IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPLICATION NO. 10/1 OF 2020

THADEI MLOMO .....1ST APPLICANT
CHARLES NYIMBO @ MCHUZI MWANZALILA .....2ND APPLICANT
BEN PHILIPO SANGA.....3RD APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(An application for review of the decision of the Court of Appeal of Tanzania, at Mbeya)

(Lubuva, Nsekela and Mbarouk, JJA.,)

dated the 27th day of August, 2007
in

Criminal Appeal Nos. 99,100,101 and 102 of 1999

RULING OF THE COURT

28th June, & 19th July, 2021

MWANDAMBO, J.A.:

Thadei Mlomo, Charles Nyimbo @ Mchuzi Mwanzalila and Ben Philipo Sanga the applicants herein together with Joseph Keneth Ngole who is not a party to this application stood trial for murder before the High Court sitting at Iringa which convicted them as charged resulting into Criminal Appeal Nos. 99,100,101 and 102 of 1999. This Court (Lubuva, Nsekela and Mbarouk, JJA) sustained the appeal by Joseph Keneth Ngole but dismissed the appeals by the applicants. The Court's judgment dismissing the applicants' appeals was delivered on 27th

August, 2007. Earlier on, the applicants stood another trial of murder before the High Court sitting at Mbeya in Criminal Sessions Case No. 102 of 1990 and were convicted and sentenced accordingly. Their appeal; Criminal Appeal No. 33 of 1994 was dismissed by the Court (Ramadhani, Mfalila and Lubuva, JJA) in a judgment delivered on 9/09/1995.

Convinced that the Court did not do justice in dismissing Criminal Appeal Nos. 99,100,101 and 102 of 1999, the applicants are now before the Court with an application for review predicated under rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules). They did so after obtaining an order extending the time within which to do so. The applicants are contending that the decision dismissing their appeals was based on a manifest error on the face of the record resulting in miscarriage of justice. They have listed five grounds in support of the application reproduced verbatim hereinbelow:

(a) *That, the Court contravened the rule against bias, in that one of the members of the panel, Hon. LUBUVA, J.A presided over two appeals filed by Applicants in the Court, Criminal Appeal No. 99,100,101 and 102 of 1999 and Criminal Appeal No. 33 of 1994 which had involved the same parties and the same evidence in the same Court.*

(b) That, the Court erred in making determination based upon the statements Exh. P. 9, P. 10, P.11, P. 12, P.13 and P.14 which were res judicata, that were determined in criminal appeal No. 33 of 1994 in which the applicants were parties.

(c) That, the decision of Court of corroborative evidence of visual identification as adduced by PW6 (Rhodes Moshi) was double standard. Because at pages 20 and 21 of the judgment of the Court, that evidence was found to be of doubtful nature which cannot be called in aid to corroborate other evidence. But, on the other hand, the same evidence was found at pages 30 and 31 of the judgment of the Court to be of probative value, and was used to corroborate the retracted confessional Statements alleged to have been made by the Applicants.

(d) That, the decision of the Court as regard on Corroborate evidence of the discovery of the firearms Exh. P.1, P.2 and P.3 alleged to have been shown by the third Appellant (2nd Applicant) lacks evidential value. Because the provisions of the Criminal Procedure Act, Cap 20 R.E 2002 relating to search and seizure was not followed, in that neither search order not certificated (sic!) of seizure was produced before the Court. Worse still no independent witness testified as to that effect and nowhere it was shown on the record that Exh. P1, Exh. P 2 and P.3 were shown by the third Appellant (second Applicant).

(e) That, the decision of the Court was based on evidence which was tendered in Court by the State Attorney instead of the

testifying witness, and documentary exhibits which were not read out after being admitted in evidence.

Each of the applicants has filed a separate affidavit containing similarly worded averments in elaboration of the grounds set out in the notice of motion. The respondent resists the application through an affidavit in reply deponed to by Ms. Christine Joas learned Senior State Attorney.

At the hearing of the application, the applicants appeared in person, unrepresented. The respondent Republic had the services of Ms. Christine Joas learned Senior State Attorney together with Ms. Jacqueline Werema, learned State Attorney. It was Ms. Werema who addressed the Court after the applicants had each let the respondent submit first before they could rejoin having adopted the contents of the notice of motion and the averments in their respective affidavits.

Addressing the Court, Ms. Werema invited the Court to dismiss the application for failure to meet the threshold under rule 66 (1) (a) of the Rules under which it has been predicated. Elaborating, Ms. Werema argued that the participation of Justice Lubuva in Criminal Appeal Nos. 99, 100, 101 and 102 of 1999 on the one hand giving rise to the instant application and Criminal Appeal No. 33 of 1994 in which they were also

appellants does not constitute manifest error on the face of the record occasioning injustice warranting a review under rule 66(1) (a) of the Rules. On the other hand, the learned State Attorney argued that the complaint in ground (b) does not constitute a manifest error on the face of the record in so far as its determination on the admissibility and reliance on the documentary exhibits will involve examination of the record. At any rate, it was the learned State Attorney's submission that the complaint raised now featured in the appeals was adequately addressed in the impugned judgment as one of the grounds of appeal and so, it cannot constitute a ground of review.

With regard to grounds (c), (d) and (e), Ms. Werema argued that these are complaints which can only be raised in an appeal which is not what the Court is asked to do in this application. She cited to us our decision in **Emmanuel Kondrad Yosipati v.R,** Criminal Application No. 90/07 of 2019 (unreported) to reinforce the argument that litigation must come to an end and that review should not be used as another chance of an appeal. Ultimately, the learned State Attorney urged us to dismiss the application for failure to meet the threshold of review under rule 66 (1) (a) of the Rules.

The applicants had a chance to rejoin but, not surprisingly so, they could not address the learned State Attorney's arguments. The first applicant reiterated his attack on the participation of Justice Lubuva in two panels that heard the appeals which, according to him was prejudicial allegedly because he had influence on the outcome in the appeals whose judgment has given rise to this application. Otherwise, he stood by the complaints in the notice of motion and the founding affidavit, so did the second applicant. The third applicant had similar complaints against the participation of Justice Lubuva in the appeals. He had two other complaints; one, the Court wrongly relied on the evidence of PW9 in both cases in which he was one of the accused persons; and two, the Court applied double standard in the treatment of evidence on the basis of which, the first appellant in the consolidated appeals was acquitted. So much for the arguments for and in opposition.

Having heard the submissions and upon examination of the grounds set out in the notice of motion, the application turns for determination on three main aspects. First and foremost is the participation of Justice Lubuva in the two appeals. Secondly, the treatment of the evidence relied upon in sustaining the applicants' conviction and thirdly, the

complaint against reliance on the alleged improperly admitted documentary evidence.

Before making our determination, we find it appropriate to state the law as it relates to review of the Court's decisions premised on rule 66 (1) (a) of the Rules. It is trite law that to constitute a ground, the error complained of must not only be manifest on the face of the record but also capable of occasioning injustice. In the oft quoted ruling in **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218, this Court underscored the meaning of the phrase manifest error on the face of the record for the purpose of review to mean a patent and discernible error which can be easily seen by a person who is running and reads. Such an error must be self-evident whose determination does not require a long-drawn process of reasoning on points capable of resulting into two or more opinions. On the same stance, see also; **Mirumbe Elias Mwita v. R**, Criminal Application No. 4 of 2015, **Chacha Jerimiah Murimi v.R.** Criminal Application No. 69/08 of 2019, **Emmanuel Kondrad Yosipati v. R** Criminal Application No. 90/07 of 2019 (all unreported) to mention but a few of the Court's previous decisions reiterating the stance underscored in **Chandrakant's** case (supra).

The cases cited above also reiterate the position that review is not to be used as an appeal from the impugned decision through the back door it being the law that an error manifest on the face of the record is not the same as an erroneous decision. Whilst the former is justiciable by way of review under section 4 (4) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019], an erroneous decision on the other hand gives rise to an appeal. On this position see for instance: **Patrick Sanga v. R.** Criminal Application No. 8 of 2011, **Blue Line Enterprises Ltd v. East African Development Bank,** Civil Application No. 21 of 2012, **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 20018 (all unreported). Furthermore, it is also the law that not any error may warrant a review, and such an error must be capable of occasioning injustice to the applicant as exemplified by the Court's decisions in Charles **Barnaba v. R**, Criminal Application No. 13 of 2009, **Maulidi Fakihl Mohamed @ Mashauri v. R,** Criminal Application No. 120/07 of 2018 and **Issa Hassan Uki v. R**, Criminal Application No. 122/07 of 2018 (all unreported). We shall be guided by the above in determining the instant application.

We shall start with the complaint against the participation of Justice Lubuva in the appeals from which the instant application and Criminal No. 33 of 1994 in which the applicants were also unsuccessful appellants. The basis of the applicants' complaint is that the learned justice had an influence in the outcome of the appeal by reason of his participation in a previously decided appeal. However, there is no indication whatsoever in the affidavits that the applicants' advocates raised any objection against the participation of the learned justice in the appeal giving rise to the impugned decision. They cannot be permitted to raise it long after losing their appeals as a ground of review. In our view, this cannot be better explained than reiterating what we said in **Blue Line Enterprises Ltd v. East African Development Bank** (supra) quoting with approval from **Haystead v. Commissioner of Taxation** [1920] A.C. 155 at P. 166 thus: -

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present so as to what should be a proper apprehension, by the Court of the legal result...* ***If this were permitted litigation would have no end except when legal ingenuity is exhausted"*** *(emphasis added).*

On the basis of the above decision, the complaint is misplaced. At any rate, that complaint is misconceived in so far as it personalizes the impugned judgment with the learned justice rather than it being a judgment of the Court. We are not surprised by that complaint because we are convinced that it was made out of ignorance of the decision-making process in this Court. Happily, the Court had occasion to express itself in that in **Ahamad Chali v.R** [2006] T.L.R. 313. This was a case in which two members of the panel composed a judgment following the death of one of them after the hearing of the appeal. After a discussion on what could have been the best way forward, the Court stated at page 318:

> *"After hearing a matter there is normally a 'Conference' in Chambers where the Justices exchange views freely, respectfully, but seriously. Learned argument, and hammering out for consensus, take place. No bull-dozing, no arm - twisting. If there is dissent it is respected, not resented. If there is all - round consensus it is obtained that way. If there is no consensus there will prevail the majority view, and the written decision will so indicate. At such a Conference the Chairman of the panel is merely 'primus inter*

pares', and the only additional power he has is to assign a Justice, himself included, who will compose the decision, for the consideration of others. That decision, after approval by the others in that 'camp', is the decision of all those in that camp, owned by them and they are all responsible for it. Regarding such a decision it is therefore the height of blissful ignorance to label the composing Justice as 'liberal' or 'progressive' or 'conservative' etc. For all there is, such a Justice might have started the Conference holding a diametrically opposite view and only been converted during the course of the Conference."

From the above in the absence of evidence of bias, the complaint alleging bias merely because Justice Lubuva sat in both panels which heard and determined the applicants' appeals against them is baseless and we dismiss it.

Next we shall consider grounds (b), (c) and (d) together. These boil down to consideration and treatment of evidence. The applicants' complaint lies in the Court's alleged application of double standards in the treatment of the evidence which it relied on in convicting and acquitting their colleague, Joseph Kenneth Ngole, reliance on exhibits

P.9, P.10, P.11, P.12, P.13 and P.15 claimed to be res *judicata* having been used in Criminal Appeal No. 33 of 1994 and lack of evidence corroborating the evidence of discovery of fire arms, exhibits P1, P2 and P3 by way of seizure order and seizure certificate. There is no doubt whatsoever that neither of the complaints fits into the definition of an error manifest on the face of the record warranting a review. As rightly submitted by Ms. Werema, all of the complaints are grounds which can be taken in an appeal rather than in a review. Put it differently, they are concerned with an erroneous decision rather than an error manifest on the face of the record. Guided by the authorities referred to above, the Court has no jurisdiction to review its decision outside the parameters prescribed by rule 66(1) of the Rules.

The applicants' complaints all boil down to grounds in an appeal which the Court has frowned upon in many of its decisions including; **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggarwal** (supra) and **Patrick Sanga v. R** (supra). We find it compelling to reproduce what we stated in the latter case at page 6 as under:

> *"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."

For a similar position see also: **Tanzania Transcontinental Company Limited v. Design Partnership Limited,** Civil Application No. 62 of 1996 (unreported) we referred to recently in **Amina Maulid Ambali & 2 Others v. Ramadhani Juma**, Civil Application No. 173/08 of 2020 (unreported). That aside, it is evident from the impugned judgment that the Court dealt at length with exhibits P9, P10 P11, P12, P13, and P14 and came to a firm conclusion that the High Court rightly convicted the applicants on the basis of the impugned confessional statements. Bringing it again before the Court is tantamount to asking the Court to sit as an appellate court from its own judgment which is not what review is all about. The same applies to the complaint on the alleged lack of evidence corroborating the evidence leading to the

discovery of fire arms (exhibit P1 and P2). The Court dealt with it in its judgment as one of the grounds of appeal and dismissed it. Worth for what it is, it is not a ground of review within the meaning of it under rule 66 (1) (a) of the Rules. Finally on this category, the attack against the Court on the alleged application of double standard in the treatment of evidence is not a manifest error on the face of the record. It will require a long-drawn process to come to an opinion this way or the other. It is equally below the threshold of grounds for review under rule 66 (1) (a) of the Rules.

Finally on ground (e) faulting the reliance on the irregularly admitted evidence. We need not be detained on this ground. Firstly, it ought to have been made a ground of appeal and determined as such. Secondly, it does not constitute a manifest error on the face of it because it will require an examination of the proceedings of the trial court to determine its correctness. Finally, it militates against the rule frowning upon beginning fresh litigation each time a litigant discovers a new version which appears to be favorable to his case discussed in **Haystead v. Commissioner of Taxation** (supra). In our view, challenging the judgment of the Court rendered as far back as August, 2007; a period of 14 years now on the alleged reliance on improperly

admitted evidence is against public policy which requires that litigation must come to an end. We said so in **Patrick Sanga v. R** (supra) and considering the circumstances in the instant application we must reiterate here that litigation must have finality and that review of judgment of the final Court of the land should be an exception.

The above said, we are satisfied that the application for review is patently misconceived and we dismiss it.

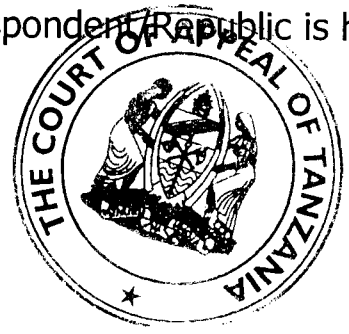
DATED at **DAR ES SALAAM** this 14th day of July, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Ruling delivered this 19th day of July, 2021 in the presence of the 1st 2nd, and 3rd applicants in person linked via-Video conference from Ukonga Prison and Ms. Lilian Rwetabule, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL