IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPLICATION NO. 105/11 OF 2018

EMMANUEL MALAHYA ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(An application for Review against the Judgment of the Court of Appeal of Tanzania at Tabora)

(Ramadhani, CJ, Mroso, Munuo, JJA)

dated the 30th day of September, 2008
in
Criminal Appeal No. 212 of 2004

RULING OF THE COURT

30th April & 5th May, 2021

KWARIKO, J.A.:

The applicant, Emmanuel Malahya was arraigned before the Resident Magistrate's Court of Tabora at Tabora (Somi, PRM-Ext. Jur.) with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002] [now CAP 16 R.E. 2019]. He was convicted and sentenced to suffer death by hanging. Aggrieved by that decision, the applicant appealed to this Court. His appeal was found unmerited and was accordingly dismissed.

Undaunted by that failure, the applicant has once more knocked on the door of the Court on an application for review of its decision. He has filed the application by way of a notice of motion under Rule 66 (1) (a) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds in support of the notice of motion are that: -

1. *The judgment of the Court was based on manifest error on the face of the record resulting in miscarriage of justice.*
2. *The trial court had no jurisdiction to entertain the case.*

The particulars given in support of the first ground were that the record of appeal at page 16 shows that PW2 who was the applicant's wife was addressed in terms of section 130 (1) of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act) but she was not informed of the gist of her evidence and was not made aware that she was not a compellable witness. In respect to the second ground, the applicant explained that the High Court did not transfer the case to the Resident Magistrate's Court to be tried by Somi, PRM-Ext. Jur. in terms of section 256 A of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA).

The notice of motion is supported by the applicant's affidavit. In the affidavit, the applicant reiterated his contention that the judgment contained manifest errors which occasioned injustice.

On the other hand, the respondent Republic opposed this application through an affidavit in reply deposed by Mr. Titto A. Mwakalinga, learned State Attorney, wherein he stated that there is no point of law touching on legality of the decision which was not determined by the Court and further that the decision was not based on any manifest error on the face of the record. Additionally, it was deposed that the issue of transfer of the case was thoroughly dealt with by the Court on appeal.

Before us, the applicant appeared in person, unrepresented; whilst Mr. Deusdedit Rwegira, learned Senior State Attorney represented the respondent Republic. When he was called upon to argue his application, the applicant adopted the contents of the notice of motion together with the supporting affidavit and preferred to let the learned State Attorney to reply first reserving his right to rejoin, should there be the need to do so.

For his part, Mr. Rwegira did not support the application. He argued in respect of the first ground that compliance with section 130 (1) of the

Evidence Act is a matter of proceedings of the trial court. He submitted that, if PW2 was addressed in terms of that provision then there was no apparent error on the face of the record. To support the foregoing, the learned Senior State Attorney cited the Court's decision in the case of **Issa Hassan Uki v. R,** Criminal Application No. 122/07 of 2018 (unreported).

As regards the issue of jurisdiction of the trial court, Mr. Rwegira argued that, the same was sufficiently addressed by the Court as clearly shown at pages 2 to 8 of its judgment. In the circumstances, he contended that, this Court cannot again address this matter otherwise it would be sitting on appeal of its own judgment. He argued that, it appears that the applicant was not satisfied with the Court's decision but litigation should come to an end.

In his rejoinder, the appellant insisted that his wife, PW2 was not prepared in respect of the effect of her evidence. Finally, he argued that the Court's decision had no errors but the omission was committed by the lower court.

Having considered the opposing submissions from the parties, it is now our turn to decide whether the application has merit. The Court's power of review of its own decisions is provided for under section 4 (4)

of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] which is exercisable subject to 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."*

According to Rule 66 (1) of the Rules, the Court cannot review its decision on grounds other than those prescribed therein. In the instant case, first, 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 although the trial court addressed PW2 in

terms of section 130 (1) of the Evidence Act, it did not inform her on the effect of her evidence, being his wife. The issue which arises here is whether this complaint fits as a ground of review.

What constitutes manifest error on the face of the record occasioning injustice was explained in the famous case of **Chandrakant Joshubhai Patel v. R** [2004] TLR 218. 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."*

-See also **Issa Hassani Uki** (supra) cited by Mr. Rwegira, **Mbijima Mpigaa and Another v. R,** Criminal Application No. 3 of 2011 and

Edson Simon Mwombeki v. R, Criminal Application No. 6/08 of 2017 (both 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 Court was not at all called upon to determine the issue whether the trial court complied with the provisions of section 130 (1) of the Evidence Act. It is therefore our considered opinion that had there been any complaint relating to this matter, the applicant would have raised it as a ground of appeal in this Court at the time of hearing the appeal. This ground thus fails.

The second ground which the applicant has predicated under sub-rule (1) (c) of Rule 66 of the Rules, relates to transfer of the case from the High Court to the Resident Magistrate's Court. Going through the impugned decision it is clear that this matter was one of the complaints by the appellant. It reads as follows:

> *"That since the preliminary hearing was conducted by a Judge of the High Court, the*

subsequent trial of the case by the learned Principal Resident Magistrate with extended jurisdiction was irregular and the proceedings and resultant judgment a nullity."

The Court addressed this ground from page 2 and concluded at page 8 of the judgment thus:

"In the light of the foregoing, we are of the decided opinion, and with greatest respect, that we have but to depart from ***Juma Lyamwiwe*** *[****Juma Lyamwiwe v. R,*** *Criminal Appeal No. 42 of 2001 (unreported)] and other similar authorities to the effect that transfer of a case to a Resident Magistrate extended jurisdiction can only be done before a preliminary hearing. The transfer could be at any time before the trial begins. Therefore, we dismiss this ground of appeal."*

Therefore, because the issue regarding section 256A of the CPA was determined by the Court in its appellate jurisdiction, we cannot again sit to determine it on review; otherwise, we would be sitting as an appellate court over our own judgment which is not the aim of the review jurisdiction.

Considering the applicant's complaints, it appears that the applicant would have wished the Court to sit again as an appellate court on its own decision. Commenting on the finality in the administration of justice, the Court of Appeal in the case of **Patrick Sanga v. R,** Criminal Application No. 8 of 2011 (unreported) said as follows:

> *"The review process should not be allowed to be as an appeal in disguise. 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."*

The foregoing pronouncement has been followed in a number of the Court's decisions, including **Godfrey Gabinus @ Ndimba & Two Others v. R,** Criminal Application No. 91/07 of 20 19 and **Juma Mzee v. R,** Criminal Application No. 88/07 of 2019 (both unreported).

Moreover, during the hearing, the applicant confessed that he has no problem with the impugned decision, but still he resorted to raising a new matter which the Court did not even decide upon. He also raised the issue which was sufficiently determined on appeal. As we have said in our earlier decisions, there should be an end to litigation and parties should adhere to that principle by filing applications which conform to the requirements of Rule 66 (1) of the Rules.

In the event, we find the application unmerited and it is hereby dismissed.

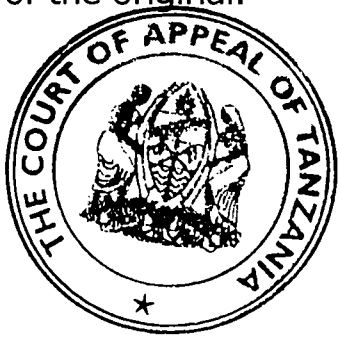
DATED at **TABORA** this 4th day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of May, 2021 in the presence of the Appellant in Person and Ms. Upendo Malulu, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL