IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPLICATION NO. 17/04 OF 2020

1. SABATO THABITI
2. BENJAMINI THABITI ..... **APPLICANTS**

VERSUS

THE REPUBLIC..... **RESPONDENT**

(Application for Review from the Judgment of the Court of Appeal of Tanzania at Bukoba)

(Mmilla, Mziray, And Kwariko, JJ.A.)

Dated the 4th day of December, 2019
in
Criminal Appeal No. 441 of 2018

.....

RULING OF THE COURT

20th & 27th August, 2021

KENTE, J.A.:

Sabato Thabit and Benjamin Thabit, who are siblings (henceforth the first and second applicant respectively), were convicted of murder by the High Court of Tanzania sitting at Bukoba and subsequently sentenced to the mandatory death sentence. They unsuccessfully appealed to this Court (Mmilla, Mziray and Kwariko,JJA) in Criminal Appeal No. 441 of 2018. The present application is for review of the judgment of the Court which finally

brought down the curtain on the applicants' relentless efforts to protest their innocence.

The application is predicated under Rule 66 (1) (a), (b) and (e) of the Court of Appeal Rules, 2019 (the Court Rules) and is supported by an affidavit jointly sworn by the applicants. Notably, the applicants had raised six grounds of complaint in the Notice of Motion but, at the hearing, they abandoned the first, second, third and fourth grounds and decided to argue the application relying on the fifth and sixth grounds only. For ease of reference, whereas in the fifth ground, the applicants are complaining that the impugned judgment of the Court was procured illegally and that the Court failed to note that the trial High Court Judge did not indicate that the punishment for the offence of murder is provided for under section 197 of the Penal Code, in the sixth ground, the applicants are faulting the judgment of the Court for allegedly not taking into account that, the sketchmap of the crime scene (Exh. P3) was not signed and certified by the trial Judge. Apart from the applicants deponing in their jointly sworn affidavit that they were the appellants in the above-mentioned Criminal Appeal case and that, before the said appeal, they were the accused in respect of Criminal Sessions Case No. 68 of 2015 before the High Court, they did not say anything substantive

in relation to what is contended in the Notice of Motion. Instead, they promised that they would expound on their grounds of complaint during the hearing of the application.

Before us, the applicants appeared in person to argue the application without any legal representation. On the other hand, Ms. Happiness Makungu and Ms. Suzane Masule both learned State Attorneys appeared to represent the respondent Republic. At the outset, after having adopted the material contents in the Notice of Motion and the supporting affidavit, the applicants indicated their desire to hear the submissions in reply by the learned State Attorney before they could come forward to make rejoinder submissions in support of the application.

Submitting in opposition of the application, Ms. Makungu maintained that, the grounds of complaint cited by the appliants did not meet any of the benchmarks for review as envisaged under Rule 66 (1) of the Court Rules. The learned State Attorney contended that, almost all the grounds cited in the Notice of Motion, were canvassed and the issues arising therefore finally resolved by the Court in its impugned judgment. She thus challenged the applicants for invoking Rule 66 (1) of the Court Rules to pursue what she called *"a disguised appeal."* The learned State Attorney referred us to the

unreported cases of **Juma Mzee v. Republic,** Criminal Application No. 88/07 of 2019 and **Selemani Nasoro Mpeli v. Republic,** Criminal Appeal No. 68/01 of 2020 in support of her position.

Notably, in **Juma Mzee** (supra), among other things, we relied on our previous decision in **Chandrakant Joshubhai Patel v. R** [2004] T.L.R. 218 and consequently declined to allow the application as, in our view, it represented many others in which the applicants would wish the Court to sit again as an appellate court on its own decisions. The learned State Attorney was of the stance that, the application before us is devoid of merit and she therefore urged us to dismiss it.

Having heard the learned State Attorney, it was the applicants' turn to substantiate their grievances. In essence however, they had nothing substantial to expound on their grounds of complaint. After deciding to abandon the first, second, third and fourth grounds, they complained that the Court strayed into error when it dismissed their appeal and upheld the decision of the High Court in total disregard of the fact that, section 197 of the Penal Code which provides for the punishment for murder was not cited in the information initiating their trial. They also complained that the sketchmap of the crime scene (Exh. P3) was not signed and certified by the

learned trial Judge of the High Court during the trial. On the basis of these grounds, they prayed for the application to be allowed, but without saying anything on what should be the way forward in event of the application being allowed.

As it will be noted at once, Rule 4 (4) of the Appellate Jurisdiction Act CCap. 141 R.E. 2019), empowers the Court to review its own decision where it is proved under Rule 66 (1) (e), that the said judgment was procured illegally, or by fraud or perjury. However, the Court Rules do not define the phrase *"procured illegally"* but plainly speaking, it simply means, obtained in a way or manner that is contrary to, or forbidden by law.

In view of the above definition, one would have expected the applicants at the hearing of the application, to demonstrate, how the impugned judgment of the Court was procured illegally. While we recognize that, being lay persons they could hardly comprehend and make use of the above-cited law, we are of the respectful view that their complaint on that aspect, is totally misconceived. For all purposes and intents, the applicants' first ground of complaint appears to be a ground of appeal which has been brought to us in a camouflage way. The same applies to the complaint raised in the sixth ground. For, it is obvious that the applicants, being aggrieved

by the impugned decision of the Court, they thought that they could make use of the provisions of Rule 66 (1) of the Court Rules to have that decision overturned. It is on this kind of thinking and approach by some desperate and disgruntled litigants who are aggrieved by the outcomes of the appeals to this Court that we now turn our attention.

In all applications of the present nature, it is important to keep in mind that, the criteria for entertaining such an application, are clearly provided under Rule 66 (1) (a), (b), (c), (d) and (e) of the Court, Rules which, for ease of reference, we take liberty to reproduce as hereunder:

> *"The Court may review its judgment or order, but no application for review will be entertained except on the following grounds namely that:*
>
> *a) The decision was based on a manifest error on the face of 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;*
>
> *d) The court had no jurisdiction to entertain the case*
>
> *e) The judgment was procured illegally, or by fraud or perjury."*

A careful reading of Rule 66 (1) as a whole, reveals that, as opposed to the thinking and misconception of the increasing number of litigants, the review jurisdiction of the Court is limited in scope. In **Mirumbe Elias @ Mwita v. Republic**, Criminal Application No. 4 of 2015 (unreported), commenting on the said limitation, we observed that:

> *"This is reflected in the principles governing the exercise of review as established by case law in our jurisdiction and from various jurisdictions"*

We went on to observe in **Mirumbe Elias** (supra) that:

> *"**One,** the principle underlying a review is that the Court would not have acted as it had, if all the circumstances had been known (see **Atilio v. Mbowe** [1970] HCD n. 3. **Two**, a judgment of the final court is final and review of such judgment is an exception (see **Blueline Enterprises Ltd v. The East African Development Bank** (EADB), Civil Application No. 21 of 2012. **Three**, in review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge*

the impugned judgment in the guise that an alternative view is possible under the review jurisdiction (see ***Blueline Enterprises Ltd v. The East African Development Bank*** *(EADB), (supra) and* ***Kamlesh Varma v. Mayawati and Others****, Review Application No. 453 of 2013, EAC).* ***Four,*** *the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case . . .* ***Five****, the power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law . . ."*

With regard to the reason as to why should the judgment of the final court of the land be final and that it should not be easily disturbed except for a strong reason, we held in **Marcky Mhango and 684 Others v. Tanzania Shoe Company and Another**, Civil Application No. 90 of 1999 (unreported) that:

"There can be no certainty if decisions can be varied at any time at the pressure of the losing party and the machinery of justice as an institution would be brought into question"

(see also **Exavery Malata v. Republic**, Criminal Appeal No. 3 of 2013 (unreported).

Reverting to the present application, the applicants are complaining but without showing that, how the impugned decision of the Court was obtained illegally. Assuming that, indeed the information for murder which initiated their trial, did not refer to section 197 of the Penal Code which prescribes the mandatory death sentence for murder and that the learned trial Judge of the High Court did not certify as true and sign the sketchmap of the crime-scene, would these complaints be sufficient grounds to warrant a review? Definitely, the answer to the above-posed question is in the negative. We think, with respect, these are the complaints which ought to have been raised at the hearing of the appeal and not as the grounds in support of the application for review. We are saying so because, we are mindful of the position of the law that, while exercising the review jurisdiction conferred upon this Court under section 4 (4) of the Appellate Jurisdiction Act (supra) the rule of the thumb is that, we have no jurisdiction to reconstitute ourselves into another appellate court and purport to confirm or overturn our own decision. This is a major thread to be discerned throughout our various judicial pronouncements and it is the surest guard against uncertainty of the court decisions.

It follows therefore that, if we are to stick to the principles underlying the exercise of our review jurisdiction both in civil and criminal cases as we should, it behoves us to find and hold as we hereby do that, the applicants in the present case have failed to demonstrate to us how the impugned decision of the Court in Criminal Appeal No. 441 of 2018 was procured illegally as to warrant a review. We accordingly, find the application to have no merit and, in consequence, we dismiss it in its entirety.

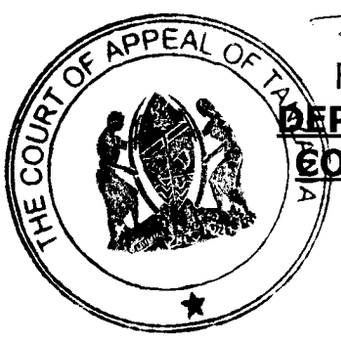
DATED at **BUKOBA** this 26th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 27th day of August, 2021 in the presence of Mr. Juma Mahona, learned State Attorney for the Respondent/Republic and 1st and 2nd Applicants in person hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL