2 Others,** Civil Application No. 160 of 2016 (unreported).

As regards the second ground, the applicant contended that there is a manifest error on the face of record in the Court's decision resulting in the

miscarriage of justice as the Court failed to critically evaluate the evidence of PW1 who testified to know the applicant as a hot-tempered person and irritable. It was his argument that if the Court considered that fact, it could have examined his mental status and convicted him with manslaughter. To buttress his proposition, he cited the case of **Muhidin Ally @ Muddy and 2 Others v. Republic,** Criminal Application No. 2 of 2016 (unreported).

On the third ground, the applicant insisted that, since the Court did not effectively consider his grounds of appeal the decision arrived at was procured illegally, hence null and void. He thus concluded by inviting the Court to find that the three grounds are sufficient to invoke its jurisdiction to review its earlier decision which had dismissed his appeal.

Responding to the first ground, Ms Kyara disputed the contention by the applicant that he was deprived of an opportunity to be heard. She submitted that during the hearing of the appeal the applicant was represented by his advocate and there were eight grounds of appeal which were combined and argued jointly by his advocate because they revolved on the defence of provocation. It was her submission that since the applicant was represented by an advocate at the hearing of the appeal before the Court, and since there is nowhere in the record and the impugned judgment that the applicant complained about his advocate, he cannot raise that complaint at this stage.

She said that the said claim is only an aforethought. Ms. Kyara also challenged the applicant's complaint that his mental health was not considered on account that it is as well an aforethought because during the trial neither the applicant nor his advocate raised that concern before the trial court. To bolster her proposition, she cited the case of **Godfrey Gabinus @ Ndimba and 2 Others v. Republic,** Criminal Application No. 91/07 of 2019 (unreported). As such, Ms. Kyara urged us to find that the first ground has no merit.

On the second ground, Ms. Kyara argued that the applicant's complaints do not qualify to be manifest error on the face of record to meet the threshold for a review envisaged under Rule 66 (1) of the Rules. She clarified that to constitute an error apparent on the face of record, the mistake complained of should not be discerned from long process of reasoning but rather, it should be an obvious and patent mistake.

On the last ground, Ms. Kyara argued that the decision of the Court was not procured illegally as she insisted that during the hearing of the appeal the applicant was dully represented by his advocate. On the basis of the foregoing submissions, Ms. Kyara urged us to dismiss the application.

In his brief rejoinder, the applicant did not have much to contribute to the legal issues raised by Ms. Kyara, he only stated that as a layperson it was

not possible for him to request the Court to have him medically examined on his mental health.

On our part, having examined the record of the application, the written and oral submissions advanced by the parties, the issue for our determination is whether the grounds advanced by the applicant justify the review of the Court's decision. In determining this issue, we will consider the grounds of review as submitted to us by the parties.

Starting with the first ground, it is not in dispute that the applicant appeared at the hearing of his appeal on 1st December, 2009. It is also on record that on that day the applicant was represented by Mr. Peter Swai, learned counsel who argued the appeal. It is also not in dispute that there were two memoranda, the substantive memorandum of appeal lodged by the applicant and the supplementary memorandum lodged by the applicant's counsel. It is evident that, during the hearing of the appeal the said counsel combined both memoranda and centred his submission on the defence of provocation. This can be gleaned from page 7 of the impugned judgment where it is clearly indicated that, "*The learned advocate for the appellant made a brief submission in support of appeal. He opted to combine both memoranda.*"

It is trite position of the law that when an appellant has filed his grounds of appeal, an advocate who has been assigned to represent him may file a supplementary memorandum of appeal to or in substitution of the one lodged by the appellant. In this regard, Rule 73(2) of the Rules provide as follows: -

> *"An advocate who has been assigned by the Chief Justice or the presiding Justice to represent an appellant may, within twenty-one days after the date when he is notified of his assignment, and without requiring the leave of the Court,* ***lodge a memorandum of appeal on behalf of the appellant as supplementary to or in substitution for any memorandum which the appellant may have lodged.****" [Emphasis added].*

The rationale behind this rule is to enable an advocate to properly discharge his duty of representing the appellant professionally for the interest of justice. It is therefore our considered view that, since in the application at hand, the applicant was dully represented by an advocate who combined the two memoranda in prosecuting the appeal, it cannot be said that such an act amounted to denying the applicant an opportunity of being heard. Indeed, we have not discerned anything from the record indicating that the appellant who was present at the hearing before the Court raised any concern regarding the course taken by his counsel. We are therefore in agreement with Ms. Kyara that the applicant's claim at this stage that he was not consulted by his

advocate prior to the hearing date, is an afterthought. We say so, because, since the applicant was present at the hearing of the appeal, was at liberty, if he deemed so, to raise that concern when his advocate addressed the Court.

The complaint of this nature was also raised in **Godfrey Gabinus @ Ndimba and 2 Others** (supra) cited to us by Ms. Kyara. In that application, the three applicants who had the services of an advocate at the hearing of the appeal, complained, among other things, that they were not accorded the right to be heard, on account that, after the advocate being assigned to represent them he lodged a supplementary memorandum of appeal which he argued during the hearing of the appeal. Dismissing that complaint, the Court observed as follows: -

> *"... 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 compiaint 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."*

Being guided by the above authority, we are in agreement with the submission by Ms. Kyara that the applicant's right to be heard was not infringed. We are increasingly of the view that all cases cited by the applicant

on this aspect, that is, **Mbeya Rukwa Autoparts and Transport Ltd** (supra) and **Tayantkumar Chandubhai Patel @ Jeetu Patel and 3 Others** (supra) are distinguishable and not applicable on this matter.

It is also our considered opinion that even the applicant's claim that his mental health was not considered is an afterthought, as that issue was not raised during the trial or even at the hearing of the appeal. We have as well noted that in his written submission the applicant is alleging that the Court did not clearly evaluate the evidence of PW1. This submission, when examined closely, it is as if the applicant is inviting the Court to revisit and re-assess the adduced evidence during the trial. This is, with respect, not practicable, because if we do so, it will be like to sit on another appeal of our own decision. Therefore, the complaints of the applicant in the current application is an appeal in disguise which is contrary to the law. The Court of Appeal of East Africa in **Lakhamshi Brothers Ltd v. R. Raja Sons,** [1966] E.A 313 observed that: -

> "***In 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.***" [Emphasis added].

Therefore, review is by no means an appeal, but is basically intended to amend or correct an inadvertent error committed by the Court and one which, if left unattended will result into a miscarriage of justice. On the basis of the foregoing reasons, we do not find merit on the first ground of the review as the applicant has failed to demonstrate that he was denied the right to be heard as alleged.

Having found the first ground of the review to have no merit, it goes without saying that even the applicant's claim in the third ground that the decision of the Court was procured illegally is a nonstata. As we have demonstrated above, the grounds of appeal in both memoranda were not abandoned, but condensed into one main ground as the Court was called upon to determine as to whether the applicant committed the offence on provocation. We must emphasize that under Rule 66 (1) (e) of the Rules, the applicant must demonstrate that the impugned judgment was procured illegally or by fraud or perjury. Unfortunately, in the present application the applicant has not put forward sufficient explanation to justify his claim. In the circumstances, we also find the third ground of review devoid of merit.

As for the second ground, the law is now settled that for a decision to be based on manifest error on the face of record, the error must be clear to the reader not requiring long-drawn arguments or reasoning.

There are various decisions of the Court to that effect including **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 where the Court cited with approval an excerpt from Mulla, 14th Edition at pages 2335-36 and stated that: -

> *"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 two opinions... **A mere error of iaw is not a ground for review** under this rule. That a decision is erroneous in law is no ground for ordering review...It can be said **of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established...".*** [Emphasis added].

In the application at hand, we note that what the applicant has indicated in paragraph (b) (i) and (ii) reproduced above, require us to re-evaluate the evidence of PW1 to find whether the defence of provocation was established, which was sufficiently considered by the Court in the impugned decision. It is our considered opinion that the applicant has not established any manifest error apparent on the face of record. As such, we agree with Ms. Kyara that errors submitted by the applicant herein do not fall

under the Court's review jurisdiction. See cases of **Charles Barnaba v. Republic,** Criminal Application No. 13 of 2009 (unreported) and **Lakhamshi Brothers Ltd** (supra). We equally find the second ground of review devoid of merit.

In the circumstances, and for the foregoing reasons, we see no merit in the applicant's application to warrant this Court to review its decision in Criminal Appeal No. 100 of 2008. Accordingly, this application fails in its entirety and it is hereby dismissed.

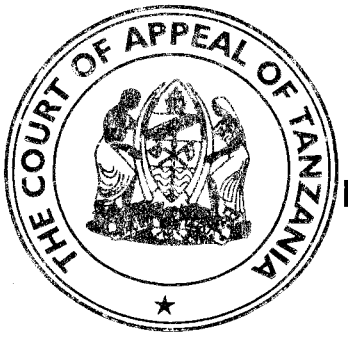
DATED at **DAR ES SALAAM** this 12th day of April, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 13th day of April, 2021 in the presence of Mr. Christian Joas, learned counsel for Respondent, and in the absence of the Applicant, is hereby certified as a true copy of original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL