IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPLICATION NO. 27/6 OF 2019

GEORGE MWANYINGILI ..... APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Application for Review of the Decision of the Court of Appeal of Tanzania at Mbeya)

(Mmilla, Mugasha, Mwambegele, JJ.A.)

Dated the 11th day of December, 2018
in
Criminal Appeal No. 335 of 2016

.....

RULING OF THE COURT

8th & 23rd February, 2021

KOROSSO, J.A.:

By way of a Notice of motion made under Rule 48 (1) and Rule 66(1)(a) and (b) of the Tanzania Court of Appeal Rules, 2019 (the Rules), George Mwanyigili, the applicant filed an application for review of the judgment of this Court (Mmila, Mugasha and Mwambegele, JJA.) dated 11th December, 2018 in Criminal Appeal No. 335 of 2016. The said judgment dismissed the appeal lodged by the applicant to challenge the judgment of the High Court sitting at Mbeya dated 10th May, 2015 which upheld the decision of the District Court of Rungwe at Tukuyu. The trial

court had convicted the appellant of Rape for contravening the provisions of section 130(1), (2)(e) and 131(1) of the Penal Code Cap 16 Revised Edition 2002 and sentenced him to thirty (30) years imprisonment of which he is currently serving. The application is supported by the applicant's own affidavit.

At this juncture, we find it pertinent to reproduce the grounds raised by the applicant to support his application as found in the Notice of Motion thus:-

> "I. *This Hon. Court may be pleased to review the said judgment of the Court of Appeal of Tanzania in Criminal Appeal No. 335 of 2016 where Hon. B.M. Mmila, JA; SEA Mugasha, JA; and JCM Mwambegele, JA. dismissed my appeal unlawfully.*
>
> *II. To clarify the points of law raised regarding the alleged evidence.*
>
> *III. To allow the Review and according orders the acquitted for the applicant on the following grounds: -*
>
> a. *That the decision was based on the manifest error on the face of the record resulting in the miscarriage of justice.*
> b. *A party was wrongly deprived of an opportunity to be heard."*

On the part of the respondent, the Director of Public Prosecutions, they resisted the application and lodged an affidavit in reply sworn by

HannaRose Kasambala, a State Attorney. In essence, the affidavit in reply disputes the averments by the applicant, contending that the applicant has failed to substantiate his claims or to assign good grounds warranting this Court to exercise its powers to review its own decision.

On the date when the application was called on for hearing, the applicant who fended for himself, entered appearance linked to the Court from Ruanda Prison through video conferencing facility, whereas the respondent DPP, was represented by Mr. Baraka Mgaya, learned State Attorney.

When invited by the Court to amplify the reasons grounding the application, being a layperson, he had nothing substantive to add to what is stated in the Notice of Motion and the supporting affidavit. He then proceeded to adopt the contents therein and urged us to find the application meritorious and grant the prayers sought therein.

On the part of the respondent, Mr. Mgaya resisted the application and at the outset sought leave to adopt the contents of the filed affidavit in reply. According to him, what he has established from the Notice of Motion and the affidavit in support of, is that two grounds have been advanced for the review sought. **One**, that there is manifest error on the face of the record; and **two**, he was denied the right to be heard.

He then proceeded to respond to the first ground as expounded in paragraph 3(b) of the supporting affidavit, that contends there being a manifest error on the face of the record, in that the trial court failed to convict him as legally required and also that the PF3 which was admitted as Exhibit P3 did not support the evidence of PW3 with regard to proof of penetration. The learned State Attorney argued that for the Court to review its decision, the alleged manifest error on the face of the record must be apparent and clearly discerned on the face of it as cemented by case law. He referred us to our decision in **Masudi Saidi Selemani vs Republic**, Criminal Appeal No. 92/07 of 2019 (unreported) as providing factors that can be used to determine existence of manifest errors, such as the fact that it should be an error that can be seen by a naked eye and which does not require any further reasoning or long drawn arguments.

The learned State Attorney submitted that the alleged instances raised by the applicant as exposing a manifest error, were already dealt with and determined by the Court as found in its judgment (at pages 6-7 of the judgment). Thus, if this Court is invited again to determine the same issues that will mean reconsidering the grounds of appeal through the back door and thus defeat the purpose and intent of a review. He argued that in **Masudi Saidi Selemani vs Republic** (supra), the Court

frowned upon courts to review matters as if considering an appeal from its own judgment.

Submitting on the complaint by the applicant that the evidence of PW2 is contrary to the contents found in Exhibit P3 (PF3). The learned State Attorney argued that this should have been a ground of appeal in the appeal which was dismissed by this Court and should not be brought at this stage for this Court to reconsider, as a ground for review. That, this is because to prove the allegation, a process of reasoning and assessment of evidence is required and thus in contravention of the intent of a review as envisaged by the law. He asserted that in any case, the applicant has not shown any apparent and clear manifest error to warrant the Court to exercise its powers of review as sought.

With regard to the second ground where the applicant protests that his right to be heard was curtailed, the learned State Attorney challenged the applicant's assertion that during the hearing of the appeal the Court failed to accord him an opportunity to submit his rejoinder. The learned State Attorney argued that this contention is unwarranted and not supported by the record of appeal which displays that during the hearing of the appeal, after the respondent Republic finalized their submission, the applicant, when invited to address the Court, he stated that he had nothing to state. The learned State

Attorney thus implored us to find the application without merit and to dismiss it accordingly.

In rejoinder, the applicant had nothing further to state other than reiterating his prayer to be set free so that he can join his family.

Having heard the arguments for and against the application and reading through the grounds set out in the Notice of Motion, the supporting affidavit, oral submissions and the law applicable, what is clear to us is that the application is essentially founded under Rule 66(1)(a) and (b) of the Rules which reads:-

> *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;*
>
> *(b) a party was wrongly deprived of an opportunity to be heard;"*

Accordingly, in this application our deliberations will focus on the two grounds, that is determining whether the decision of this Court in the appeal lodged by the applicant against the DPP in Criminal Appeal No. 335 of 2016, subject of the present application is **first**, based on a manifest error on the face of the record and **second**, whether in the

process of hearing of the said appeal, the applicant was not accorded an opportunity to be heard.

There are numerous decisions of this Court holding that a manifest error on the face of the record, has to be manifest in the judgment and must be obvious and easily perceptible. This Court, in **East African Development Bank vs Blueline Enterprises Tanzania Limited**, Civil Application No. 47 of 2019 (unreported) cited the case of **Chandrakant Joshubhai Patel vs Republic** [2004] TLR 218 where we stated that:-

> *"It is, we think apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this lest disguised appeals pass off for application for review. We say so for the well-known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be, beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review".*

What should be noted is that the Court in **Chandrakant's case** (supra) did adopt the reasoning in MULLA on the **Indian Procedure Code** 14th Edition PP 2335-36 stating:-

> *"An error 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... 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 .."*

Evidently, the holding of this Court referred to above amplified the requirements of Rule 66(1)(a) of the Rules, that a manifest error on the face of the record must be an error that is clear, obvious and patent, one which does not need to be established by long drawn process of reasoning. This position has also been restated in several decisions of this Court including in **Masudi Said Selemani vs Republic** (supra); **Issa Hassan Uki vs Republic**, Criminal Application No. 122/07 of 2018

and **Ex. F. 5842 D/C Maduhu vs DPP**, Criminal Application No. 46/06 of 2019 (both unreported).

In the current application we find it prudent to reproduce the relevant averments in the affidavit supporting the Notice of motion, expounding on the first ground as found in paragraph 3(a) and (b) thus:-

> "a*) The decision was based on the manifest error on the face of the record resulting in the miscarriage of justice.*
> *b) Hon. Justices this hon. Court may be pleased to review this judgment by clarifying the points of law on page 26 of district court proceedings and page 30 which shows that as the appellant claimed in his memorandum appeal on page 5 of CAT typed No. 5 this court may review this judgement of the DC that was true the appellant was not convicted according to the law by failing to cite section 235(1) of the CPA Cap 20 RE 2002. Even the said PF3 appeared on page 30 of DC typed proceedings was not corroborated by evidence of PW3. This hon. evidence on record that there was not any penetration which was established by the said PF3."*

Our scrutiny of the above clearly shows that the applicant seeks this Court to rehear the appeal and thus overturn our own decision, a

feat which we have no mandate to do. This is because in the appeal he has implored us to review, the Court did determine the complaint that the trial magistrate erred in law in not citing section 23(1) of the Criminal Procedure Act, Cap 20 Revised Edition, 2002 (the CPA) when convicting the applicant and this was the sixth ground of appeal.

For the foregoing, we are of the view that the other complaint raised by the applicant that the admitted PF3 did not corroborate the evidence of PW3, is one of evidence, that dictates evaluation of evidence. Undoubtedly, both of the issues raised as manifest errors on the face of the record fall short of the established guidelines of being obvious, patent errors that can be clearly discerned on the face of the record. In fact, both of the issues raised are in effect grounds of appeal already dealt by this Court in the appeal, subject of the current application.

This Court has had an opportunity to observe in numerous cases such as the **Chandrakant case** (supra) and **Karim Kiara vs Republic**, Criminal Application No. 8 of 2010 (unreported), stating that, a review is not an appeal in disguise and not for thé purpose of rehearing and correcting an erroneous decision. Having scrutinized the Notice of Motion and the supporting affidavit, in the end, we are satisfied that the content therein establishes that the alleged anomalies on record relate to grounds of appeal already determined by this Court;

there is no manifest error found on the face of the record as contended by the applicant. Accordingly, for reason stated above, we are of the firm view that the first ground for review is misconceived and it thus fails.

The second ground is that the applicant was denied an opportunity to be heard during the hearing of the appeal due to the Court's failure to accord him an opportunity to rejoin after the respondent Republic's submission during the hearing of his appeal. The complaint is expounded in paragraph 3(c) of the supporting affidavit and reproduced it reads:-

> *"c) A party was wrongly deprived of an opportunity to be heard. Hon. Judges this hon. court may be pleased to review its judgment by clarifying the evidence on record that the appellant was convicted on a single witness. Even in the said PF3 the doctor observed the small hole since the penis of the appellant was not measured to be compared by the said claimed hole. This hon. Court by clarifying the evidence on record that the whole proceedings was defective due to failure for being compiled (sic) by the procedure."* .

Undeniably, the Court has emphasized the importance of courts to observe the cardinal principles of natural justice when conducting trials and hearing as observed by this Court in **Barnabas William @Mathayo vs Republic**, Criminal Appeal No. 254 of 2018

(unreported). Stating that the foregoing is rooted on the understanding that those principles are the footing upon which our judicial system operates. One important tenet arising from this, is emphasis on fair trials, where it is expected that all parties to a trial are afforded a chance to be heard prior to reaching a final decision because failure to observe such principles will result in miscarriage of justice. This Court, has time and time again, reiterated this stance. In **Mbeya- Rukwa Auto Parts and Transport vs Jestina Mwakyoma** [2003] TLR 251 we stated:-

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In* ***Ridge v. Baldwin*** *[1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Moris in* ***Furnell v. Whangarei High School Board*** *[1973] AC 660, "Natural justice is but fairness writ large and judicially."*

The above holding emphasizes that violation of the right to be heard is not only a breach of natural justice but it retracts the constitutional guarantee for the basic right to be heard found under Article 13(6)(a) of

the United Republic of Tanzania Constitution 1977 (as amended) (the Constitution). Indeed, observance of the right to be heard for parties in a trial or any proceedings cannot be overemphasized. The Court had occasions to address this in cases where such right was not observed. These include; **National Housing Corporation vs Tanzania Shoes and Others** [1995] TLR 251 and **Yazidi Kassim Mbakileki vs CRDB** [1996] LTD and Another, Civil Reference No. 14/04 of 2018 (unreported).

In **Abbas Sherally and Another vs Abdul S. H. M. Fazalboy,** Civil Application No.33 of 2002 (unreported) it was held that:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Thus, considering the above settled position, there is no doubt in our minds, that the present case does not fall within the ambit that the right to be heard was not observed. Our scrutiny of the record, leads us to agree with the learned State Attorney that during the hearing of the

appeal, this Court afforded the applicant an opportunity to state his rejoinder and he maintained having nothing further to state. This can be observed from the judgment of the Court in the said appeal at page 6. We reproduce the relevant part of the judgment which reads as follows:-

> *"Before us, the appellant appeared in person and was not represented; whereas the respondent Republic was represented by Mr. Ofmedy Mtenga, learned State Attorney. The appellant chose for the Republic to respond first but reserved his right for rejoinder if need would arise."*

Upon finalizing the summary of the submissions by the learned State Attorney, at page 8 paragraph 4 it reads:-

> *"On the other hand, the appellant said he had nothing to say."*

Evidently, when time came for rejoinder, when given an opportunity, the applicant preferred not to state anything. This being the case, there is nothing from the record that can lead us to disagree with the submissions by the learned State Attorney that this complaint by the applicant, has no merit. Therefore, this ground also fails.

What is important to note is that despite the fact that the appellant may feel aggrieved by the decision of this Court in appeal, in the present application he has failed to show the manifest errors in the judgment in

appeal that are obvious and patent. There is also no evidence that he was denied the right to be heard as alleged. We thus find that both grounds advanced by the applicant lack merit to justify a review of the judgment of this Court in appeal.

In the end, for the foregoing reasons, we find that the application is devoid of merit and it is hereby dismissed. It is so Ordered.

DATED at **MBEYA** this 23rd day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 23rd day of February, 2021 in the presence of the Applicant in person, unrepresented through video conference and Ms. Rosemary Mgenyi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL