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. 11/01 OF 2020

GEORGE STUWART SHEMTOI @ WHITE .....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Rutakangwa, Kimaro and Mandia, JJ.A)

dated the 9th day of July, 2012
in
Criminal Appeal No. 11 of 2012

.....

RULING OF THE COURT

9th June, & 1st July, 2021

NDIKA, J.A.:

George Stuwart Shemtoi alias White, the applicant herein, moves the Court pursuant to rule 66 (1) (a), (c) and (e) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") to review its judgment dated 9th July, 2012 in Criminal Appeal No. 11 of 2012.

The essential facts of the case and the context in which this matter has arisen are briefly as follows: the applicant was convicted by the Court

of Resident Magistrate of Tanga at Tanga, on the first count, of conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap. 16 R.E. 2002 ("the Code") and, on the second count, of armed robbery contrary to section 287A of the Code. He was sentenced to two concurrent terms of imprisonment of three years and thirty years for the first and second counts respectively. His first appeal against the convictions and sentences having been unrewarded, the applicant appealed further to this Court vide Criminal Appeal No. 11 of 2012. The said appeal was partly successful as the Court (Rutakangwa, Kimaro and Mandia, JJ.A) by its judgment dated 9th July, 2012, the subject of this application, quashed the conviction on the first count on the ground that the said offence was unproven. Consequently, the Court set aside the corresponding punishment of three years imprisonment. However, the Court upheld the conviction and sentence in respect of the second count resulting in the appellant's appeal being dismissed in that regard.

So far as it relates to the second count, the Court, having summarized the facts of the case and considered the applicant's general complaint on the assessment of the evidence by the courts below,

dismissed the appeal. For clarity, we wish to extract at length the relevant passage as shown at pages 13 and 14 of the typed judgment:

> *"**The main issue is that both the trial court and the first appellate court found it as a fact that there were persistent robbery threats on PW1 Rajabu Lusewa which were reported to the Police**, that on different dates the police laid traps in wait of the perceived robbers but the alleged robbers sprung the traps, and that on 23/11/2008 the appellant and a confederate who escaped went to the house of PW1 Rajabu Lusewa and demanded money from the latter while brandishing a panga and was shot in the leg by the police as he was going out of the house after the robbery. In both courts below, as weli as in this Court, the appellant's explanation on why he was at the house of the complainant is that he was there to discuss an amount of money totalling Shs. 420,000.00 owed to him by PW1 Rajabu Lusewa as a civil claim. **This explanation was discounted by the person who the appellant alleged was the go-between in the negotiations, and did not explain away the repeated robbery threats made on PW1 Rajabu Lusewa** which*

made him to report to the Police, and which made the police arrange the traps which finally caught the appellant. ***We uphold the concurrent findings of fact made by the courts below. We find the appeal lacking in merit and we dismiss it in so far as the second count is concerned."***
[Emphasis added]

The applicant has predicated this application upon five grounds, which, by any yardstick, are explicitly bold contentions:

"1. That the decision was based on manifest errors on the face of the record because it was a clear case of entrapment which the Court failed to realize for working (sic) on it.

2. That the decision was based on manifest errors on the face of the record regarding the information lodged at Police and how it was received in the manner of which to arrange to set a trap for engaging the alleged armed robbers.

3. That the judgment of the Court is a nullity, the applicant's conviction was based on defective charge that the particulars of the offence differ with the evidence submitted in court by the prosecution witnesses.

4. That the judgment of the Court was procured by perjury, the explanation in the particulars of the offence about the

locality (District) are contradictory with the fact when the trial court moved and reached not within the District of Korogwe which rendered the decision of the Court procured by fraud.

5. That the judgment of the Court was procured by perjury and fraud because it originated from the trial that was conducted in a court without jurisdiction to hear the same contrary to sections 177, 180 and 181 of the Criminal Procedure Act, Cap. 20 R.E. 2002."

In support of the application, the applicant swore a seven-paragraph affidavit giving background to the application. In further support of the application, on 27th May, 2021 he lodged a supplementary affidavit attached with a number of documents including copies of the charge sheet, memorandum of appeal to the Court and a portion of trial proceedings containing evidence of some witnesses. In the latter affidavit, the applicant claims in paragraph 8 that the Court misapprehended the evidence of PW1 Rajabu Lusewa in its judgment as there was no proof that PW1 ever reported any threat on him to PW3 SP Joseph Kiyengi, the then OC-CID, Korogwe District. In paragraph 9, it is averred that the impugned judgment is a nullity on the ground that the conviction was based on a defective charge in that the particulars of the offence were in variance with the

evidence as to whether the alleged offence was committed in Handeni District or Korogwe District. Furthermore, in paragraph 10, it is deposed so daringly that the impugned judgment of the Court was:

> *"procured by fraud and perjury because within the District of Korogwe there was no such crime committed. This fact was proven by the trial court and PW8 at the aileged locus in quo when the trial court reached for PW8 to be cross-examined ...."*

In highlighting the written submissions lodged in advance in support of the application, Mr. Josephat Mabula, learned counsel, referred to several parts of the impugned judgment and then contended that the alleged report to the police on the threats of raiding the complainant's home was unproven. If such threats had actually been reported to the police, in terms of the Police General Order No. 309 the matter would have been recorded in the police report book and that such evidence should have been laid at the trial. To bolster his submission, he cited **Mashaka Pastory Paulo Mahengi @ Uhuru and 5 Others v. Republic**, Criminal Appeal No. 49A, 50, 52, 53, 54 and 55 of 2015; and **Zainabu d/o Nassoro @ v. Republic**, Criminal Appeal No. 348 of 2015 (both

unreported). His essential submission was, therefore, that the Court misapprehended the evidence on the alleged report on the threats and that this aspect constituted an error manifest on the record occasioning apparent injustice to the applicant.

When probed by the Court if the application had met the threshold requirements of rule 66 (1) (a), (c) and (e) of the Rules, Mr. Mabula valiantly argued that apart from the application having showed that there was an error on the face of the record, paragraph 10 of the supplementary affidavit sufficiently established that the impugned judgment was vitiated by fraud and perjury. However, he conceded that the claim that the judgment was a nullity was plainly untenable. Accordingly, he urged us to grant the application and vacate the judgment the subject of the review.

Ms. Neema Moshi, learned State Attorney, who was assisted by Ms. Theresia Mtawa, also learned State Attorney, gallantly resisted the application. Having referred to the provisions of rule 66 (1) (a) to (e) of the Rules, Ms. Moshi contended that the application discloses no proper ground for review but appeal. She submitted that the alleged error vitiating the judgment under review is not one on the face of the record and that the

impugned judgment is proper and valid. She added that even if it were assumed that the alleged perjury occurred at the trial, such concern cannot vitiate this Court's judgment because such an issue ought to have been taken up much earlier on appeal. In the premises, the learned State Attorney urged us to dismiss the matter.

In a brief rejoinder, Mr. Mabula maintained that the application was properly and soundly based upon the cited enabling provisions and that the absence of proof of the alleged report made to the police constituted a fatal error on the face of the record.

At the outset, it bears restating that a review of a decision of the Court is by no means an appeal in disguise whereby an erroneous decision is examined and corrected. The power of review being residual and circumscribed is only exercisable upon any of the grounds enumerated by rule 66 (1) (a) to (e) of the Rules:

> *"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."

As hinted earlier, the instant application is predicated upon five grounds laid under paragraphs (a), (c) and (e) of sub-rule (1) of rule 66 of the Rules contending that the impugned judgment of the Court is riddled with a manifest error resulting in the miscarriage of justice, that it is a nullity and that it is vitiated by fraud and perjury.

In determining the application, we propose to begin with the contention in the third ground that the judgment under review is a nullity. We recall that on being prodded by the Court, Mr. Mabula conceded so unreservedly to untenability of that contention. As stated earlier, Ms. Moshi had taken the same position. Quite unwaveringly, we affirm this concurrent

submission. We do not see how the alleged defect in the charge sheet or the supposed variance between the particulars of the offence in the charge and the evidence adduced at the trial could negate the validity of this Court's judgment. Unquestionably, the Court acted with competent jurisdiction in the appeal in terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now 2019) and, therefore, its judgment was a valid outcome of a lawful exercise of its appellate authority. The alleged defect in the charge or the claimed variance are matters that could only have been taken up and pursued in the first appeal to the High Court or the second appeal to this Court. Certainly, they are not proper grounds for review.

There is equally no substance in the fourth and fifth grounds of review contending that the impugned judgment is vitiated by fraud and perjury. What the applicant stated in paragraph 10 of his supplementary affidavit is a far cry from substantiating that claim. The averment that the alleged "fraud and perjury" existed because there was proof that none of the alleged crimes were committed within Korogwe District is clearly impertinent. Actually, it is a flawed and misconceived contention because it

has no direct bearing on the judgment under review. If, indeed, such fraud or perjury existed at the trial stage, it should have featured on the first or second appeal as a ground of appeal. Equally tenuous and startling is the claim that the trial court had no jurisdiction over the matter. Whether the offence was committed within the precincts of Handeni District or Korogwe District, it surely fell within the territorial jurisdiction of the trial court (that is, the Court of Resident Magistrate of Tanga at Tanga). In terms of section 5 of the Magistrates' Courts Act, Cap. 11 R.E. 2002 (now R.E. 2019) read together with the Magistrates' Courts (Courts of a Resident Magistrate) (Re-Designation) Order, G.N.s Nos. 68 of 1981 and 570 of 1986 the trial court's geographical reach covers the whole area of Tanga region. While we confirm that this Court has, in terms of rule 66 (1) (e) of the Rules, the power to recall its own judgment upon review, if it arrives at the conclusion that the said judgment was obtained illegally, or by fraud or perjury, we find no semblance of proof to support such a conclusion.

We now revert to the first and second grounds featuring the claim that the judgment under review is tainted with a manifest error on the face of the record resulting in injustice. Indeed, the phrase "manifest error on

the face of record resulting in injustice" was fully addressed by the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at 225. Having examined several authorities on the matter, the Court adopted from **Mulla on the Code of Civil Procedure** (14 Ed), pages 2335 – 2336 the following summarized description of that expression:

> *"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****: State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU] 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. 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:*

> *Utsaba v. Kandhuni (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin.* ***It can be said of an error that it 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*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]."* [Emphasis added]

See also the decisions of the Court in **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General**, Criminal Application No. 5 of 2011, **Mashaka Henry v. Republic**, Criminal Application No. 2 of 2012, and **Elia Kasalile & 17 Others v. Institute of Social Work**, Civil Application No. 187/18 of 2018 (ail unreported).

Turning to the instant application, the alleged manifest error is that there was no proof of any persistent robbery threats on the complainant reported to the police. This complaint essentially assails this Court's judgment upholding the concurrent finding by the courts below, which we reproduced above, that:

"there were persistent robbery threats on PW1 Rajabu Lusewa which were reported to the Police, that on different dates the police laid traps in wait of the perceived robbers but the alleged robbers sprung the traps ...."

The Court is, in effect, faulted for misapprehending the evidence on the record resulting in its decision ratifying lower courts' allegedly incorrect findings of fact. On our part, we have no difficulty in rejecting this complaint because it raises no proper ground for review. For it is noticeably a ground inviting us to sit on our judgment and rehear the appeal mistakenly hoping that we may come to a different conclusion. The applicant's call on us to re-assess the evidence is laid bare by his annexation to the supplementary affidavit a copy of the trial court's record of allegedly contradictory evidence of PW1 and PW3. This is a clear misconception, if not a brazen abuse, of the review jurisdiction of the Court.

In **Patrick Sanga v. The Republic,** Criminal Application No. 8 of 2011 (unreported), the Court underlined that:

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

In **Charles Barnaba v. Republic,** Criminal Application No. 13 of 2009 (unreported), the Court was categorical that review is not meant to challenge the merits of the impugned decision but to address irregularities of a decision or proceedings which caused injustice to a party. See also **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggarwal,** Civil Application No. 17 of 2008 (unreported) citing with approval the decision of the Supreme Court of India in **M/s. Thungabhadra Industries Ltd v. the Government of Andhra**

Pradesh, AIR 1964 SC 1372. In consequence, we hold that the first and second grounds are equally unmerited as no error on the face of the record has been proven let alone one occasioning injustice to the applicant.

The upshot of the matter is that the application stands dismissed in its entirety.

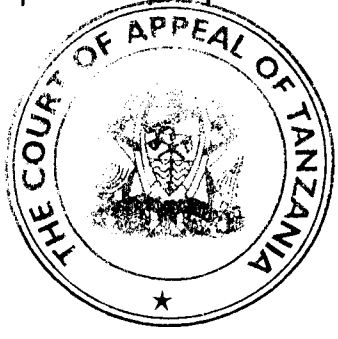
DATED at **DAR ES SALAAM** this 24th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 1st day of July, 2021 in the presence of the applicant in person and Ms. Esta Kyara, 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