IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KEREFU, J.A., And MAIGE, J.A.)

CRIMINAL APPLICATION NO. 1 OF 2020

SALIM MOHAMED MARWA @ KOMBA.......................................1ST APPLICANT
PETER CHARLES MAYALA...2ND APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mwangesi, Kwariko and Kerefu, JJ.A.)

dated the 13th day of November, 2019
in
Criminal Appeal No. 267 of 2017

RULING OF THE COURT

28th, June & 6th July, 2021

KEREFU, J.A.

The applicants, Salim Mohamed Marwa @ Komba and Peter Charles Mayala (the first and second applicants) respectively were 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, they were each handed down the mandatory death sentence.

Aggrieved, the applicants unsuccessfully appealed to this Court vide Criminal Appeal No. 267 of 2017. Still dissatisfied, they have 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 Rule 66 (1) (a) and (b) of the

Tanzania Court of Appeal Rules, 2009 (the Rules). The applicants have moved the Court to review its decision made on 13th November, 2019 dismissing their appeal. Therefore, the grounds upon which the review is sought are to the effect that: -

(1) *The decision of the Court was based on a manifest error on the face of record resulting in the miscarriage of justice, to wit: -*
   (a) *Some defects appear in the post mortem examination report (exhibit P1), but was corrected by the Court which stepped into the shoes of the prosecution side and termed anomaly as just a slip of pen;*
   (b) *That, the clarification of the said defect ought to have come from the doctor who was not called for testimony and not from the bar or from the bench, in so doing, the Court had done what it ought not to do.*

(2) *The applicants were wrongly deprived of an opportunity to be heard, to wit: -*
   (a) *The record of appeal which was served to the applicants was lacking and at variance with the ones which was used by the Court to determine the appeal against the applicants;*
   (b) *That, there were some missing pages on the evidence of PW1 on the record of appeal which was supplied to the applicants and hence prevented or limited them to prepare sand file a ground of appeal in relation to that portion of the missing and/or unsupplied evidence.*

The application is supported by two affidavits deposed by the applicants. The said affidavits though separate they contain similar contents. The relevant paragraphs for purposes of this application are paragraphs 6, 7, 8 and 9 where the applicants have amplified the grounds of review indicated in the notice of motion.

On the other hand, the respondent Republic has filed an affidavit in reply resisting the application. Essentially, the respondent contends that all grounds relied upon by the applicants do not warrant the Court to exercise its jurisdiction to review the impugned decision as all issues complained of were adequately dealt with in the ensuing appeal and the same do not constitute grounds of review.

At the hearing of the application, the applicants appeared in person without legal representation whereas the respondent Republic was represented by Ms. Neema Mbwana, learned State Attorney.

When invited to amplify the grounds for review, both applicants adopted the contents of the notice of motion together with the supporting affidavits and preferred to let the learned State Attorney to respond first while reserving their right to rejoin, should there be the need to do so.

Ms. Mbwana strongly resisted the application by arguing that, the application has not met the threshold enshrined under Rule 66 (1) (a) and (b) of the Rules, as what has been stated in the notice of motion and applicants' affidavit cannot be determined by this Court without re-evaluating the evidence adduced 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 a long-drawn process of reasoning but rather, it should be an obvious and patent mistake.

Specifically, and in terms of the first ground for review, the learned counsel referred us to paragraphs 9 of the said affidavits and argued that, the applicants have attached the post-mortem report (exhibit P1) tendered during the trial claiming that it was corrected by the Court and invited the Court to revisit and re-assess the same despite the fact that it was considered by the Court when determining the applicants' appeal. She argued that the said defect and the nature of the alleged correction cannot be gleaned from the applicants' complaint.

To clarify further on this point, Ms. Mbwana referred us to page 17 of the impugned judgment and argued that the Court did not correct the contents of exhibit P1 as alleged by the applicants, instead, after having noted the said defect and considering other evidence on the record, it made a finding that the

pointed defect was only a slip of the pen. As such, Ms. Mbwana submitted that the first ground is unfounded.

As regards the second ground where the applicants alleged that they were denied an opportunity to be heard on account of missing record of the evidence of PW1 which prevented them to prepare grounds of appeal, Ms. Mbwana argued that, during the hearing of the appeal, the applicants were dully represented by an advocate who argued the appeal on their behalf. It was her argument that the applicants' advocate was duty bound to inspect the record of appeal and/or peruse the original record and raise such concerns prior or even during the trial. Since the applicants were represented and there is nowhere in the record and the impugned judgment indicated that the said concern was raised or the applicants complained about their advocate, they cannot be allowed to raise such complaints at this stage. In that regard, the learned counsel submitted that the applicant's claim at this stage is, nothing but an afterthought. To bolster her proposition, she cited the case of **Emmanuel Konrad Yosipati v. Republic,** Criminal Application No. 90/07 of 2019 (unreported).

To amplify further on that issue, Ms. Mbwana argued that, the Court in its own wisdom and for the purpose of meeting the ends of justice, having observed that some pages were missing, it considered the original record and

came to its final conclusion on that matter. To verify her proposition, she referred us to page 20 of the impugned judgment. She then concluded that, since all issues indicated in the applicants' grounds were adequately considered by this Court when determining the applicants' appeal and made a decision therein, it is not proper for the applicant to invite the same Court to re-asses the same on review. On the basis of her submission, she urged us to dismiss the application for lack of merit.

In his brief rejoinder, the first applicant argued that since there were missing pages in the record of appeal and their advocate inadvertently omitted to raise that concern during the trial, it was improper for the Court to consider that portion of the record at the time of composing judgment. In that regard, the first applicant urged us to review the impugned judgment and grant the prayers sought in the notice of motion.

On his part, the second applicant insisted that it was improper for the Court to correct the post-mortem report. Upon being probed by the Court as to whether the Court corrected the contents of the said exhibit, the second applicant responded that the Court did not correct the contents of exhibit P1 but after having noted the said defect, it decided that the same is only a slip of the pen. He however insisted that the application should be granted.

On our part, having examined 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.

To start with, we wish to note that the Court's power of review of its own decisions is provided for under section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (AJA). The grounds upon which a review can be sought are stated under Rule 66 (1) of the Rules. The said Rule provides that: -

> "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."*

Going by the above cited provisions, it is clear that, though the Court has power and unfettered discretion to review its own decision, the said power and discretion should be exercised within the specific benchmarks prescribed under Rule 66 (1). In the case of **Minani Evarist v. Republic,** Criminal Application

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No. 5 of 2012 (unreported) the Court while interpreting the applicability of Rule 66 (1) of the Rules stated that: -

> *"We are settled in our minds that the language of Rule 66 (1) is very clear and needs no interpolations.* ***The Court has unfettered discretion to review its judgment or order, but when it decide to exercise this jurisdiction, should not by any means open invitation to revisit the evidence and re-hear the appeal"*** *[Emphasis added].*

From the above authority and as argued by the learned counsel for the respondent, for an application of review to succeed, the applicant must satisfy one if not all the conditions stipulated under Rule 66 (1) of the Rules. It is only within the scope of that Rule that the applicant can seek the judgment of this Court to be reviewed. Therefore, the next question for our determination is whether the applicants' alleged manifest error is apparent on the face of the impugned decision.

Before venturing in responding to the said question, we find it prudent, at this juncture, to restate the meaning of the phrase *'apparent error on the face of record'* as stated by the Court in **Chandrakant Joshubhai Patel v. Republic,** [2004] TLR 218 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].

- See also **Issa Hassani Uki v. Republic,** Criminal Application No. 122/07 of 2018, **Mbijima Mpigaa and Another v. Republic**, Criminal Application No. 3 of 2011 and **Edson Simon Mwombeki v. Republic,** Criminal Application No. 06/08 of 2017 (all unreported).

It is clear from the cited cases that for an error to warrant review, it must be a patent error on the face of the record not requiring long-drawn arguments to establish it.

In the instant application, the grounds for review are predicated under Rule 66 (1) (a) and (b) where the applicants are alleging that the decision of this Court has an error on the face of record resulting in a miscarriage of justice. However, in the supporting affidavits together with their oral accounts

before us, the applicants have failed to point out the said error on the face of record, as their claims are mainly focused on the evidence adduced before the trial court and their dissatisfaction with the decision of this Court.

For instance, in clarifying their claim under the first ground for review, the applicants, under paragraph 9 of their supporting affidavits have attached a copy of the post mortem report (exhibit P1) and invited us to re-asses that document. As argued by Ms. Mbwana, this is improper because the attached document was adequately considered by this Court when determining the applicants' appeal and made a decision therein. This can be evidenced from page 17 of the impugned judgment when the Court after considering the contents of exhibit P1 concluded that: -

> *"The issue which arises from the second ground of appeal, is whether the anomaly occasioned at paragraph 7 of the post mortem examination report (P1), where it was indicated that the post mortem was conducted after the lapse of twenty -two (22) years from the death of the deceased, was fatai. In the light of the evidence that was placed before the Court through PW5, PW6 and PW7, who witnessed the exhumation of the body- of the deceased, before it was sent to the Doctor for examination, the body of the deceased had not lasted under the grave for twenty -two years. What happened to the Doctor while recording, was just a siip of the pen as opined by the learned State Attorney.*

The Court went on to state that: -

> *In regard to the question as to whether the body of the deceased was identified before examined, there was the testimony of PW6, who told the trial court that, a black bag was dug out from the earth by the appellants, and when it got unzipped a body of a human being, was seen which was identified by the wife of the deceased to be of her late husband and she started crying. As it was for the learned trial Judge, we also entertain no doubt that, the body of the deceased was identified before the post mortem was conducted by the Doctor. More so, according to the testimonies of the witnesses as corroborated by the cautioned statement of the first appellant, the deceased was killed on the eve of the 10th September, 2010, while his body was exhumed on the 30th September, 2010. We therefore find no merit in the second ground of appeal, which is also dismissed."*

Furthermore, under the second ground, the applicants in clarifying their complaint that they were not accorded the right to be heard, on account of the missing record, they again, attached the portion of the testimony of PW1 under paragraph 8 of their supporting affidavits. In her submission, Ms. Mbwana challenged the style adopted by the applicants of attaching annexures to an application of this nature as she said those documents were adequately considered by the Court while determining the appeal. To verify this point, we

have examined the impugned judgment of the Court and observed that, at page 20 of the said judgment, indeed, the Court considered the missing record of the appeal and made its finding therein. The Court said: -

> *"Going by the typed proceedings of the trial court, there is a problem in estabiishing as to when the information implicating the first appellant, with the offence of murder came to light. This is from the fact that some pages were skipped in the course of typing. Upon taking trouble of checking the records in the original hand written case file, we were able to note that, the information to the effect that the first appellant had been involved in causing death to the deceased was revealed to the police officers by the first appellant himself during midnight of 29th September, 2010, when he went to show them the place where they had buried the dead body of the deceased."*

From the above extract, we are in agreement with the submission of Ms. Mbwana that both issues raised by the applicants were adequately considered and decided upon by the Court. Re-opening the same at the point of review is to sit in another appeal of our own decision which is contrary to the spirit of Rule 66 (1). In the case of **Tanganyika Land Agency Limlted and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 2008, the Court 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."*

Furthermore, and discouraging litigants from resorting to review as disguised appeals, and underscoring the end to litigation, in **Patrick Sanga v. Republic,** Criminal Application No. 8 of 2011 we emphasized 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 judgements.*** *In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands." [emphasis added].*

As intimated above, the application before us does nothing less than inviting the Court to re-hear the appeal afresh which is contrary to the cherished public policy that litigation must come to an end. In this regard, we agree with Ms. Mbwana that the applicants herein have failed to justify the

grant of this application, as all issues they have raised were determined by this Court in their appeal. The applicants' dissatisfaction with the finding of the Court cannot be said to constitute an error apparent on the face of record so as to justify a review.

In the circumstances, and for the foregoing reasons, we see no merit in the applicants' application to warrant this Court to review its decision in Criminal Appeal No. 267 of 2017. Accordingly, this application fails in its entirety and it is hereby dismissed.

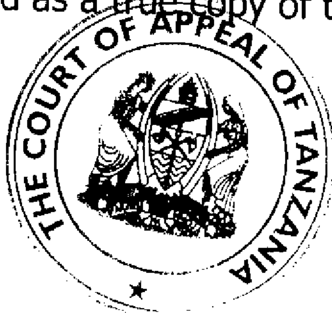
DATED at **DAR ES SALAAM** this 2nd day of July, 2021.

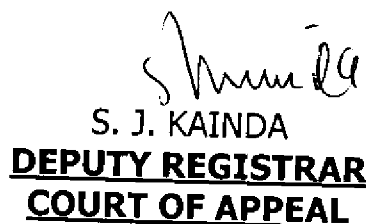
S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 6th day of July, 2021 in the presence of the applicant in person connected by video conference from Ukonga prison. And Haika Temu, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.





S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL