IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And KIHWELO, J.A.)

CRIMINAL APPLICATION No. 21/01 OF 2020

SAID HARUNA MAPEYO.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Review from the Judgment of the Court of Appeal of Tanzania, at Dar es Salaam)

(Mmilla, Mkuye And Mwangesi, JJ.A)

dated the 28th day of February 2020
in
Criminal Appeal No. 269 OF 2017
.....

RULING OF THE COURT

30th June & 23rd July, 2021

KIHWELO, J.A.:

In this application the Court is being asked to review its decision in Criminal Appeal Number 269 of 2017 dated 28th February 2020. The applicant, Said Haruna Mapeyo, was before the High Court sitting at Dar es Salaam convicted of murder of one Mussa Marco @Mhagama (the deceased) and sentenced to suffer death. The conviction and sentence were upheld by this Court in the decision it is sought to review by the applicant.

The applicant through a notice of motion has raised three grounds predicated upon Rule 66(1)(a)(b)(c) (2) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended ("the Rules"), that is to say the decision was based on a manifest error on the face of record resulting in the miscarriage of justice, the applicant was wrongly deprived of the right to be heard and that the Court's decision was a nullity.

The application has been supported by an affidavit of the applicant. Paragraphs 6, 7 and 8 of the supporting affidavit deal with the alleged errors. To be more precise, in paragraph 6 the applicant faults the judgment of the Court for being a nullity since it has been founded on a defective charge sheet, whereas in paragraph 7 the applicant faults the judgment of the Court for containing a lot of procedural irregularities that resulted into manifest error on the face of record which occasioned miscarriage of justice and the fact that the applicant was deprived of an opportunity to be heard.

On the other hand, the respondent Republic filed an affidavit in reply sworn by Deborah Rabiel Mushi, learned State Attorney. In essence, the respondent Republic opposed the application and denies that any of the

grounds relied upon by the applicant warrants the Court to exercise its powers of review.

At the hearing before this Court, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Deborah Rabiel Mushi, learned State Attorney. The applicant adopted the contents of the supporting affidavit without more, urging us to grant the application.

Ms. Mushi, first and foremost argued that although the applicant has predicated his application upon rule 66 of the Rules in essence the averments in the affidavit do not fall within the purview of an application for review, for they are aimed at calling upon the Court to revisit the evidence at the trial which is not what a review is all about. She went on to argue that all the grounds raised by the applicant do not qualify for a review but rather they are mere grounds of appeal which have been brought through back door. Reliance was placed in the case of **Amina Maulid Ambali and 2 Others v. Ramadhani Juma**, Civil Application No. 173/03 of 2010 (unreported) which cited the case of **Tlatla Saqware v. The Republic**, Criminal Application No.2 of 2011 (unreported) which quoted the

case of **Mirumbe Elias @ Mwita v The Republic**, Criminal Application No. 04 of 2015 (unreported).

Submitting in response to grounds 2 and 3, Ms. Mushi contended that these were new grounds which were not raised even at the second appellate court which would have been considered anyway being grounds of law. She invited this Court to visit the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of the Estate of the late Dolly Maria Eustace) and 3 Others**, Civil Application No. 314/12 of 2020 (unreported) where the Court dealt with an issue brought for review while it was not raised as a ground of appeal.

Having carefully considered the submissions, and after going through the notice of motion and the supporting affidavit as well as the affidavit in reply, it is now our turn to consider them in the light of the established principles in application for review.

Before we dwell onto the determination of this application it seems desirable that we, first, discuss the principles governing the Court's power to review its decision. This Court in the most recent case of **Hassan Ng'anzi Khalfan v. Njama Juma Mbega and Another**, Civil Application No.336/12 of 2020 discussed the powers of the Court to review its decision thus:-

"We wish, in the first place, to point out that powers of the Court to review its decision constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court becomes functus officio in that it ceases to have control over the matter and has no jurisdiction to alter or change it. Needless to overemphasize that a review is called for only where there is a glaring and patent mistake or grave error which has crept in the earlier decision by judicial fallibility. Simply stated, the finality of the decision should not be reopened or reconsidered so as to let the aggrieved party fight over again the same battle which has been fought and lost. It is obvious therefore that the court's power of review is limited."

We therefore think it is appropriate here to recapitulate briefly the provision of Rule of 66 of the Rules and more in particular Rule 66(1)(a)(b)(c) in which the applicant has, in this application confined his grievances which reads:-

"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"

Starting with what amounts to an error manifest on the face of record we wish to refer to the most celebrated case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 in which the issue was fully addressed by the full Court at page 225. Having examined several authorities on the matter, the Court adopted from Mulla on the Code of Civil Procedure (14th Ed), pages 2335-2336 the following passage:

> *"An error apparent on the face of 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 be two opinions.*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU [223]...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v Athanasius (1955) 1 SCR 520].....But it is no ground*

for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error on law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori.94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. 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 [Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]" [Emphasis added]

It was also stated in part at page 224 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."

In this regard, we are keenly aware that the above decision was decided prior to the enactment of Rule 66 of the Rules, but has remained one of the landmark cases in the interpretation of the issue of error manifest on the face of the record resulting in miscarriage of justice within the scope of Rule 66(1)(a) of the Rules. The Court in this case stressed that to constitute as reviewable error, such error must be patent on the record and not one which can be established by a long-drawn process of argument with the potential of two different opinions.

A cursory perusal of the impugned judgment in particular at page 8 it is conspicuously clear that the Court dealt at lengthy while addressing grounds 1,3 and 10 of the supplementary Memorandum of Appeal where the appellant complains that there was no plausible evidence to establish that the deceased died and the main complaint was that apart from the evidence that the found body was rotten, also that it had no head, hence the autopsy (exhibit P2) was not very helpful; DNA evidence was necessary to establish the identity of the corpse and that the identification with the aid of the clothes was doubtful. We are fortified in this view by the fact that this issue neither is an error apparent on the face of record resulting from the impugned decision nor is an erroneous decision. This is simply because the complaint is baseless owing to the fact that this issue was

dealt with well by the Court when it evaluated and analyzed the evidence of the trial court and came to the conclusion that despite admitting that the autopsy report (exhibit P2) was not helpful because examination was performed on a body which had no head and that the DNA evidence if present would have been helpful to establish whose body was, nonetheless, the Court found that there was other cogent evidence to show that the said body was that of the deceased. In any case this complaint by the applicant does not fall squarely within the scope of reviewable errors but rather a ground of appeal in disguise which is not acceptable at this juncture.

Fortunately, we have held similar position consistently in various decisions of this Court. For instance, in the case of **Rizali Rajabu v Republic**, Criminal Application No.4 of 2011 (unreported), the Court stated that:-

> *"First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if it is not reconsidered will result into a miscarriage of justice. We are alive to a well-known principle that a review is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on appeal against its own judgment in the same*

proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim – ***Interestei reipublicae ut finis litium****. (See* ***Chandrakant Joshubhai Patel v R*** *[2004] TLR 218;* ***Karim Karia v R****, Criminal Appeal No.4 of 2007 CAT (unreported)."*

In view of the foregoing position, it cannot be doubted that the first ground of the Notice of Motion by the applicant is misconceived and it fails.

Looking at the second ground, the applicant contends that he was wrongly deprived of an opportunity to be heard for the trial court's failure to summon the medical doctor who conducted post-mortem examination so that the applicant could cross-examine him. On our part, we have no hesitation that this complaint has no merit as it is not the denial of the right to be heard envisaged under the law. We think, with respect, the argument about the failure to call the medical doctor who conducted the autopsy would have been properly advanced at the hearing of the appeal, to advance it in this application is to misconceive seriously the purpose of review and to have a second bite at the appeal. The applicant is attempting to bring a ground of appeal through back door which is unacceptable in the spirit of the necessity of finality of litigation as a matter of public policy and certainty of law. See **Marcky Mhango and 684 Others v. Tanzania Shoe**

Company and Another, Civil Application No. 37 of 2003 (CAT) (unreported). Even if it was raised, still the issue as to whether or not the medical doctor was called or why he was not called is a matter that requires evidence and argument defeating the purpose of review. To that end, there was no question of the denial of the right to be heard in the decision of the Court which renders the second ground of the notice of motion a mere misconception. We dismiss it.

On the third ground, we think that this ground should not detain us much. The applicant has complained that the decision of the Court is a nullity for basing on a defective charge sheet that offends the provisions of section 135(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (now R.E. 2019). The learned State Attorney challenged this ground on the basis that this complaint was a new issue which was not raised on appeal.

With respect we think that this ground has no merit. The contention that the information was fatally defective is a complaint that ought to have been raised and canvassed on the appeal. It is evident from the impugned judgment of the Court that the said complaint was not raised. At any rate, we do not see how the alleged defect in the information could affect the validity of the Court's judgment on the appeal which was an outcome of its

exercise of competent jurisdiction in terms of section 6(1)(a) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (now R.E. 2019). The above exposition renders the third ground of the notice of motion also to lack merit.

That said and done, we find that the application for review is devoid of merit. It is accordingly dismissed.

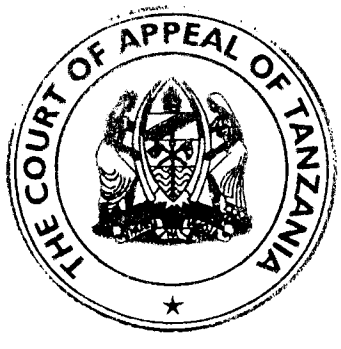
DATED at **DAR ES SALAAM** this 22nd day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 23rd day of July, 2021 in the presence of Applicant present in person linked via Video Conference at Ukonga Prison and Mr. Yusuf Aboud, State Attorney for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL