IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

CORAM: MUGASHA, JA., KOROSSO, JA., And MWANDAMBO, JA.

CRIMINAL APPLICATION NO. 8/12 OF 2020

SEIF MOHAMED EL-ABADAN .....APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review from the decision of the Court of Appeal at Tanga)

(Munuo, Msoffe and Kimaro, JJA.)

dated the 19th day of March, 2010
in
Criminal Appeal No. 320 of 2009

RULING OF THE COURT

7th & 10th June, 2021

MWANDAMBO, J.A.:

Seif Mohamed El-Abadan, the applicant, is before the Court for the second time following the dismissal of his appeal in Criminal Appeal No 320 of 2009 in a judgment delivered on 19th March 2010. That appeal was against the judgment of the High Court at Tanga in its appellate jurisdiction from a decision of the District Court of Korogwe which tried, convicted and sentenced the applicant on a charge of rape. This time around, he has accessed the Court by way of review of its decision which he believes is pregnant with an error manifest on the face of the record.

We think a brief background will be necessary before we belabour into the merits. The applicant, a medical Doctor by profession, stood charged before the District Court of Korogwe with the offence of rape c/s. 130 (3) (c) of the Penal Code [Cap.16 R.E 2002]. The trial court convicted the applicant as charged and sentenced him with 30 years' imprisonment. His appeal to the High Court at Tanga (Mussa, J. as he then was) was not successful. The Court found no merit in the applicant's five grounds of appeal. It dismissed the appeal having concurred with the findings of the trial court, and the first appellate court which found the applicant guilty as charged. It is not less significant to point out at this stage that two of the grounds of appeal before the High Court faulted the trial court for shifting the burden of proof from the prosecution to the defence and entering conviction on weak and uncorroborated evidence of the prosecutrix.

Still dissatisfied, the applicant preferred a second appeal before the Court predicated on six grounds of appeal. Ground two challenged the first appellate court for not drawing adverse inference against the prosecution for its failure to call Mary Chorogondo, the first alleged witness of the complainant in proof of its case. In ground six, the applicant criticized the first appellate court and the trial court for misdirecting themselves on the burden and standard of proof. At the end of it all, the Court dismissed the

appeal being satisfied that the applicant was properly convicted on the weight of evidence. Stripped of everything else, the Court dismissed ground two as baseless having been satisfied that Mary Chorogondo the subject of the applicant's contention was not a material witness for the prosecution. This was more so because the said "witness" paid no attention to the prosecutrix's complaint of being raped by the applicant and left which justified the defence calling her as its witness instead.

It is to be noted that the Court appears to have not specifically dealt with the complaint on the misdirection on the burden and standard of proof the subject of the applicant's ground six of appeal. However, it is implicit from reading the judgment that the Court was satisfied that the prosecution discharged its burden proving the charged offence to the required standard against the applicant resulting into his conviction and sentence. It dismissed all grounds of appeal and ultimately, the appeal in its entirety.

Fortunately, the dismissal of the applicant's appeal did not mark the end of the road in pursuit of justice. He has now sought to move the Court to review its decision in pursuance of section 4(4) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] henceforth, the AJA. The applicant thinks that the Court reached at the decision in the wake of an error

manifest on the face of the record occasioning injustice which is a sufficient ground under rule 66 (1) (a) of the Rules. He relies on three grounds set out in the notice of motion. They are reproduced hereinbelow:

(a) *The Court shifted the burden of proof as regards the commission of the offence of rape onto the Applicant in that in held that the Applicant could have called a crucial witness, one Mary Chorogondo who received the first report on the alleged rape after the prosecution had failed to call her;*

(b) *Having observed that an adverse inference could be drawn against a party who deliberately did not call a crucial witness, the Court proceeded with upholding the prosecution's case that there was an actual rape committed and in the absence of any corroborative evidence.*

(c) *The Court placed on the Applicant a standard of proof higher than the one required in proving that the Applicant was not in good relations with his colleagues at work to make it possible that the Applicant was framed with their collusion.*

The affidavit annexed to the notice of motion makes averments in paragraphs 4, 5, 6, 7, 8 and 9 in elaboration of the grounds set out above. Not amused, the respondent has filed an affidavit in reply resisting the application.

At the hearing of the application, we heard Mr. Selasini Romani Lamwai prosecuting the application on behalf of the applicant. Mr. Paul

Kusekwa, learned State Attorney stood for the respondent Republic opposing the application. The gravamen of the learned advocate's argument on the alleged error in relation to the complaint on shifting the burden of proof rested on our decision in **Nathaniel Alphons Mapunda v. R.** [2006] TL.R. 395. We restated in that case the long-time established principle applicable in criminal trials; that the prosecution shoulders the burden of proving the offence against the accused person beyond reasonable doubt. Contrary to the above, the learned advocate argued, it was an error on the face of the record for the Court holding, as it did, that the applicant could as well have called Mary Chorogondo as his witness upon the prosecution's failure to call her. Without any further elaboration, Mr. Lamwai criticized the Court for shouldering a higher burden on the applicant to prove his innocence which he didn't legally have. A little while, Mr. Lamwai, responding to questions from the Court conceded that Mary Chorogondo was not a material witness to the prosecution owing to the fact that the trial court was satisfied that the evidence of the prosecutrix was sufficient to prove the charge independent of other witnesses.

Likewise, the learned advocate conceded that considering the holding of the Court in **Azizi Abdallah v. R.** [1991] T.L.R 71, drawing adverse inference does not necessarily ruin the case for the prosecution.

Be it as it may, the learned advocate was adamant that the application was meritorious warranting our interference by way of review.

Mr. Kusekwa for his part urged the Court to dismiss the application for failure to meet the benchmarks in rule 66 (1) (a) of the Rules. He advanced two reasons. One, the grounds in the notice of motion are not grounds for review but an appeal which is not what the Court is called upon to determine. Two, at any rate, the grounds set out in the notice of motion were considered and determined in the impugned judgment and for that reason, they cannot yet again be raised as grounds in an application for review which is confined to determining whether or not there is an error manifest on the face of the record. Mr. Kusekwa referred us to one of our decisions in a similar application in **Suddy Mshana @ Kasala v. R,** Criminal Application No. 2/09 of 2018 (unreported) underscoring the distinction between an error on the face of the decision which warrants a review and an erroneous decision which is amenable to an appeal. Mr. Kusekwa pointed out that the applicant's grounds fall into the latter category and so the Court should dismiss the application.

In his rejoinder, Mr. Lamwai contended that the grounds in the notice of motion never featured in the appeal. He distinguished, without more the application of **Suddy Mshana @ Kasala v. R.** (supra) and prayed for an order granting the application.

We find it convenient to kickstart our discussion with an examination of the law upon which the applicant has predicated his application. The Court's power to review its own decisions under section 4 (4) of the AJA is exercisable in accordance with Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which provides as follows:

> *"66-(1) 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".*

There is no doubt from reading the above that the power of review is not open ended. The grounds upon which the applicant is seeking review falls under rule 66 (1) (a) of the Rules. What is meant by the phrase; manifest error on the face of the record is very well settled. Our previous decisions exemplified by the cases cited by the learned State Attorney, namely; **Suddy Mshana @ Kasala v. R.** (supra) and **Omari Mussa**

@Selemani @ Akwishi & 2 Others v. R, Consolidated Criminal Application Nos. 117,118 & 119/07 of 2018 (unreported) are just a few in a very long list of cases in which the Court discussed the phrase. Others include; **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218, **Ghati Mwita v. R,** Criminal Application No. 3 of 2013, **John Kashindye v. R,** Criminal Application No. 16 of 2014, **Patrick Sanga v. R** Criminal Application No. 8 of 2011, **Maulidi Fakihi Mohamed @ Mashauri v. R,** Criminal Application No. 120/07 of 2018 an **Issa Hassan Uki v. R,** Criminal Application No. 122/07 of 2018, **Tanganyika Land Agency Limited and 7 Others. Manohar Lal Aggrwal, Civil Application No. 17 Of 2008** (all unreported) to mention but a few.

The position expressed in **Chandrakant's** case (supra) cannot be more appropriate to illustrate the scope of review. The Court quoted with approval an excerpt from the distinguished authors of Mulla, 14th Edition to stress the point that an error must be such that it can be seen by a person running and not one which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions. That decision is also relevant for the proposition that a mere error of law is not a ground for review.

It has also been stressed that an error on the face of the record resulting into the impugned decision and an erroneous decision are not one and the same. If established, the former warrants a review but the latter does not it being the law that an erroneous decision is amenable to appeal and not a review. See for instance: **Charles Barnaba v. R**, Criminal Application No. 13 of 2009 (unreported) cited in **Godfrey Gabinus @Ndimba & 2 Others v. R**, Criminal Application No. 91/07 of 2019 (unreported).

In **Patrick Sanga v. R** (supra) the Court made the position more lucid when it stated:

> *"The review process should never be allowed to be used 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."* [at page 6].

It will be clear from the above that the law is well settled as it were on what it entails to invoke the Court's power of review based on the ground that there is a manifest error on the face of the impugned decision.

After highlighting the law, the next question is whether the applicant has succeeded in bringing his application within the ambit of rule 66(1) (a) of the Rules. With respect, we have to answer the question in the negative being satisfied that the grounds relied upon by the applicant are not grounds in a review, rather in an appeal. It is plain in this application as rightly submitted by the learned State Attorney, the grounds in the notice of motion formed part of the grounds of appeal and were determined as such by the Court in the appeal. They cannot again be raised as grounds in the application for review, for that would be tantamount to the Court sitting as an appellate court from its own decision which is not what review is all about under our law. Put it differently, the applicant's invitation to review our decision on the alleged errors is nothing other than an appeal in disguise contrary to the settled principle in many of the Court's previous decisions including the cases we have referred to in this ruling. For instance, in **Tanganyika Land Agency Limited and 7 others vs. Manohar Lal Aggrwal** (supra) the Court aptly stated that an application for review is by no means an appeal through a back door whereby an

erroneous decision is reheard and corrected at the instance of a litigant who becomes aggrieved by such a decision. The grounds relied upon in the application were dealt with as grounds of appeal right from the High Court to the Court and were dismissed. It is obvious that the applicant is doing nothing other than asking the Court to rehear his appeal which is not permitted under the law. As we stated in **Patrick Sanga v. R** (supra), the Court has no jurisdiction to sit as an appellate Court from its own decisions. Doing so will be in clear conflict with public policy which requires that litigation must come to an end. While we appreciate that any other person in the appellant's position would be dissatisfied with the outcome in the appeal, that in itself does not constitute a manifest error apparent on the record warranting the Court's exercise of its power to review its decision. Indeed, Mr. Lamwai had a lot of difficulties, understandably so, in defending his arguments. In the course of his submissions, he was constrained to concede that the failure to call Mary Chorogondo was inconsequential to the case for the prosecution because the evidence of the prosecutrix was sufficient to support its case. In our view, his concession went to the bedrock of the grounds in the application. He could no longer pursue the alleged error in the Court shifting the burden of proof from the prosecution to the defence.

In the upshot, we are satisfied that the application was filed without good cause and so the Court cannot exercise its jurisdiction under section 4(4) of the AJA and review the decision as prayed in the notice of motion. Consequently, the application fails and we dismiss it.

DATED at **TANGA** this 10th day of June, 2021.

S. E. A MUGASHA
JUSTICE OF APPEAL

W. B KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 10th day of June, 2021 in the presence of the Applicant in person and Ms. Luciana Kikala, learned State Attorney for Respondent, is hereby certified as true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL