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. 45/01 OF 2019

MICHAEL JAIROS.....1ST APPLICANT

BONIFACE MFUMBE .....2ND APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Ramadhani, Munuo And Nsekela, JJ.A.)

Dated the 25th day of September, 2003
in
Criminal Appeal No. 53 of 1999

RULING OF THE COURT

9th July & 5th August, 2021

WAMBALI, J.A.:

Michael Jairos and Boniface Mfumbe, the first and second applicants respectively appeared before the High Court (Manento, J. as he then was), where they were jointly charged with the murder of one Abdulaziz Sadiki.

It was alleged during the trial in Criminal Sessions Case No.96 of 1996 that on 2nd December, 1995 at Makundi Village within Morogoro District and Region, the applicants jointly murdered the deceased, an allegation they strongly disputed. Nevertheless, after a full trial, the trail court convicted them of the offence and imposed a sentence of death by hanging.

Unfortunately, their desire to be set free was not fulfilled as their appeal to this Court, namely, Criminal Appeal No. 53 of 1999 was dismissed in its entirety on 25th September, 2003. That was not the end of the road for the applicants in seeking justice as on 4th July, 2019, almost after seventeen years of that decision, they lodged the present application, urging the Court to review it.

The application which is through a notice of motion is premised on Rule 66(1) (a) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by two affidavits of the applicants which are identical both in form and substance.

Particularly, the application is centred on the following paraphrased grounds of review: -

1. *That the decision of the Court was based on manifest error on the face of the record resulting in miscarriage of justice as the post mortem report concerning the cause and proof of death of the deceased was unprocedural tendered without complying with the provisions of section 240 (3) of the Criminal Procedure Act which required summoning of the examining doctor to appear for a cross-examination.*

2. *That the decision of the Court was based on manifest error on the face of the record in terms of the provisions of section 192 (4) of the Criminal Procedure Act and the Accelerated Trial and Disposal Rules, 1988 as the Post*

Mortem Report was admitted at the Preliminary Hearing without being read out and explained to the applicants at the trial."

The application is strongly contested by the respondent Republic through an affidavit in reply lodged in Court earlier on.

At the hearing of the application, the applicants entered appearance in person, with no legal representation. They did not wish to explain further on the application as they firmly adopted their grounds in the notice of motion as amplified in the supporting affidavits and urged the Court to allow the application in its entirety.

The applicants' stand allowed the respondent Republic's counsel, namely, Mr. Adolf Verandumi assisted by Ms. Mossie Kaima both learned State Attorneys to respond to their application as presented before the Court.

In his spirited submission, Mr. Verandumi characterized the applicants' grounds of review as unfounded for failure to meet the requirement of the law prescribed under Rule 66(1) (a) of the Rules. He submitted that though the contention of the applicant in both grounds concerns a manifest error on the face of the record allegedly occasioning injustice, they have failed to show in the supporting affidavits the alleged omission committed by the Court to entitle it to decide in their favour.

The learned State Attorney added that according to the record of the application for review, the issues raised in the two grounds were not part of the grounds of appeal before the Court and thus not subject of the decision being impugned for containing a manifest error. Mr. Verandumi maintained that the grounds preferred by the applicants are suited for being argued on appeal and not in an application for review. To support his contention, he made reference to the decision of the Court in **Juma Luluba v. The Republic**, Criminal Application No. 69/01 of 2017 (unreported) in which a decision of the erstwhile Court of Appeal for East Africa in **Lakhamshi Brothers Limited v. R. Raja Sons** [1966] E.A. 313 was acknowledged to the effect that: -

> *"In review the Court should not sit on appeal against its own judgment in the same proceedings. In a review the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention to what clearly would have been the intention of the Court had some matter not been in advertently omitted."*

In the end, Mr. Verandumi implored the Court to dismiss the application in its entirety for lacking merit.

At this juncture, the crucial issue for our determination is whether the applicants have made up a case to justify a review of the decision of the Court dated 25th September, 2003.

We wish to preface our deliberation by emphasizing the settled position that for the applicant to satisfactorily convince the Court to review its judgment on account of an error apparent on the face of the record in terms of Rule 66 (1) (a) of the Rules, he must show specifically that the error is apparent and clear without requiring long drawn arguments or reasoning. For this position see for instance the decision of the Court in **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R 218 in which an excerpt from Mulla, 14th Edition at pages 2335-36 to the following effect was cited with approval thus: -

> *"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 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 to 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..."*

Moreover, for a successful application for review under the provisions of Rule 66 (1) (a) of the Rules, it must be demonstrated that the error

apparent on the face of the record must be capable of occasioning miscarriage of justice to the applicant.

In the present application, having considered the grounds of review we have referred above, we have no hesitation to state that they do not constitute manifest errors on the face of the record which are apparent in the judgment of the Court under scrutiny. This is so because the complaint on failure to summon the doctor for cross-examination at the trial and failure to read out the postmortem report (exhibit P1) during the preliminary hearing before it was relied into evidence is of no consequence to the applicants' conviction and sentence. We note from the record of the application that the complaint on the mishandling of the post mortem report at the preliminary hearing and the trial was not part of the grounds of appeal in Criminal Appeal No.53 of 1999 whose judgment is the subject of the instant application for review.

Apparently, according to the impugned judgment the major complaints of the appellants as reflected at page 4 were two, to wit; the invalidity of identification parade and failure of the prosecution to prove the case against them beyond reasonable doubt. It is further not disputed that the Court dealt at length with the said complaints and in the end it found them to lack merit and dismissed the appeal in its entirety. Thus even if the complaint on the handling of the postmortem report could have been raised,

considered and determined by the Court and the said exhibit ultimately expunged from the record, as the applicant would wish, yet that was not the only piece of evidence to prove that death occurred and that those who caused it were none other than the applicants. A thorough perusal of the impugned judgment indicates that there was ample evidence that the Court relied to come to the conclusion that the death of the deceased was caused by severe injury which was inflicted by the matchet that was found lying by the body of the deceased.

It is settled law that the postmortem report is not the only piece of evidence to be relied upon to prove the cause of death. It is in this regard that in a situation like this in **Bombo Tomola v. The Republic** [1980] T.L.R 254, the Court emphasized that even without the postmortem report, cause of death could be proved by other evidence. Besides, in the present matter, even in the absence of the post mortem report, we are settled that no injustice was caused on the part of appellant in view of the other evidence that was adduced at the trial, upheld by the first appellate court and affirmed by the Court on appeal.

In the circumstances, since the appellant did not bring to the attention of the Court the complaints on the handling of the post mortem report concerning non-adherence to sections 291 (3) and 192 (4) of the CPA during the preliminary hearing and trial, it cannot be categorized as an

error apparent on the face of the impugned judgment of the Court as the applicants have unfortunately failed to demonstrate to that effect.

Moreover, we wish to remark that the reliance of the applicants on the provisions of section 240 (3) of the CPA as the one which was breached is wrong as that is particularly applicable in trials before the subordinate courts. The proper provision under consideration should have been section 291 (3) of CPA for trials before the High Court. Nonetheless, as we have observed above the complaints in the two grounds are unmerited even if a proper provision would have been indicated and relied upon by the applicants.

Be that as it may, at this point we wish to reiterate what we stated in **Mirumbe Elias @Mwita v. The Republic**, Criminal Application No.4 of 2015 (unreported) that an application for review should not be invoked by parties as a backdoor method for unsuccessful appellants to reargue their appeal on matters which were not placed before the Court. Indeed, in **Patrick Sanga v. The Republic,** Criminal Application No.8 of 2011 (unreported), we quoted with approval the observation in **Haystead v. Commissioner of Taxation** [1920] A.C.155 at page 166 where Lord Shaw stated that: -

> *"Parties are not permitted to begin fresh litigation because of new view 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 inequity is exhausted."

The above decision was also followed by the Court in **Chacha Jeremia Murimi and 3 others v. The Republic,** Criminal Application No.69 of 2019 and **Emmanuel Kondrad Yosipati v. The Republic,** Criminal Application No.90/07 of 2019 (both unreported).

In the present application, we are satisfied that as the complaints in the two grounds were not raised during the hearing of the appeal, the applicants are trying to re-argue the appeal through a back door which is not permitted. If this is allowed the Court will be sitting on appeal against its own judgment. In essence, this is not the purpose of review envisaged under section 4 (4) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and Rule 66 (1) of the Rules.

On the other hand, we must state that despite the failure of the applicants to show in their affidavits the apparent errors on the face of the judgment in terms of Rule 66 (1) (a) of the Rules, they have also completely failed to indicate how they were not given the opportunity to be heard and how the decision of the Court is a nullity in terms of Rule 66 (1) (b) and (c) as indicated in the notice of motion. It is unfortunate that apart from the indication of the said relevant provisions to be relied upon in an application for review in the notice of motion, the applicants have said nothing in the

grounds of review rephrased above and the supporting affidavits. Indeed, they did not say anything during the hearing of the application. Their complaints on the respective provisions, therefore, remain unsupported and we disregard them.

All in all, considering our deliberation above, we entirely agree with the submission by the learned State Attorney for the respondent Republic that the application for review is baseless and thus the complaints remain to be an afterthought.

Consequently, we are constrained to dismiss the application in its entirety as we hereby do.

DATED at **DAR ES SALAAM** this 2nd day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of August, 2021 in the presence of the applicants 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