**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. 54/01 OF 2020**

**HAMIS JUMA CHAUPEPO @ CHAU ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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

**(Lila, Mwangesi, Sehel, JJ.A.)**

**dated the 20th day of May, 2020**
**in**
**Criminal Appeal No. 95 of 2018**

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## RULING OF THE COURT

6th & 19th July, 2021

**MWAMBEGELE, J.A.:**

The applicant Hamis Juma Chaupepo @ Chau was convicted by the High Court of the offence of murder and sentenced to the mandatory sentence of death by hanging. His appeal to the Court was barren of fruit, for the Court dismissed it in its entirety on 20.05.2020. The applicant has this time around come to the Court seeking to assail the judgment of the Court by way of this application for review. The application has been made under the provisions of rule 66 (1) (a) of

the Tanzania Court of Appeal Rules (hereinafter referred to as the Rules). It is supported by an affidavit deposed by the applicant himself. The same is resisted by an affidavit in reply deposed by Eric Leonard Shija; a State Attorney in the office of the respondent.

When the application was placed for hearing before us on 06.07.2021, the applicant appeared in person, unrepresented. The respondent appeared through Mr. Eric Leonard Shija, learned State Attorney. Upon being called to address us on his application, the applicant simply adopted his notice of motion and the supporting affidavit and preferred to hear the response of the learned State Attorney after which, need arising, he would make his rejoinder.

Mr. Shija, having adopted the affidavit in reply as part of his oral arguments, resisted the application with some force. In his response, he put the four grounds on which the application is pegged in two clusters. He combined the first three grounds in one cluster and the fourth one in another cluster. In respect of the first three grounds; that is, grounds (a), (b) and (c), the learned State Attorney submitted that they don't fall within the scope and purview of grounds under rule 66 (1) of the Rules on which an application for review may be legally

pegged. On this premise, the learned State Attorney implored us to disregard the purported grounds for review. To buttress this proposition, he referred us to our unreported decision in **Emmanuel Kondrad Yosipati v. Republic**, Criminal Application No. 90/07 of 2019 in which we observed that grounds of appeal are not grounds for review and that an application for review must be pegged on the limbs in paragraphs (a) to (e) of Rule 66 of the Rules.

With regard to the last ground of review comprised in the second cluster which is a complaint to the effect that the applicant's right to be heard was abrogated because the supplementary memorandum of appeal was not considered by the Court, the learned State Attorney submitted that the grounds in the supplementary memorandum of appeal were abandoned during the hearing of the appeal and in lieu thereof, one ground was added with leave of the Court. Mr. Shija referred us to p. 8 of the impugned judgment where the Court so stated. He added that, after all, the applicant was virtually present in Court when his advocate so abandoned the grounds in the supplementary memorandum of appeal, so he should have raised an alarm there and then failure of which makes his complaint in the

application for review an afterthought. To reinforce this proposition, Mr. Shija referred us to our decision in **Godfrey Gabinus @ Ndimba & 2 Others v. Republic**, Criminal Application No. 91/07 of 2019 (unreported) in which we dismissed such a complaint on the ground that the applicants were present in court during which they could intimate to the Court their wish to canvass the grounds complained of. The learned State Attorney urged us to dismiss this ground.

Having submitted as above, Mr. Shija submitted that the application was filed with no scintilla of merit and implored us to dismiss it in its entirety.

In rejoinder, the applicant conceded that the first three grounds, the subject of the first cluster, do not fall under the ground enumerated by rule 66 (1) of the Rules. In the premises, he had no qualms if the Court would disregard them. However, he had a strenuous resistance against the arguments by the learned State Attorney in respect of the last ground for review. He had a series of complaints preceding his arguments in rejoinder of the last ground of review; that his advocate did not visit him in prison to prepare for the hearing of the appeal, that the meagre time allotted to their remote

conversation through video conferencing before commencement of the hearing of the appeal was not enough to air his view to his advocate, that physical consultations should have been better than remote consultations as happened etc. The applicant stuck to his guns that he was not fairly tried as the grounds in the supplementary memorandum of appeal were not considered by the Court thus denying him the right to be heard. Given the supposed shortcoming, the applicant implored us to allow the application and order that the Court hears him on the grounds in the supplementary memorandum of appeal.

Having summarized the background to the application and heard the submissions of both parties, the ball is now in our court to confront the issues of contention. We shall do that in the manner and approach opted by the learned State Attorney. We should state at the outset that, the grounds upon which an application for review may be pegged, have been set out in rule 66 (1) (a) to (e) of the Rules. For easy reference we take the liberty to reproduce them here:

*"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;*

*(c) the court's decision is a nullity; or*

*(d) the court had no jurisdiction to entertain the case;*

*(e) the judgment was procured illegally, or by fraud or perjury."*

As rightly submitted by Mr. Shija and rightly admitted by the applicant, the grounds for revision in the notice of motion under the first cluster, which are that: evidence of visual identification was not watertight, PW5 and PW6 were not credible witnesses and that the Court should have believed the applicant, do not fall under rule 66 (1) (a) to (e) of the Rules. As such, these purported grounds for review are discarded and, in consequence, we dismiss the applicant's complaint based on the first three grounds.

We now turn to consider the last complaint; the complaint to the effect that the applicant was denied the right to be heard on the grounds in the supplementary memorandum of appeal. This complaint falls under sub-rule (1) (b) of rule 66 of the Rules. For the avoidance of doubt, we understand that the applicant has not cited section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 and sub-ruie (1) (b) of rule 66 of the Rules as enabling provisions of his application. However, the fact that the gist of para 5 of the affidavit is this complaint; that he was deprived of his right to be heard on the supplementary grounds of appeal, we think the non-citation of the enabling provisions on this complaint can be glossed over. Be that as it may, we hasten to remark that with profound respect to the applicant, we find ourselves unable to comprehend his complaint that he was not heard on the grounds of the supplementary memorandum of appeal. With equal profound respect, we go along with the submissions by the learned State Attorney that the complaint sounds more of an afterthought than a genuine one. We shall demonstrate. In resolving this problem, we will do no better than reproduce what the court stated at p. 8 of the typed judgment. After the Court

reproduced the grounds of appeal filed by the applicant, it went on to state:

> *"The appellant further filed two sets of supplementary memoranda of appeal which were dropped during the hearing by Mr. Clement Kihoko, learned advocate who appeared to argue the appeal for the appellant .... Mr. Kihoko, with the leave of the Court, in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules of 2019, added one more ground of appeal, thus:-*
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> *1. The learned trial judge erred in law by committing procedural irregularities in admitting the sketch map, Exhibit PI and Post Mortem Report, Exhibit P2."*

Given the above, the judgment speaks it all that the applicant's advocate dropped the two sets of supplementary memoranda of appeal and, in their stead, with leave of the Court, added one ground shown above. We were confronted with an identical scenario in **Godfrey Gabinus @ Ndimba** (supra), the case cited to us by the respondent. In that application, like in the present, the applicants complained that they were wrongly deprived of their right to be heard

on the grounds they filed earlier on. They contended that despite being represented by an advocate, the Court should have allowed them to argue the grounds they filed along with those filed by their advocate. We observed at p. 11 of the typed ruling of the Court:

> *"The fact that the learned advocate chose to canvass the grounds he filed after the appeal had been assigned to him by the Court in accordance with rule 73(2) of the Rules could not have amounted to a wrongful deprivation of the opportunity to be heard as claimed by the applicants. In any event, since the applicants were present in Court during the hearing of the appeal, they had the right to bring to the Court's attention to their grounds of appeal had they wished to canvass them.* ***In so far as they did not express their wish to do so, their complaint cannot qualify to be a ground for invoking the Court's jurisdiction to review its decision on the alleged wrongful deprivation of the opportunity to be heard."***
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> [Emphasis added].

Adverting to the application before us, the applicant was represented and his advocate sought to abandon the two supplementary memoranda of appeal and, with leave of the Court, added one new ground. The applicant was virtually present in Court during the hearing of the appeal. If he wished to have the grounds in the supplementary memoranda of appeal canvassed, he was not precluded to do so, failure of which, we respectfully think, his belated complaint in this application is an afterthought geared at rescuing his otherwise not only capsized but also sank boat. On the authority of what we stated in **Godfrey Gabinus @ Ndimba** (supra), we are inclined to find and hold that the applicant was not wrongfully deprived of his right to be heard. Thus, this complaint does not qualify to move us to invoke our jurisdiction for review. The last ground of complaint also fails.

For the avoidance of doubt, we understand that the applicant also complained that his advocate did not visit him in prison to deliberate over the appeal. In fact, what the applicant wanted was physically meeting his advocate. This ground cannot be accepted because it is not a ground for review and, after all, the applicant

confessed that they met remotely before the hearing of the appeal by video conferencing.

In the upshot, in view of what we have endeavoured to state hereinabove, we find and hold that this application was filed with no iota of merit. It stands dismissed entirely.

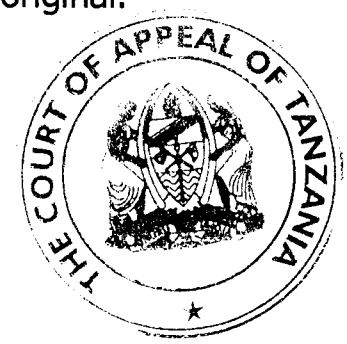
**DATED** at **DAR ES SALAAM** this 9th day of July, 2021.

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**