IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And KEREFU, J.A.)

CRIMINAL APPLICATION NO. 69/01 OF 2017

JUMA LULUBA.. APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

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

dated the 30th day of October, 2017
in
Criminal Appeal No. 42 of 2011

RULING OF THE COURT

05th & 17th May, 2021

KEREFU, J.A.

The applicant, Juma Luluba, was arraigned before the High Court of Tanzania at Dar es Salaam with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). Upon conviction, he was handed down the mandatory death sentence.

Aggrieved, the applicant unsuccessfully appealed to this Court vide Criminal Appeal No. 42 of 2011. Still dissatisfied, he has once more knocked on the door of the Court on an application for review. The application is by way of notice of motion made under section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] (the AJA) and Rule 66 (1) (a) and (b)

of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is inviting the Court to review its decision on the ground that there is an error on the face of record resulting into miscarriage of justice. In the notice of motion, the grounds upon which the review is sought are to the effect that:

(a) *The Court of Appeal abandoned ten (10) grounds of appeal filed by the applicant without giving him right to be heard; and*

(b) *In discarding the applicant's ten (10) grounds of appeal resulted to miscarriage of justice.*

The application is supported by affidavit deposed by the applicant. The relevant paragraphs in the said affidavit for the purposes of this current application are paragraphs 6, 7, 8, 9 and 10 where the applicant states that the advocate who was assigned to represent him during the hearing of the appeal, abandoned his ten grounds of appeal without consulting him, thus he was denied right to be heard. The contents of paragraphs 11 and 12 are based on his dissatisfaction with the Court's decision as will be demonstrated later in this Ruling.

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 the jurisdiction to review the impugned decision.

It is noteworthy that upon filling his appeal before this Court, the applicant lodged a memorandum of appeal comprising of eleven (11) grounds. During the hearing of the appeal, the applicant had the services of Mr. Aloyce Sekule, learned counsel who was assigned by the Court to represent him under Rule 31 (1) of the Rules. Upon being assigned, and in terms of Rule 73 (2) of the Rules, the said advocate, abandoned ten (10) grounds lodged by the applicant and centred his submissions on the tenth ground. For clarity, we find it apposite to reproduce the eleven grounds raised by the applicant in the memorandum of appeal herein below: -

> *(1) That, the trial court erred in law for being guided by the religious influences and emotions in determining credibility of PW1 and the case as a whole to the prejudice of the appellant;*
>
> *(2) The trial court erred in law and fact in convicting the appellant despite lack of credible expert proof regarding cause of the death of the deceased;*
>
> *(3) The trial court erred in law and fact in convicting the appellant basing on hearsay evidence of PW1 to the effect that it is the appellant who poured hot water to the deceased;*
>
> *(4) The trial court erred in law and fact in convicting the appellant based on unestablished circumstantial evidence;*

(5) The trial court erred in law and fact in convicting the appellant based on broken chain of circumstantial evidence;

(6) The trial court erred in law and fact in convicting the appellant for the wrong charge preferred by the prosecution that the appellant committed the offence on 13/1/2005 while the evidence pointed the 14/1/2005 as the date on which the crime was committed which led to the miscarriage of justice;

(7) The trial court erred in law and fact in not considering the evidence of the PW4 that the witness (PW4) did post-mortem examination on a body found in the bush which fact created serious doubts over prosecution's case

(8) The trial court erred in law and fact in rejecting to admit police statement made by PW2 which statement contradict the testimony of PW1 on whether she (PW1) and the deceased were closed indoors by the accused;

(9) The trial court erred in law and fact in not considering exhibit D1, I.E the statement of PW1 made to police which statement contradicts the testimony of PW1 narrated to court;

(10) The trial court erred in law and fact in convicting the appellant against weight of evidence and despite contradictions in the prosecution's case.

Without prejudice to the foregoing: -

(11) *The trial court erred in law and fact in convicting and sentencing the appellant for murder and not manslaughter.*

In its judgment, the Court considered the submissions made by the parties on ground ten above and found that the same has been adequately and properly addressed by the trial court. Consequently, the appeal was dismissed in its entirety as indicated above.

At the hearing of the application, the applicant appeared in person through video conference linked to Isanga Central Prison in Dodoma without legal representation whereas the respondent Republic was represented by Ms. Faraja George, learned Senior State Attorney assisted by Ms. Dhamiri Masinde, learned State Attorney.

Submitting in support of the application, the applicant contended that he was denied right to be heard because his eleven grounds of appeal were abandoned by his advocate who submitted only on ground ten. He also added that the said advocate failed completely to submit on that ground before the Court. He contended further that, before the hearing of the appeal, there was no prior discussion with his advocate to agree on the grounds of appeal to be argued and /or the option of abandoning the other grounds. It was the applicant's submission that, since his grounds of appeal

were abandoned, without being consulted, he was denied the right to be heard. He thus concluded by inviting the Court to find that the two grounds for review are sufficient to invoke its jurisdiction to review its earlier decision which had dismissed his appeal.

In response, Ms. George strongly resisted the application by arguing that, the application has not met the threshold enshrined under Rule 66 (1) (a) of the Rules, as what has been submitted in the notice of motion and in the applicant's affidavit cannot be determined by this Court without re-evaluating the evidence tendered before the trial court. 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. In amplification, she referred us to paragraphs 11 and 12 of the said affidavit and argued that in those paragraphs the applicant had invited the Court to revisit and re-assess the evidence adduced during the trial and note that the prosecution's case was tainted with contradictions and inconsistencies. It was her argument that, since the said contradictions and inconsistencies were adequately considered and decided upon by this Court when determining the applicant's appeal, it is not proper for the applicant to again raise the said issue before the same Court on review.

She also disputed the contention by the applicant that he was denied an opportunity to be heard. She argued that during the hearing of the appeal, the applicant was dully represented by his advocate who argued the appeal on the basis of one ground of appeal. It was her strong argument that since the applicant was represented by an advocate and there is nowhere in the record and the impugned judgment that the applicant complained about his advocate, he cannot be allowed to raise that complaint at this stage. She said that the applicant's claim is nothing but an afterthought. To bolster her proposition, she cited the case of **Issa Hassan Uki v. Republic,** Criminal Application No. 122/07 of 2018 (unreported). On the basis of her submissions, she urged us to dismiss the application.

In his brief rejoinder, the applicant reiterated what he submitted earlier and insisted that the application should be granted.

On our part, having examined the record of the application and submissions made by the parties, the issue for our determination is whether the grounds advanced by the applicant justify the review of the Court's decision.

It is not in dispute that the applicant appeared at the hearing of his appeal on 16th August, 2017. It is also on record that on that day the

applicant was represented by Mr. Aloyce Sekule, learned advocate who argued the appeal. It is also not in dispute that there was a memorandum of appeal lodged by the applicant containing eleven grounds of appeal and during the hearing of the appeal, the said advocate abandoned ten grounds of appeal and centred his submission only on the tenth ground which was to the effect that the evidence of the prosecution witnesses was tainted with inconsistencies and contradictions. This can be gleaned from page 6 of the impugned judgment where it is clearly indicated that: -

> *"For a start, Mr. Sekule abandoned the entire grounds of appeal save for ground No. 10 which complains thus: -*
>
> *10, the trial court erred in law and in fact in convicting the appellant against the weight of evidence and despite contradictions in the prosecution's case."*

It is trite position of the law that where an appellant has filed his grounds of appeal, an advocate who has been assigned to represent him may substitute the grounds of appeal 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 argued the appeal on the basis of one ground, 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 advocate. We are therefore in agreement with Ms. George 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 v. Republic,** Criminal Application No. 91/07 of

2019 (unreported). 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 then. In so far as they did not express their wish to do so, their complaint 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."*** *[Emphasis added].*

Guided by the above authority, we agree with Ms. George that the applicant's right to be heard was not infringed. On the basis of the foregoing reasons, we do not find merit on the two grounds of the review submitted by the applicant, as he has failed to demonstrate that he was denied the right to be heard as alleged.

We have as well considered the contents of paragraphs 11 and 12 of the applicant's affidavit, which are based on the applicant's dissatisfaction with the Court's decision alleging that the Court did not address the contradictions and inconsistencies found in the evidence of prosecution's witnesses. In the said paragraphs the applicant stated as follows: -

> *"(11) That, the Court erred by not addressing itself on error apparent on face of record at page 18 for not addressing failure by the trial court to admit statement of PW2 which was contradicting with statement by the said witness sworn before trial;*
>
> *(12) That, the Court erred in held (sic) that discrepancies in the record were minor and did not go to the root of trial and my appeal."*

As argued by Ms. George, the above paragraphs, 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 tenable, because if we do so, it will be like to sit on another appeal of our own decision. To justify this point, we have examined the impugned judgment of the Court in Criminal Appeal No. 42 of 2011 and observed that, at page 10 of the said judgment, indeed, the Court considered the said contradictions in

the evidence of prosecution witnesses including that of PW2 and concluded that: -

> *"Coming now to the alleged inconsistencies and self-contradictions by the prosecution witnesses, we note that the learned trial Judge addressed the issues with sufficient details. We cannot agree more. True, there were inconsistencies but, as correctly remarked by the trial Judge, the same did not detract from the material story that it was the appellant who inflicted the fatal injuries upon the deceased. It should also be noted that, whereas the incident occurred in January, 2005, the witnesses were called to testify in April, 2010, which was more than five years post the occurrence."*

From the above extract from the impugned judgment, we are in agreement with Ms. George that the issue of contradictions in the prosecution case raised by the applicant was adequately considered and decided upon by the Court. Re-opening the same at the point of review is tantamount to sitting in another appeal of our own decision which is contrary to the spirit of Rule 66 (1). In the case of **Tanganyika Land Agency Limited and 7 Others (supra)** the Court at page 9 aptly stated that: -

> *"For matters which were fully dealt with and decided upon on appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that would, not only be an abuse of the Court process, but would result to endless litigation. Like life litigation must come to an end."*

Therefore, the complaint of the applicant in this 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 correct an inadvertent error committed by the Court and one which, if left unattended will result into a miscarriage of justice. We must emphasize 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, **Charles Barnaba v. Republic,** Criminal Application No. 13 of 2009 (unreported) and **Lakhamshi Brothers Ltd** (supra). Specifically, in **Chandrakant Joshubhai Patel** (supra) 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 law 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].

It is therefore our considered opinion that the applicant has not established any manifest error apparent on the face of record. As such,

we agree with Ms. George that the alleged errors do not fall under the Court's review jurisdiction.

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. 42 of 2011. Accordingly, this application fails in its entirety and it is hereby dismissed.

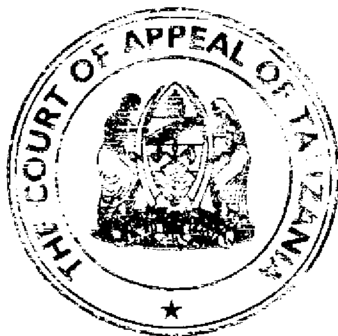
DATED at **DAR ES SALAAM** this 11th day of May, 2021.

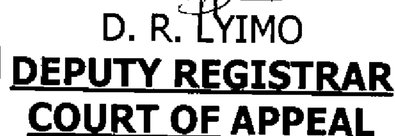
S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 17th day of May, 2021 in the presence of the applicant in person and Mr. Benson Mwaitenda, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.





D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL