IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI, J.A. And KAIRO, J.A.)

CRIMINAL APPLICATION NO. 43/01 OF 2020

MUHSIN MFAUME ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mugasha, Ndika and Kitusi, JJ.A.)

dated the 25th day of April, 2020
in
Criminal Appeal No. 99 of 2012

RULING OF THE COURT

2nd & 19th July, 2021

MWAMBEGELE, J.A.:

By a Notice of Motion taken under rule 66 (1) (a), (b) and (c) of the Tanzania Court of Appeal Rules (hereinafter referred to as the Rules), the Court is moved to review its decision dated 25.04.2020 in Criminal Appeal No. 99 of 2012 delivered to the parties on 05.05.2020. The Notice of Motion is supported by an affidavit duly affirmed by Muhsin Mfaume, the applicant. It is resisted by an affidavit in reply

duly sworn by Medalakini Emmanuel; a State Attorney in the office of the respondent.

The application arises from the following brief background. Before the District Court of Kibaha at Kibaha, the applicant was arraigned for, and convicted of, the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002. He was awarded a prison term of thirty (30) years as well as twelve strokes of the cane. His first appeal to the High Court was barren of fruit. So was his final appeal to the Court. In the instant application, the applicant seeks to challenge the decision of the Court by way of review on three grounds gleaned in the notice of motion that; **one**, there is a manifest error on the face of the record resulting in the miscarriage of justice, **two**, failure to have the charge sheet on record and relying on what was reproduced in the judgment of the trial court led to miscarriage of justice and, **three**, the decision of the trial court was based on an incomplete record thus denying the applicant the right to be heard.

At the hearing of the application before us on 02.07.2021, the applicant appeared in person, unrepresented. The respondent had the services of Mr. Medalakini Emmanuel, learned State Attorney. When

we called upon the applicant to argue his application, he just reiterated what he deposed in the affidavit supporting the application. He stressed that the Court erred in entertaining the appeal without the charge sheet. That was an apparent error on the face of the record and denied him of the right to be heard, he contended. On that note, he prayed that the application should be allowed and he should be released from prison.

On the other hand, Mr. Emmanuel strenuously opposed the application. He submitted that there is no error apparent on the face of the record. Relying on our decision in **Emmanuel Kondrad Yosipita v. Republic**, Criminal Appeal No. 90 of 2019 (unreported), he submitted that the applicant is inviting the Court to rehear the appeal. The course taken by the Court to decide the appeal without the charge sheet on the record of appeal was quite apposite and did not prejudice the applicant, he contended. In the same line of reasoning, the learned State Attorney submitted that the applicant was not denied the right to be heard. He submitted that the application was preferred without any merit and implored us to dismiss it.

Before we delve into the determination of this application in earnest, we find it apt to state at this very outset of our determination

that this Court has jurisdiction to review its own decisions. This jurisdiction is derived from subsection (4) of section 4 of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA). The subsection was introduced in the AJA by the Written Laws (Miscellaneous Amendments) Act, 2016 – Act No. 3 of 2016 which came into force on 08.07.2016; the date of its publication. Prior to that, the Court's jurisdiction to review its decisions was derived from case law. It commenced with **Felix Bwogi v. Registrar of Buildings**, Civil Application No. 26 of 1989 (unreported).

Reverting to the determination of the application at hand, the applicant's complaint is essentially one, lack of the charge sheet in the record of appeal. Because of that infraction, the applicant contends that; **one**, there was an apparent error on the face of the record, **two**, there was miscarriage of justice and **three**, the record of appeal was incomplete thus denying him the right to be heard. The single issue for our determination is whether lack of the charge sheet in the record of appeal amounted to an apparent error on the face of the record resulting to miscarriage of justice, prejudiced and deprived the applicant of his right to be heard.

That the charge sheet was missing in the record of appeal is indeed apparent in the impugned judgment. However, we have serious doubts if the Court erred in deciding the appeal without it, placing reliance on its reproduction by the trial court in its judgment. And even if we agreed that the court erred, we have more serious doubts if the same can be a ground for review. If anything, the same can be a good ground of appeal. As the Court observed in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, borrowing from MULLA 14th Edition at pp. 2335-6, 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. We are therefore satisfied that the lack of the charge sheet in the record of appeal is apparent on the face of record but still the ailment is not one to move the Court exercise its review jurisdiction. It is an error which may fit well as a ground of appeal rather than a ground of review.

The second complaint is that failure to have the charge sheet in the record of appeal and relying on what was reproduced by the trial court in the judgment of the trial court led to miscarriage of justice. We are afraid, we are not prepared to hold that lack of the charge

sheet in the record of appeal occasioned injustice to the applicant. The Court addressed this issue at pp. 5 – 6:

> *"The charge was drawn under sections 130(1) (2) (e) and 131 of the Penal Code, Cap 16. These provisions create a category of rape involving victims of the age below 18 years, commonly known as statutory rape. We see nothing wrong in the charge sheet both on the statement of the offence and the particulars thereof, therefore section 135 of the Criminal Procedure Act [Cap 20 RE 2002] (the CPA) was complied with.*
>
> *However, a copy of that charge sheet is missing from the record of appeal placed before us, and the question is whether hearing of the appeal could proceed without it. When the State attorney was engaged on this issue, she took the view that in composing its judgment the trial court reproduced the charge sheet sufficiently to enable us as well as the appellant know the gist of the allegations placed at the appellant's door. The appellant, being unrepresented, did not offer much on this rather technical aspect of the case.*

On our part, we agree with the learned State Attorney that the charge was adequately reproduced by the trial court at the opening statement of its judgment, which goes thus;
"The accused person Muhsin Mfaume stands charged with the offence of Rape C/S 130 (1)(2) (e) and 131 of the Penal Code, Cap 16 as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998".
We are satisfied that the above statement represents what the charge sheet stated in substance, and it was drawn in compliance with section 135 of the CPA."

It is apparent from the foregoing excerpt that the Court discussed the point and made a decision thereon. We are thus satisfied that the lack of charge sheet in the record of appeal and the Court making its decision relying on what was reproduced by the trial court in its judgment did not prejudice the applicant.

The foregoing discussion answers the third ground of review as well, which is a complaint to the effect that by the Court deciding without the charge sheet on the record of appeal deprived the applicant of his right to be heard. The judgment of the Court in the relevant part reproduced above, bears out that the applicant was

engaged on the point as well as the learned State Attorney who represent the respondent Republic in the appeal. The learned State Attorney took the view that the reproduced charge sheet in the judgment of the trial court made the applicant as well as the respondent herein know the gist of the allegations levelled against him. However, for his part, being unrepresented and the question being rather technical, the applicant did not have any useful contribution to the probing. With this on record, we think the applicant was heard on the point. The fact that he complains in this application for review seems to us as sheer afterthought.

We are in agreement with Mr. Emmanuel that this application is an appeal in disguise. The mere fact that the applicant is not happy with the judgment of the Court would not amount to a ground of review. As we stated in **Blueline Enterprises Tanzania Limited v. East African Development Bank**, Civil Application No. 21 of 2012 (unreported), a court will not sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. We also subscribe to an unreported decision of the Appellate Division of the East African Court of Justice in **Angella**

Amudo v. The Secretary General of the East African Community, Civil Application No. 4 of 2015 in which it observed that it would be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard.

In view of what we have stated above, we find and hold that the application was filed without any justifiable ground for review. We accordingly dismiss it.

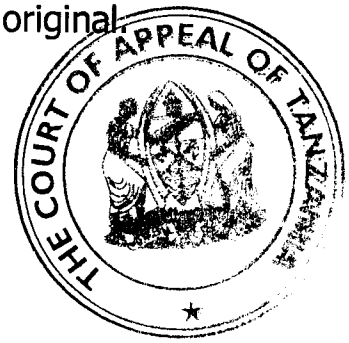
DATED at **DAR ES SALAAM** this 13th day of July, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The ruling delivered this 19th day of July, 2021 in the presence of the Applicant in person and Ms. Lilian Rwetabula, 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