IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: JUMA CJ., MWAMBEGELE, J.A., And KENTE, J.A.)

CRIMINAL APPLICATION NO. 19/04 OF 2020

UMALO MUSSA ..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Arising from the Judgment of the Court of Appeal of Tanzania at Mwanza)

(Nsekela, Kileo, And Othman., JJA.)

Dated the 22th day of May, 2009
in
Criminal Appeal No. 150 of 2005

.....

RULING OF THE COURT

24th & 27th August, 2021

KENTE, J.A.:

The background giving rise to this application for review, may be set out briefly as follows. The applicant Umalo Mussa, was charged before the High Court (sitting at Bukoba), with the offence of murder, contrary to section 196 of the Penal Code. Upon conviction, he was sentenced to suffer death by hanging. His appeal to this Court against conviction and sentences was dismissed on 22nd

May, 2009 (Nsekela, Kileo, and Othman, JJA). Believing that there was sufficient ground to support review, by way of Notice of Motion dated 7th November, 2019, the appellant lodged the current application moving the Court under Rule 66(1) (a) (c) and (e) of the Court of Appeal Rules (the Court Rules), to review its own decision on the grounds that:

1. *The impugned decision of the Court was based on manifest error on the face of the record;*
2. *He was wrongly deprived of the opportunity to be heard; and*
3. *The impugned decision of the Court was procured illegally.*

When this application was called for hearing, the applicant appeared in person to prosecute his case. On the other hand, Mr. Juma Mahona, learned State Attorney represented the respondent Republic. At the outset, Mr. Mahona rose and informed the Court that, he had lodged a Notice of Preliminary objection pursuant to Rule 107(1) of the Court Rules, citing two grounds of complaint, thus:

a) *The jurat of attestation in the applicant's affidavit is incurably defective for violating section 10 of the Oath and Statutory Declaration, Act, Chapter 34 Revised Edition 2019: and;*

b) *The applicant's affidavit is incurably defective for containing prayers.*

Following this, we sought to find out from Mr. Mahona, but, as it turned out, he could not lead any evidence showing that indeed the applicant was served with the said Notice of objection at least three clear days before the hearing as required by (Rule 107 (1) of the Court Rules which provides that:-

> *"A respondent intending to rely upon a preliminary objection to the hearing of the appeal or application shall give the appellant or applicant three clear days notice thereof before hearing, setting out the grounds of objection such as the specific law, principle or decision relief upon, and shall file five copies of the notice with the Registrar within the same time and copies of the law or decision as the case may be, shall be attached to the notice."*

Besides, it appears to us that the Notice of objection relied upon by Mr. Mahoma, was not duly filed in Court as it does not indicate the date of its lodgment and, what is more, it was neither stamped nor endorsed by the Registrar or any other authorized officer of the Court to acknowledge its receipt and filing, as required by law.

Rule 18 of the Court Rules provides that:

> *"Whenever any document is lodged in the Registry, sub-registry of the Court, or in the registry of the High Court, or tribunal under or in accordance with these Rules, the registrar or Deputy Registrar, or the Registrar of the High Court or any other officer of the Court appointed for that purpose, as the case may be, shall forthwith cause it to be endorsed, showing the date and time when it was lodged."*

Given the defects contained in the notice of objection purportedly filed by the respondent, we are of the view that, in a

proper sense, there is no objection worth of determination by the Court. We say so, notwithstanding the course of action taken by Mr. Mahoma in his steadfast arguments in support of the preliminary objection. As a matter of general principle, the Court cannot entertain a notice of preliminary objection which was lodged in total violation of the mandatory provisions of Rule 18 and 107 (1) of the Court Rules. In the circumstances, we agree with the applicant who expressed his misgivings about the way the notice of objection found its way into the court's record without being served on him.

The combined effect of our finding with regard to the Notice of Preliminary Objection filed by the respondent is that, the same is not properly before the Court as to warrant our attention. Therefore in the next part of this ruling we shall proceed to consider and determine the application on merit.

With regard to the first ground of complaint as presented by the applicant, the issue is whether or not the impugned decision of the Court proceeded from, or contained an apparent error on the face of the record which resulted into a miscarriage of justice. In his brief submissions, the applicant sought to point out the alleged error by contending that, in its judgment, the Court ought to have realized

that he was convicted by the trial court while there was no indication that section 197 of the Penal Code which prescribes the sentence for murder, was cited along with section 196 in the information which charged him with murder. As for the second and third grounds of complaint, the applicant had nothing substantial to say. In his unquestionably misguided understanding and belief, he submitted that, under Rule 66 (1) of the Court Rules, the Court is mandated to re-sit on its own judgment and reconsider the appeal afresh. He therefore implored us to allow the application for allegedly being meritorious.

In reaction, Mr. Mahoma submitted generally that, the grounds cited by the applicant in support of the application did not attain the threshold for purposes of review as envisaged under Rule 66 (1) (a) (c) and (e) of the Court Rules. The learned State Attorney told the Court that, having gone through the impugned judgment of the Court, he could not discern any of the defects raised by the applicant which would form the basis of review. He referred us to the case of **Mirumbe Elias @ Mwita v. Republic,** Criminal Appeal No. 4 of 2015 (unreported) with regard to the principles underlying review. Mr. Mahoma pinned down his case by submitting that, the

applicant had cited the grounds for review which are essentially intended to attack the decision of the Court and therefore, the present application is an appeal in disguise. He urged the Court to dismiss the application as otherwise, we cannot sit as an appellate Court on a matter which we have already heard and finally determined.

It is common ground that, pursuant to section 4(4) of the Appellate Jurisdiction Act, (supra) the Court has the power to revise its own decisions. But the said power is exercisable subject to the provisions of Rule 66 (1) of the Court Rules which provides in unequivocal terms that:

> *"The Court may review its judgments or order, but no application for review shall be entertained exception 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;*
>
> *(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."

According to the applicant, there are two limbs of the manifest error on the face of the record in this case. **One,** that the information which was lodged in court to commence the charges against him, did not disclose the time when the charged offence was committed and **two,** the applicant seems to complain that there was a problem with the assessors who sat with the trial Judge of the High Court. However, the applicant could not disclose the nature of the said problem. As for the complaint that he was wrongly deprived of the opportunity to be heard, the applicant is alleging in the Notice of Motion that, the Court did not raise *suo mottu* the question as to why the provisions of section 231 (a) and (b) of the Criminal Procedure Act [Cap 20 R.E 2002 now R.E 2009] were not complied with by the trial Court. Finally, the applicant challenged the Court for allegedly failing to discover the illegality which was committed by the trial court when it failed to indicate that the punishment for the offence of murder is prescribed under section 197 of the Penal Code.

Given the above criticisms against the judgment of the Court, the question that calls for determination is whether, any of the three grounds of complaint as raised and expounded on by the applicant out of his scanty understanding of the law, if proved, would fall under the purview of Rule 66 (1) (a) (c) and (e) of the Court Rules as to form the basis of review.

With due respect, having revisited the applicable law, we are in total disagreement with the applicant. The complaints that the information lodged in the High Court did not disclose the time when the charged offence was committed and the alleged problem with the assessors who sat with the trial Judge, if any, are matters which fall under the scope of either the trial court or this Court, upon appeal. They cannot be raised and considered as grounds in support of an application for review. Similarly, are the complaints that the provisions of section 231 (a) and (b) of the CPA were not complied with by the trial Judge and that the trial Judge did not indicate that the offence of murder of which the applicant was convicted, was punishable under section 197 of the Penal Code.

As we have been observing, time after time, the review jurisdiction of the Court is not a backstairs way for the unsuccessful

litigants to revive and re-argue their case and for that reason, a mere discontent with the judgment of the Court cannot form the basis of a review under Rule 66 (1). (see also **Mirumbe Elias @ Mwita** (supra). We need also to emphasize here that, the review jurisdiction of the Court was meant to cater for the rarest and deserving cases which meet the specific benchmarks stipulated in Rule 66 (1) of the Court Rules. (see **James @ Shadrack Mkulingwa & Another v. Republic,** Criminal Appeal No. 1 of 2012 (unreported).

However, as the matters stand today, contrary to what we have observed hereinabove, there is a general misapprehension of the law which seems to be catching fast among the litigants that, after one has finally lost a Criminal appeal before this Court, he can successfully come back and apply for review based on either in appreciable or belatedly raised grounds. In our respectful view, the surmise that the applicant in the instant case is most probably one of such litigants, is not far from correct. Perhaps, it should be restated here, as it was held in the unreported case of **Karim Ramadhani v. Republic,** Criminal Application No. 25 of 2012 that, the Court shall not entertain an appeal against its own judgment.

In conclusion therefore, we find nothing in the applicant's grounds of complaint which can be said to be sufficient to warrant review of the judgment of the Court in Criminal Appeal No. 150 of 2005. We are satisfied on the whole that, the application before us has no merit and, we accordingly dismiss it in its entirety.

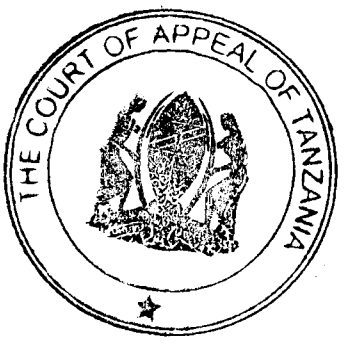
DATED at **BUKOBA** this 26th day of August, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence Mr. Juna Mahona, learned State Attorney for the Respondent/Republic of the Appellant in person, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL