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. 68/01 OF 2020

SELEMANI NASSORO MPELI ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Mmilla, Ndika, Kitusi, JJ.A.)

dated the 27th day of July, 2020
in
Criminal Appeal No. 3 of 2018

RULING OF THE COURT

14th & 23rd July, 2021

MWAMBEGELE, J.A.:

The District Court of Rufiji sitting at Kibiti convicted the applicant Selemani Nassoro Mpeli of the offence of armed robbery contrary to section 287 of the Penal Code, Cap. 16 of the Revised Edition, 2002 and sentenced him to serve a jail term of thirty years. His first appeal to the High Court (Munisi, J.) was unsuccessful. So was his second appeal to the Court (Mmilla, Ndika and Kitusi, JJ.A).

In this application made under the provisions of section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002

and rule 66 (1) (a) of the Tanzania Court of Appeal Rules (the Rules), the applicant seeks to challenge the decision of the Court by way of review. The application is supported by an affidavit affirmed by Selemani Nassoro Mpeli, the applicant. No affidavit in reply was lodged to resist the application.

The application was argued before us on 14.07.2021 during which the applicant appeared in person, unrepresented. The respondent was represented by Mr. Adolf Verandumi, learned State Attorney. When we called upon the applicant to argue his application, he adopted the notice of motion and the supporting affidavit and preferred to hear the response of the learned State Attorney after which he would make his rejoinder if the need to do so would arise.

Responding, Mr. Verandumi, at the very outset, having been prodded by the Court, stated that as the respondent Republic did not file any affidavit in reply to resist the application, he would respond on only legal points, not on factual matters deposed in the founding affidavit. Indeed, the learned State Attorney walked the talk. He argued only one legal point that the ground for review in the notice of motion does not fall within the scope and purview of rule 66 (1) (a) of

the Rules. He clarified that the ground for review appearing in the notice of motion is that there was variance between the charge and the evidence regarding the registration number of the alleged stolen motor cycle. He submitted that the applicant deposed at para 9 of the supporting affidavit that while the charge referred to the registration number of the allegedly stolen motor cycle as T322 ABW, the evidence had it that its registration number was T322 BAW. That infraction, the learned State Attorney went on to submit, is what in the applicant's view, amounts to a manifest error on the face of the record which resulted in the miscarriage of justice.

Mr. Verandumi submitted further that the subject of this ground was one of the grounds of appeal in the Court and that the same was decided at pp. 20 - 21 of the judgment of the Court that it was not fatal and did not prejudice the applicant. He thus stated that the same cannot be a ground of review but fits to be a ground of appeal. The learned State Attorney argued that the fact that the applicant was not happy with that conclusion cannot justify a review.

Having submitted as above, the learned counsel implored us to dismiss the application in its entirety.

In a short rejoinder, the applicant reiterated his ground for review in the notice of motion and the depositions in the affidavit and prayed that his application be allowed.

Having summarized the submissions of the parties to the application, the ball now is in our court to determine the issue of contention, that is, whether there is an apparent error on the face of the record to warrant a review. However, before we do that we wish to state that the jurisdiction of the Court to review its decisions has now been provided by statute. It is provided for in section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA). Subsection (4) was added to section 4 of the AJA by the Written Laws (Miscellaneous Amendments) Act, 2016 – Act No. 3 of 2016. 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) and the jurisprudence developed ever since. The principles governing review developed by case law have now been codified in rule 66 (1) of the Rules. We reproduce rule 66 (1) hereunder with a view to coming to

grips with what is its tenor and purport, more especially rule 66 (1) (a) under which the applicant has predicated his application. It 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;*
>
> *(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 stated above, the application has been pegged on rule 66 (1) (a) of the Rules. The ground of complaint, as gleaned from the notice of motion, is that there was a variance between the charge and the evidence regarding the registration number of the alleged stolen motor cycle. As already alluded to above, the applicant deposed at para 9 of the supporting affidavit that the variance hinges on the fact that while the charge referred to the registration number of the

allegedly stolen motor cycle as T322 ABW, the evidence referred to the same motor cycle as bearing registration number T322 BAW. That constituted a manifest error on the face of the record which resulted in the miscarriage of justice, he deposed. The issue for our determination, as posed above, is whether the ailment complained of amounts to a manifest error on the face of the record which resulted in the miscarriage of justice to warrant a review. As good luck would have it, we were confronted with an identical scenario in **Thomas Mang'era Mango & Another v. Republic**, Criminal Application No. 8 of 2010 (unreported). It was an application for review like the present. The application was pegged on rule 66 (1) (a) of the Rules like the present. In that application, the applicant's complaint was to the effect that there was an apparent error on the face of the record in that, to uphold the applicant's conviction and sentence, the Court relied on the evidence of visual identification which was not watertight. We relied on our previous decision in **African Marble Company Ltd v. Tanzania Saruji Company**, Civil Application No. 132 of 2005 (unreported) to hold that the complaint did not amount to a manifest error on the face of the record.

Adverting to the matter at hand, guided by what we stated in **African Marble** (supra) and **Thomas Mang'era Mango** (supra), we hold that the variance between the charge and the evidence respecting the registration number of the alleged stolen motor cycle does not amount to a manifest error on the face of the record. At this juncture, we find it irresistible to refer to an excerpt in **MULLA: The Code of Civil Procedure,** 14th Edition, at pages 2335-6 as quoted in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 on what amounts to "a manifest error on the face of the record". The learned author stated (omitting cases cited therein):

> *"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 iong drawn process of reasoning on points on which there may conceivabiy 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 ..."

[Emphasis supplied].

In the matter before us, we are afraid, there is no such error apparent on the face of the impugned judgment. After all, the complaint was discussed in the impugned judgment and found to be baseless. Having so found, the Court observed at p. 20 of the typed judgment:

"Of course, it is appreciated that there was a slight difference in respect of the identity of exhibit PA. While the charge sheet indicated that the said motor cycle was Reg. No. T. 322 ABW make SANLG, its owner (PW1) and PW3, the policeman who collected it at Vikindu Weigh Bridge from PW4 and PW5, said it was Reg. No. T. 322 BAW make SANLG. Even, we are confident that the inconsistency was a minor defect and it did not cause any injustice to the appellant. Besides, this aspect was not cross examined upon, nor did the appellant raise any complaints to that effect in his defence."

Flowing from the above discussion, we agree with Mr. Verandumi that the fact that the applicant might have had a different conclusion cannot constitute an error apparent on the face of record to justify a review. A mere error of law is not a ground for review under rule 66 (1) of the Rules. That is to say, that a decision is erroneous in law is no ground for ordering review. We wish to reiterate the standpoint we took in **Blueline Enterprises Tanzania Limited v. East African Development Bank**, Civil Application No. 21 of 2012 (unreported) that 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.

At this juncture, we cannot resist the urge to restate what the Court stated at page 224 in **Chandrakant Joshubhai Patel** (supra) and reiterated in unreported decisions of **East African Development Bank v. Blueline Enterprises Tanzania Limited**, Civil Application No. 47 of 2010 and **Blueline Enterprises Tanzania Limited v. East African Development Bank** (supra):

"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 iest disguised appeals pass off for applications 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****. As held by the Supreme Court of India in* ***Thungabhadra Industries Ltd v. State of Andhra Pradesh****, [(1964) SC 1372]* ***a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.****"*
[Emphasis added].

The above said, we find and hold that the applicant has failed to show any apparent error in the judgment of the Court in Criminal Appeal No. 3 of 2018 dated 27.07.2020, delivered to the parties on

29.07.2020, to justify its review. This application is wanting in merit. It stands dismissed in its entirety.

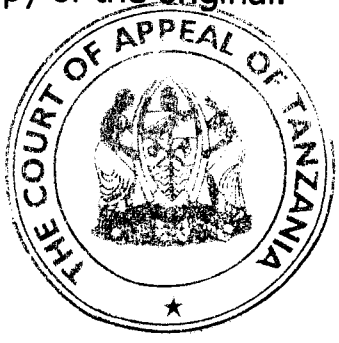
DATED at **DAR ES SALAAM** this 16th day of July, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The ruling delivered this 23rd day of July, 2021 in the presence of the Applicant in person and Mr. Selemani Nassoro Mpeli, 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