IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., KWARIKO, J.A, And SEHEL, J.A.)

CRIMINAL APPLICATION NO. 37/01 OF 2019

ANDREW SHAYO @ BANGIMOTO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Luanda, Mjasiri And Mmilla, JJ.A.)

dated the 23rd day of June, 2015
in
Criminal Appeal No. 50 of 2008

.....

RULING OF THE COURT

28th May & 10th 2021.

SEHEL, J.A.:

In this application the Court is asked to review its decision in Criminal Appeal No. 507 of 2015 dated 17th September, 2018. The application is brought by a notice of motion and it is supported by an affidavit of the applicant, himself. It is preferred under the provision of Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules of 2009 as amended (the Rules) on grounds that: -

> *"1. The applicant was wrongly deprived of an opportunity to be heard, in that;*

a) In analysing evidence upon which the decision of the Court was based, the evidence of the defence was not discussed and / or considered at all.

b) There has been a travesty of justice in that, the applicant has been denied equal opportunity and fair right of hearing by the Court being selectively inclined to the prosecution evidence and totally abandoned the evidence of the defence without assigning any reason, hence subjected to an unfair trial.

1. That the decision of the Court was based on a manifest error on the face of the record resulting in the miscarriage of justice, for failure;

a) To critically make wholesome analysis of evidence on record, otherwise the Court ought to have seen that the applicant was robbed his beloved wife and child, and that the death had occurred in the course of fight whereby the applicant was seriously injured and in self-defence.

b) To rehear and re-adjudicate the appeal as obligated by the law. The Court failed to subject the evidence on record as a whole to a fresh and exhaustive scrutiny which the applicant was entitled to expect."

The facts relevant to the matter at hand are such that; the High of Tanzania, in Criminal Sessions Case No. 74 of 2005, convicted the applicant of the offence of murdering one Sophia Hassan Mlaki (the deceased). He was sentenced to suffer death by hanging. Suffice to point out here that, in the trial, the applicant claimed that he fought with one of the prosecution witnesses, PW4 and it was PW4 who stabbed the deceased to death. The High Court, in its decision, rejected the defence case that there was a fight. It was satisfied that the applicant stabbed the deceased and caused her death with malice aforethought. Accordingly, he was convicted and sentenced to death by hanging.

Aggrieved by such conviction and sentence, the applicant filed Criminal Appeal No. 50 of 2008 wherein he maintained that he was acting in self-defence. The Court was also not convinced that the applicant was acting in self-defence. It thus dismissed the appeal. Following that dismissal, the applicant preferred the present application for review on the grounds reproduced herein.

At the hearing of the application, the applicant appeared in person without legal representation whereas Ms. Salome Assey, learned State Attorney appeared for the respondent/Republic.

When invited to argue his application, the applicant adopted the notice of motion and affidavit in support of application with no more.

Ms. Assey made a very brief reply that the application is untenable because all the grounds raised by the applicant do not fall in any of the criteria under Rule 66 (1) (a) and (b) of the Rules. She explained that the complaint that his defence was not considered and the omission to critically re-evaluate the evidence as a whole are grounds of appeal and not review. She added that it is settled position of the law that in a review, the Court does not sit to re-appraise the entire evidence on record for finding errors, as that would amount to the exercise of appellate jurisdiction which is not permissible in review. She contended that basically review is intended to amend or correct an inadvertent error committed by the Court and one which, if left unattended will result into miscarriage of justice. To buttress her position, she referred us to our previous decisions in **W.D.R Macdonald Kimambo @ Aden v. The Republic**, Criminal Application No. 36/01 of 2019 and **Godfrey Gabinus @ Ndimba and 2 Others v. The Republic**, Criminal Application No. 91/07 of 2019 (both unreported).

The applicant did not have any rejoinder. He left the matter to the Court to decide as per his grounds for review.

The central issue arising from the applicant's application and the submission by the learned State Attorney is whether the grounds raised by the applicant warrant the Court to review its own decision.

We start with the first ground where the applicant claimed that he was denied an opportunity to be heard. Indeed, the Court, under Rule 66 (1) (b) of the Rules, may review its judgment or order where it can be clearly demonstrated and established that a party was wrongly deprived of an opportunity to be heard. However, the scope of the Court's power of reviewing its own decision under this rule does not extend to a situation where a party was heard and the Court reached to a different conclusion. Mere disagreement with the view of the judgment cannot be the ground invoking the provisions of Rule 66 (1) (b) of the Rules. As long as the point was already dealt with and answered, the parties are not entitled to challenge the impugned decision in a disguise that an alternative view is possible under the review jurisdiction (see: - **Karim Ramadhani v. The Republic**, Criminal Application No. 25 of 2012; **Abel Mwamwezi v. The Republic**, Criminal Application No. 1 of 2013 (both unreported); **W.D.R Macdonald Kimambo @ Aden v. The Republic** and **Godfrey Gabinus @ Ndimba and 2 Others v. The Republic** (supra).

In the present application, the applicant is complaining that the Court did not consider his defence of self-defence and it was inclined to the prosecution evidence. We have revisited the Court's decision, subject of this application for review, and noted that during the hearing of the appeal, the applicant was present and he was ably represented by Mr. Karoli Tarimo, learned advocate. Further, at page 2 of our decision, when the learned counsel for the applicant was arguing the ground of appeal concerning a defence of self-defence, he made a bare assertion that there was a fight thus the defence of self-defence was available to the applicant. He did not make any further elaboration on it. The Court, at page 7 of the decision, went into great detail to discuss as to what would amount to a defence of self-defence in terms of section 18A of the Penal Code, Cap. 16 R.E 2002 (now R.E 2019). Having noted that there was no material evidence that would have enabled the High Court to make a finding that the applicant was defending himself against an imminent danger either towards himself, or another person or property in question, it upheld the High Court's finding that the applicant was not acting in self-defence. Thus, it dismissed the applicant's appeal. Given that scenario, we are, satisfied that the defence of self-defence put forward by the applicant was well considered by the Court before upholding the High Court's finding.

The fact that the Court reached to a different conclusion by inclining to the prosecution's case and dismissing the applicant's defence does not warrant the Court with the jurisdiction to review its decision on the pretext that there was a denial of the right to be heard. It would be an absurdity to extend the phenomena of the right to be heard where the learned counsel for the applicant was given the opportunity to explain the circumstances under which, he believed, his client (the applicant) was defending himself but he failed to do so. We are, therefore, of settled view that the grounds raised by the applicant do not constitute a ground for review under Rule 66 (1) (b) of the Rules that a party was deprived a right to be heard.

In the second ground that there was a manifest error on the face of record, the position of the law regarding an error manifest on the record as envisaged under Rule 66 (1) (a) of the Rules is now settled. Generally, an applicant must establish three things. **First** that, there was an error. **Secondly**, such error must be manifest on the face of record. **Lastly**, the error must have resulted in miscarriage of justice. By manifest error we mean that the error is so obvious such that it strikes one's eyes immediately after looking at the records and it does not require a long-

drawn process of reasoning on points where there may be possibly two opinions. It is an error which is patently clear and self-evident which does not require any extraneous matter to show its existence. We stated this position in **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R 218.

The manifest errors according to the applicant are two-fold. One, the Court failed to critically make wholesome analysis of evidence on record as it ought to have found that the applicant was robbed his beloved wife and child and that he acted in self-defence, and two, the Court, as the first appellate court, failed to re-appraise the evidence and re-adjudicate the appeal. We have no flicker of doubt that these are not manifest errors apparent on the face of the record. They are grounds of appeal as they require detailed examination, scrutiny and clarification of the facts and legal exposition of self-defence to substantiate them. We have clearly elaborated that the Court thoroughly analysed the defence of self-defence which was the sole ground of appeal, and at the end it upheld the High Court's decision. However, it seems that the applicant is still not satisfied with the Court's finding and that is why he is inviting the Court to reconsider the evidence afresh against its own judgment. In **Karim Ramadhani v. The Republic**, Criminal Application No. 25 of 2012 (unreported) reiterating the

position stated in **Abel Mwamwezi v. The Republic**, Criminal Application No. 1 of 2013 (unreported) the Court said: -

> *"...a ground of review, inviting the Court to re-consider any evidence afresh amounts to inviting the Court to determine an appeal against its own judgment. This shall not be allowed."*

In the similar vein, the applicant who is now inviting the Court to critically make a wholesome review of evidence and re-appraise the evidence for finding errors, amounts to an appeal through a back door which we are not prepared to allow it. It has been emphasized that in a properly functioning justice system, there must be an end to litigation. For instance, in **Patrick Sanga v. The Republic**, Criminal Application No. 8 of 2011 (unreported) the Court stated:-

> *"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."

In view of what we have discussed, we agree with Ms. Assey that the application has no merit. We, accordingly, dismiss it.

DATED at **DAR ES SALAAM** this 8th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 10th day of June, 2021 in the presence of the appellant in person and Ms. Ester Kyara , learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL