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. 64/01 OF 2020

JUMANNE KILONGOLA @ ASKOFU.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review of the decision of Court of Appeal of Tanzania at Dar es Salaam)
(Mmilla, Mwangesi and Ndika, JJA.)

dated the 29th day of June, 2020
in
Criminal Appeal No. 9 of 2016

.....

RULING OF THE COURT

12th July & 5th August, 2021

KAIRO, J.A.:

This is an application for review of the judgment of this Court in Criminal Appeal No. 9 of 2016 which dismissed consolidated Criminal Appeals Nos. 47 and 48 of the High Court, both of 2014.

The application is brought under Rule 66 (1) (a) and (b) of the Court of Appeal Rules, 2009 and is supported by an affidavit and supplementary affidavit affirmed by Jumanne Kilongola @ Askofu, the applicant. The applicant has raised the following grounds in his notice of motion: -

1. *That the decision was based on a manifest error on the face of the judgment resulting into miscarriage of justice, and*
2. *That the applicant was wrongly deprived of an opportunity to be heard for being denied a right to make his rejoinder.*

A brief background of facts leading to this application as obtained from the applicant's affidavits is that the applicant and five other persons were charged and convicted before the Resident Magistrate's court of Kilimanjaro Region at Moshi on two counts of conspiracy to commit an offence c/s 384 and armed robbery c/s 287A, both of the Penal Code [cap 16 RE 2002]. He was sentenced to serve a term of two and thirty-years imprisonment for the first and second counts respectively which was ordered to run concurrently. The applicant was aggrieved by the trial magistrate's decision and appealed to the High Court at Moshi in consolidated Criminal Appeals No. 47 and 48 whereby the he was partly successful in that his conviction on the first count was quashed and the two years sentence set aside while the conviction and sentence in the second count were upheld., but failed. Still aggrieved by the High Court decision, the applicant lodged an appeal in this Court via Criminal Appeal No. 9 of 2016 but again he was unsuccessful. The Court (Mmilla, Mwangesi and

Ndika, JJA) dismissed the appeal for want of merit against the applicant, among others. Undaunted, the applicant is now before the Court seeking review raising the above stated grounds predicated on rule 66 (1) (a) and (b) of the Rules.

At the hearing of the application, the applicant was self-represented while Mr. Martenus Marandu, Principal State Attorney assisted by Mr. Ladislaus Komanya, learned State Attorney represented the respondent /Republic.

The applicant has exhibited his complaints in paragraphs four and five of the affidavits together with paragraph five of his supplementary affidavit. In his brief affidavit in reply, Mr. Marandu generally refuted all of the grounds raised by the applicant.

When invited to address the Court on his raised grounds for review, the applicant adopted the contents of his affidavit and with leave of the Court lodged his supplementary affidavit under rule 49 (2) of the Rules.

The applicant argued that there is manifest a error as the Court in its judgment at pages 41- 42, indicates that PW2; one Dora Godfrey testified that the vehicle used by the bandits had registration No. ARL 583 but the trial record does not support such contention as the witness did not mention the registration number of the motor vehicle. He referred us to

the testimony of PW2 which is attached to the supplementary affidavit to justify his contention. He argued that since his conviction was based on circumstantial evidence, the Court's finding which was not supported by the evidence rendered the chain link broken. He argued this to be an error on the face of the judgment which has resulted into the miscarriage of justice as he was consequently convicted and sentenced which justifies a review by the Court.

In relation to the second ground, the applicant faulted the Court for denying him a chance to make his rejoinder after the State Attorney finalized his submission. He argued that, under the circumstances, he was denied an opportunity to be heard and that made him continue with the sentence illegally.

In response, Mr. Marandu strongly resisted the application arguing that it has not met the threshold stipulated under Rule 66 (1) (a) and (b) of the Rules. He refuted the presence of any error as alleged by the applicant since the motor vehicle registration Number ARL 583 was stated in the Court judgment. He referred us to the case of **Thobias Mange'ra Mango and Shukurani Masengenya Mango V. Republic**, Criminal Application No. 8 of 2010 (unreported) underscoring the principles governing review. Relying on the cited case, Mr. Marandu argued that the

applicant has not shown any manifest error to move the Court to review its decision. Challenging the applicant's complaint that he was not given an opportunity to make his rejoinder, thus denied right to be heard, Mr. Marandu contended that, he was present during the proceedings of the impugned decision and that the applicant was availed with a chance to respond after the prosecution side submitted. When probed as to which page of the record specifically shows that the applicant responded to the prosecution's submission, the learned counsel conceded that there is no specific area in the judgment which expressively so states, but argued that the impression of the applicant rejoining can be obtained when the judgment is read in its totality. He clarified by giving examples at page 42 of the Court's judgment when the applicant denied to be involved in the armed robbery at issue but did not deny his extravagant expenditure when asked by the Court. He further referred us to page 44 as another example when the applicant was asked with regard to contradiction observed in his *alibi* defence by the Court and remained silent. It was Mr. Marandu's conclusion that, the Court probed the applicant after the prosecution finalized its submission, that is when and how the applicant made his rejoinder, and as such, the applicant's complaint is baseless. He wound up his submission contending that the applicant has not made a case to justify a review and implored us to dismiss the application.

In rejoinder, the applicant insisted that he was not given the chance to rejoin as nowhere in the judgment it was so recorded. He wondered as to how this Court being a court of record could omit to show that he was given the opportunity to make his rejoinder. The applicant concluded by asking the Court to allow his application or in alternative, order the case file be reverted to the Court for him to make his rejoinder.

Having examined the notice of motion, the written and oral submissions advanced by both parties, we are now in a position to determine the main issue that is, whether the grounds advanced by the applicant justify the review of the Court's decision in this application.

Section 4(4) of the Appellate Jurisdiction Act, Cap 141 (AJA) empowers the Court to review its own decision provided the said powers are exercised within the benchmark provided under Rule 66(1) in the circumstances where;

> *"(a) the decision is 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; or*
> *(d) the court had no jurisdiction to entertain the case*

(e) The judgment was procured illegally or by fraud or perjury."

As earlier stated, the applicant has hinged the grounds for review on: **one**; manifest error on the face of the record resulting to miscarriage of justice and **two**; wrongly deprived of an opportunity to be heard. We find it imperative to start our discussion with what constitutes an error manifest on the face of record envisaged under rule 66 (1) (a) of the Rules. The phrase was discussed in the case of **Chandrakant Joshubhai Patel V. Republic** [2004] TLR 218 wherein the Court stated: -

> *"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 long-drawn process of reasoning on points on which there may conceivably two opinions ... It must further be an error apparent on the face of record..." at page 225.*

In amplifying the said error, the applicant is complaining on these factors; **one;** documentary exhibits were objected as were not read over in court as procedurally required. **Two;** that the exhibits were uncorroborated, unsatisfactory, unreliable and incredible. Before determining the complaints, we wish to state that, the applicant did not describe the specific exhibits he is referring to in his affidavit. However,

upon examining the Court's decision under scrutiny we noted that the applicant previously raised a similar complaint at the Court which was paraphrased as hereunder: -

> *"(4) improper and/or illegal admission of exhibits that were used to implicate him (the applicant) to the charged offence"*

Our further examination of the Court's judgment reveals that the complaint raised was conclusively determined by the Court at page 41-42 of the Record of Appeal. As such, raising it again in this application amounts to inviting the Courts to sit and determine an appeal from its own decision which is not within the purview of rule 66(1). We have stated times and again that in review jurisdiction, a mere disagreement with the judgment cannot be a ground for invoking the same. As long as the point has already been dealt with and determined, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under review jurisdiction as we resolved in the case of **Blue Line Enterprises Ltd V. The East African Development Bank (EADB),** Civil Application No. 219 of 2012 (unreported). A similar stance was taken in the case of **Minani Evarist V. Republic,** Criminal Application No. 5 of 2012 (unreported) wherein the Court while interpreting the applicability of Rule 66 (1) of the Rules relied on its previous decision in **Exavery Malata**

V. Republic, Criminal Appeal No. 3 of 2013 (unreported) to state the following;

> *"We are settled in our minds that the language of Rule 66(1) is very clear and need no interpolations.* ***The Court has unfettered discretion to review its judgment or order, but when it decides to exercise this jurisdiction, it should not by any means open invitation to revisit the evidence and re- hear the appeal."*** *(Emphasis ours)*

The applicant has also faulted the Court's decision in paragraph five of the supplementary affidavit contenting that PW2 did not mention the registration number of the vehicle used by bandits during the armed robbery as was stated in the Court's judgment and thus the chain link leading to his conviction was broken. To verify his contention, he referred us to the annexure to the supplementary affidavit. We wish to restate that; the error that are subject for review should be plain and clear. It means the error has to be looked at the judgment subject to review and not another document. Revisiting another document as the applicant invites us to do is not within the realm of rule 66 (1) (a). Our scrutiny of the arguments clearly shows that the complaint dictates evaluation of evidence, as such, the applicant seeks this court to re-hear the appeal which amounts to overturn our decision which we have no jurisdiction to

do as we stated in the case of **George Mwanyingili V. The DPP;** Criminal Application No. 27/6 of 2019 (unreported).

That apart and without prejudice, the applicant has not established how such alleged error resulted into miscarriage of justice, which is another precondition prescribed under Rule 66(1) (a)- see **Emmanuel Kondrad Yosipati V. Republic;** Criminal Application No. 90/07 of 2019 (unreported). We have also observed that the complaint was not heard and determined by the Court, and thus we take it to be an afterthought. In our view, the complaints pointed out under this ground, being capable of drawing two opinions, fit more as grounds of appeal rather than review. We are thus not ready to accept the invitation to re-hear the appeal extended by the applicant. Besides, no miscarriage of justice has been occasioned to the applicant.

The second complaint by the applicant is hinged on Rule 66 (1) (b). The gist of the complaint is that he was not given the right to make his rejoinder after the prosecutor finalised his submission, thus deprived him of an opportunity to be heard. The contention was refuted by Mr. Marandu. Admittedly, there is nowhere in the Court's judgment where there is an express indication that the applicant was invited to make his rejoinder. Nevertheless, the arguments for and against the grounds of

appeal were all considered by the Court in its decision and cannot be reconsidered in review. This was emphasized in the case **Golden Globe International Services Ltd and Another V. Millicom Tanzania N. V and 4 others**, Civil Application No. 441/01/2018 (unreported) wherein he quoted an excerpt from Autodesk Inc. V. Dyson (No 2) – 1993 HeA 6; 1993 176 LR 300 cited in **Ottu on behalf of P.L. Asenga & 106 others V. Ami (Tanzania) Limited;** Civil Application No. 20 of 2014 (unreported) as follows:

> *"iii) It must be emphasized however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court, nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspect as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re argue their case".*

We thus endorse Mr. Marandu's arguments that though no express word in the judgment showing that the applicant re-joined, but through reading it as a whole, we are convinced that the applicant made his rejoinder after Mr. Marandu's submissions.

Before we finalize, we wish to restate our view that, the lodging of this application was just geared to invite the Court to re-hear the appeal whilst the Court has no jurisdiction to do so.

In the light of the foregoing, therefore, we find no merit in any of the grounds raised to warrant the Court exercise its discretion to review its decision. The application therefore fails and we accordingly dismiss it in its entirety.

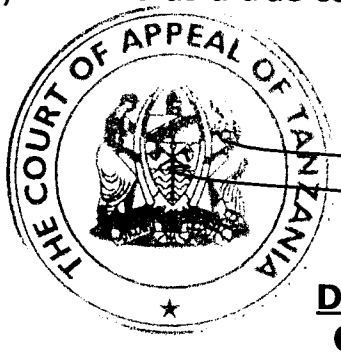
DATED at **DAR ES SALAAM** this 3rd day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 5th day of August, 2021 in the presence of the applicant in person through Video facility from Ukonga Prison and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL