IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPLICATION NO. 46/01 OF 2020

ANANIA CLAVERY BETELA ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review from a decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mugasha, Ndika, Korosso, JJJ.A)

dated the 21st day of May, 2020
in
Criminal Appeal No. 355 of 2017

RULING OF THE COURT

2nd & 28th July, 2021
MWAMPASHI, J.A.:

This is an application by Notice of Motion brought under Rule 66(1)(a) and (b) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The applicant is moving the Court to review its own decision in Criminal Appeal No. 355 of 2017 dated 22nd of May, 2020 whereby the applicant's appeal against the High Court decision in Criminal Appeal No. 254 of 2016 was dismissed. The Notice of Motion is supported by the applicant's affidavit.

Initially the applicant was arraigned before the Resident Magistrate's Court of Coast Region at Kibaha for being found in unlawful possession of Government trophy c/s 86(1) and (2) (b) of the Wildlife Conservation Act, No. 5 of 2009 (the Act) read together with paragraph 14(d) of the First Schedule to the Act and Sections 57(1) and 60(2) of the Economic and Organised Crime Control Act, Cap. 200 RE 2002. He was convicted and sentenced to serve a period of twenty (20) years imprisonment and was also ordered to pay Tshs.1,980,000,000/= as a fine.

The applicant's first appeal before the High Court (Arufani, J) in Criminal Appeal No. 254 of 2016 was unsuccessful. His second appeal to this Court (Criminal Appeal No. 355 of 2017) was also dismissed save for the twenty years imprisonment sentence which was adjusted by the Court to the effect that the imprisonment sentence has to be served in default of payment of the fine. This application at hand is therefore predicated upon the above stated decision of the Court.

According to the Notice of Motion, the application is grounded on the following two grounds:-

1. That the decision was based on a manifest error on the face of record resulting into the miscarriage of justice as the Court:-

(a) Held that the testimony of Bakari Nyakongoa (PW2) sufficiently covered the Trophy Valuation Certificate (Exhibit P2) which was not prepared by him.

(b) Failed to hold that Exhibit P2 and Exhibit P3 (List of the tusks) were tendered by an incompetent witness since the name of PW2 and the name appearing in Exhibit P2 portray two different people.

(c) Failed to hold that PW3 and PW6 testimonial account was not sufficient to explain the handling of Exhibit P5 (28 elephant tusks) as they failed to identify the same before the court.

(d) Failed to hold that PW3 who allegedly brought Exhibit P5 to the court neither tendered the same nor did he explain to whom the said exhibit was handed over by him.

(e) Failed to hold that PW3 and PW5 were police officers who failed to comply with the provisions of section 38(1) and (3) of the Criminal Procedure Act and PGO No. 229 of which they were duty bound to adhere to.

(f) Held that failure by police officers to comply with the law which they are duty bound to adhere to can be

cured or sufficiently covered by their oral testimonies before the court.

(2) The applicant was wrongly deprived of an opportunity to be heard, in that some of grounds of appeal he raised on the supplementary memorandum of appeal were not considered and determined by the court and hence subjected to an unfair hearing.

At the hearing of the application, the applicant appeared in person and fended for himself while Ms. Jenethreza Kitaly and Ms. Edith Mauya learned State Attorneys, appeared for the respondent/Republic.

Having adopted the supporting affidavit and written submissions, the applicant opted to allow the learned State Attorney to address the Court first but reserved his right to rejoin should there be a need to do so.

Ms. Kitaly took the floor and hastened to inform the Court that she was not in support of the application because it is misconceived and baseless. She argued that Rule 66(1) of the Rules lists down grounds on which application for review should be based. It was her

submission that while on the face of the Notice of Motion, the application is grounded under Rule 66(1)(a) and (b) of the Rules, that there is an error apparent on the face of record and that the applicant was not afforded the right to be heard, in fact, what is indicated in the supporting affidavit and what is in the written submission are essentially grounds of an appeal.

Ms. Kitaly further submitted that what is an error apparent on the face of record was defined by the Court in **Chandrakant Joshubhai Patel vs. The Republic,** Criminal Application No. 120/07 of 2002 and in **Omar Mussa @Seleman @Akwishi and 2 Others vs. The Republic,** Consolidated Criminal Applications Nos 117, 118 & 119/07 of 2018 (both unreported). She contended that an error apparent on the face of record is an error that can be clearly and easily seen by one who runs and reads and not something which can be established by a long-drawn process of reasoning. She insisted that there is no such an error in the case at hand but that what the applicant is trying to do is to move the Court to sit on its own decision, which is not allowed.

As on the ground that the applicant was not afforded the right to be heard, it was Ms. Kitaly's argument that the applicant was

adequately afforded his right to be heard. She pointed out that the grounds of appeal of which it is being complained by the applicant that were not heard and determined by the Court were combined and dealt with together by the Court. She further contended that the applicant abandoned his earlier grounds and the appeal was therefore, decided on the basis of the grounds raised in the supplementary memorandum of appeal which were all canvassed and determined by the Court. Finally, Ms. Kitaly argued that although the valuation certificate (Exhibit P2) was expunged by the Court, still PW2 was a competent witness to tender the exhibit in question and his testimony was properly accepted and acted upon. She then prayed for the application to be dismissed for being baseless and misconceived.

The applicant had no much to say in rejoinder but he insisted that the Court failed to see that PW2 was not a competent witness because he was not the person who had assessed the trophies and filled the valuation certificate (Exhibit P2). He further argued that since the certificate was expunged, then PW2's evidence that was relied upon was unreliable as it came from a witness who had not assessed the value of the trophies and filled the certificate. He

contended that the certificate was not filled and the trophies were not assessed and valued by PW2 but by one Bakari Yusuph Nyakunga who did not testify. The applicant was adamant and wondered how PW2's testimony could stand after the certificate, on which his testimony was based, had been expunged.

It was also argued by the applicant that his complaints on grounds 2(ii) and 5(ii) of the supplementary memorandum of appeal; that Exhibit P5 was not identified by PW6 and also that the names in the Valuation Certificate and that of PW2, who claimed to be its author, were different, were not considered and determined by the Court. He therefore prayed for the application to be granted as he was not heard on that point thus an error apparent on the face of record.

The foregoing were the submissions for and against the application. The issue that stands before us for determination in view of the Notice of Motion and the submission made for and against the application is as to whether, when subjected to the premises of the law governing applications for review, the application has merits or not. The power of the Court to review its own decisions is given by Rule 66(1) of the Rules which provides as follows:-

"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; or

(b) a party was wrongly deprived of an opportunity to be heard; or

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

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

(e) the jurisdiction was procured illegally, or by fraud or perjury.

As we have earlier on pointed out, the application at hand is premised under two grounds prescribed in sub rule 1(a) and (b) of Rule 66 of the Rules. The said two grounds are firstly that the decision sought to be reviewed is based on a manifest error on the face of record resulting in the miscarriage of justice and secondly that the applicant was wrongly deprived of an opportunity to be heard. It should also be emphasized at this very stage that, for an application for review to be successful based on the first ground, the applicant must not only establish that a decision of the Court was

based on a manifest error on the face of record but he must also establish that the error resulted in the miscarriage of justice.

In determining the first ground on whether or not the decision sought to be reviewed is based on a manifest error on the face of record, we are obliged to first appraise ourselves on what does the phrase "a manifest error on the face of record" mean. Luckily, the phrase has already been defined by the Court in a countless of cases including **Tanganyika Land Agency Limited and 7 Others vs Manohar Lal Aggrwal**, Civil Application No. 17 of 2008, **John Kashindye vs. Republic**, Criminal Appeal No. 16 of 2014, **Masudi Said Seleman vs. R,** Criminal Application No. 92/07 of 2019 (all unreported) and **Chandrakant Joshubhai Patel** (supra) to mention but a few.

In **Tanganyika Land Agency Limited and 7 Others** (supra) the Court defined the phrase "a manifest error on the face of record" as follows:-

> *".... must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinion".*

In his attempt to convince the Court that there is an apparent error on the face of record, the applicant argued that the Court erred in holding firstly, that PW2's evidence covered what was contained in the Valuation Certificate (Exhibit P2) which was, however, not prepared by him. Secondly, he argued that the Court erred in holding that Exhibit P3 was properly tendered by PW2. It was also the applicant's contention that the Court misdirected itself when it held that the contents of the expunged exhibits were sufficiently covered by oral evidence from PW2, PW3, PW5 and PW6 and also that their evidence sufficiently explained the handling of the tusks in question. He also complained that the Court erred in giving weight to PW6's evidence despite the fact that the said witness did not identify the tusks.

As correctly argued by the learned State Attorney, we do not find that the applicant's complaints, as above pointed out, establish or constitute any manifest error on the face of record. First of all, PW2's competence in tendering Exhibit P3 in evidence was sufficiently considered by the Court. The Court did also accord credence to PW2's oral evidence relating to the value of the tusks in question despite the fact that the valuation certificate had been

expunged. The issue whether in so holding the Court erred or not, is an issue that can be established by long-drawn process and it is not a fit ground that can be raised as a ground for review. Likewise, the fact that the Court concluded that the testimonial accounts of PW2, PW3, PW5 and PW6 sufficiently explained the handling of Exhibit P5 or that PW6's evidence was relevant even though he was not led to identify Exhibit P5, do not amount to an apparent error on the face of record. It is trite principle of law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. (see **Goodluck Kyando vs. R** [2006]TLR 363).

Further, an examination of paragraphs 8, 9,10,11, 12 and 13 of the supporting affidavit clearly show that the applicant is asking the Court to re-assess evidence and sit as an appellate court on its own decision. In **EX F. 5842 D/C Maduhu vs. Director of Public Prosecutions**, Criminal Application No. 46/06 of 2019 (unreported), this Court stated that:-

> *"As submitted by the learned State Attorney, the move by the applicant was aimed at inviting us to re-evaluate the evidence which is not the essence of a review".*

The applicant's complaints and the grounds raised in support of his application that there is a manifest error on the face of record, do also express nothing else but the applicant's dissatisfaction with the findings and holdings of the Court, which, as alluded above, cannot constitute a ground for review. In **Shadrack Balinago vs. Fikiri Mohamed @ Hamza and 2 Others**, Civil Application No. 25/8 of 2019 (unreported), the Court stressed on the position that a mere dissatisfaction with a court decision does not constitute an apparent error on the face of record, by stating that:-

> *"Such a ground is unacceptable, as it amounts to asking the Court to sit in its own appeal. Where an applicant for review is dissatisfied with the judgment of the court, the said fact is not sufficient to deserve a review of the judgment of the Court. The judgment of the court may contain some minor errors here and there, ... but that is not a justification for seeking review".*

Further in **Omar Mussa @ Selemani @ Akwishi and 2 Others**(supra) the Court reiterated what was stated in **Patrick Sanga vs. Republic**, Criminal Application No. 8 of 2011 (unreported) thus:-

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigations, be*

it in civil or criminal proceedings. A call to re- assess the evidence, in our respectful opinion, is an appeal through a 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, litigations must have finality and a judgment of the final court in the land is final and its review should be an exception. That what sound public policy demand".

If we may add to the above remarks of the Court, the application at hand is yet another application amidst many other applications of this nature. There has emerged a growing trend, mainly in criminal matters, for every losing party in the Court, to come back to the Court and try to challenge decisions of the Court by way of review under Rule 66(1) of the Rules. It is hight time for the Court to again remind such parties that review is a remedy of which its grounds are strictly limited to the grounds listed under Rule 66(1) of the Rules. In review a party aggrieved by a decision of the Court has no wide freedom and scope in challenging the decision as it is in appeal. We therefore find the first ground for review to have no merit.

As on the second ground on which the applicant is complaining that he was deprived of the right to be heard, the thrust of his

argument is that the Court did not address his complaints on grounds 2(ii) and 5(ii) in his supplementary memorandum of appeal. In the two above mentioned grounds, the complaints by the applicant were, firstly, that PW6 was not led to identify Exhibit P5 and secondly, that the name of the wildlife officer who assessed the tusks and who filled and issued the valuation certificate (Exhibit P2) differs from the name of PW2 who claimed to be the one who had issued the same. The Court does not agree with the applicant that he was not heard or that the said grounds were not determined by the Court. As correctly submitted by the learned State Attorneys, the grounds allegedly not dealt with by the Court were combined and argued together with other complaints on other grounds of appeal.

To justify the point that all grounds raised by the applicant were considered by the Court, we have revisited and examined the impugned judgment of the Court and observed that at page 6 of the judgment, indeed the Court combined the grounds of appeal as raised in the applicant's supplementary memorandum of appeal and dealt with them together. Hereunder, is what the Court observed:-

> *"In his oral argument, the appellant quite understandably abandoned the original memorandum but adopted and focused on the contents of his supplementary Memorandum of Appeal*

whose thrust is the following complaints; ***One****, that the chain of custody of the supposedly seized tusks was broken. Two, that Exhibits P.2, P.3, P.6 and P.10 were not read out in court after they were admitted in evidence.* ***Three,*** *that the tusks (Exhibit P.5) were wrongly admitted by PW2 having failed to lay the foundation on how they came into possession before tendering them in evidence.* ***Four****, that there was no proof that PW2 was gazetted officer competent to examine and assess the value of the tusks. And* ***finally****, that the appellant being a first offender ought to have received a milder sentence".*

The applicant's complaint that he was not heard is founded on the arguments, among others, that his complaints in regard to PW2 not being the one who had issued Exhibit P2 and in regard to the expunged Exhibits P2 and P3, were not discussed and determined by the Court. This complaint is also unfounded because the issues were considered by the Court as it can be clearly seen on page 13 of the judgment where the Court concluded that even after Exhibits P2, P3, P6 and P10 had been expunged, the contents of the expunged exhibits were sufficiently covered by the testimonies of PW2, PW3, PW5 and PW6.

Again, in regards of the handling and chain of custody of Exhibit P3, the Court on page 17 of the judgment extensively and sufficiently dealt with the issue and it was concluded that:-

> *"Certainly, in the instant case there was no chronological documentation or paper trail showing the seizure, custody, control, transfer, analysis and disposition of the tusks, nonetheless, the testimonial accounts of PW2, PW3, PW5 and PW6 sufficiently explained the handling of the tusks from their seizure to exhibition at the trial. As we held in (supra), elephant tusks constitute an item that cannot change hands easily and thus it cannot be easily altered, swapped or tampered with".*

Basing on the above observations and extracts from the impugned judgment of the Court, we are in full agreement with the submissions made by the learned State Attorney for the respondent/Republic, that the issues that were raised in the appeal by the applicant were adequately considered and decided upon by the Court. The applicant cannot be heard complaining that he was deprived of his right to be heard and the second ground for review is therefore also devoid of merit.

In the final analysis and on the above reasons and observations we find this application baseless and with no merit and we accordingly dismiss it.

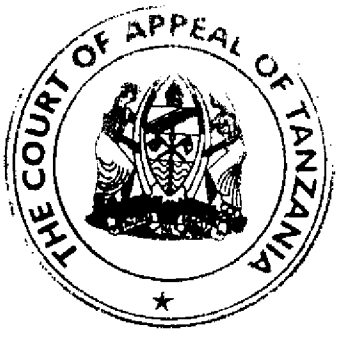
DATED at **DAR ES SALAAM** this 26th day of July, 2021.

A.G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 28th day of July, 2021 in the presence of the Applicant in person linked via video conference facility at Ukonga Prison and Ms. Cecilia Shelly, Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL