IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPLICATION NO. 01 OF 2019

BENEDICT BUYOBE @ BENE..... APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review of the decision of the Court of Appeal of Tanzania at Tabora

(Mussa, Lila And Mwambegele, JJ.A.)

Dated the 19th day of November, 2018
in
Criminal Appeal No. 354 of 2016

RULING OF THE COURT

23rd & 27th August, 2021

WAMBALI, JA.:

The applicant, Benedict Buyobe @ Bene stood charged before the District Court of Maswa with an offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, [Cap 16 R. E. 2002] [now R. E. 2019].

It was alleged by the prosecution in the particulars of the offence that on 23rd of February 2014, at Malampaka Village, within Maswa District, the applicant raped a girl aged nine years. Though the applicant firmly disputed the allegations in his defence, the trial court was satisfied that the prosecution case was proved beyond reasonable

doubt. Consequently, the applicant was convicted as charged and sentenced to a term of thirty years imprisonment. The appellant's attempt to appeal to the High Court in DC Criminal Appeal No.13 of 2015 was fruitless, as the same was dismissed and in addition the sentence meted by the trial court was enhanced to life imprisonment.

In a quest to prove that he was innocent on the contention that he was wrongly convicted and sentenced, the appellant unsuccessfully appealed to this Court in Criminal Appeal No.354 of 2016. The decision of this Court dismissing the applicant's second appeal is the subject of the instant application for review.

The application is by way of notice of motion predicated under Rule 66 (1)(a) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by the affidavit duly sworn by the applicant. Basically, the application is based on the following grounds: -

> *"(i) The decision of Court was based on a manifest error apparent on the face of the record which resulted in miscarriage of justice, and;*
> *(ii) That the decision of the Court was a nullity for being arrived at based on the proceedings which was nullity ab initio".*

To support the above grounds, the applicant has relied on the following particulars:-

1. *That the trial court did not read over and explain the substance of the charge to the applicant before the first witnesses for the prosecution started testifying (page 10-11 of the record of appeal).*
2. *That although it is clear that the applicant's plea was taken during preliminary hearing which was conducted on 17.4.2014 the record is amply clear that on 21.5.2014 (page 10-11 of the record of appeal) the trial court did not read the charge to him when trial commenced therefore he was not called upon to plead.*
3. *That the omission alluded to in paragraph 2 above is fatal for offending sections 228(1), (3) and 229 (1) of Cap 20 R. E. 2002 and that non-compliance renders the trial a nullity.*
4. *That this Court dismissed the applicant's appeal for being wholly bereft of merit (page 10-11 of the judgment of the Court last paragraph) which is indeed a manifest error.*
5. *That this Court in the case of Noache Olembile v. R (1993) TLR held that failure to arraign the accused by putting the substance of the charge to him and his plea taken before the trial court proceeds to record evidence is fatal and renders the trial a nullity.*
6. *That a similar holding was followed by the Court in the case of (Cheko Yahaya v. R,*

Criminal Appeal No.179 of 2013 and added that the omission constituted an unfair trial.

7. *That the right to a fair trial is enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.*
8. *That it is also the law that a decision of the Court reached upon a denial of the accused's right to fair trial cannot stand.*
9. *That by the time this Court pronounced its decision in the applicant's appeal namely Criminal Appeal No.354 of 2016 it had not departed from its decision in many of the cases in similar predicaments such as* ***Noache Olembile*** *(supra) and* ***Cheko Yahaya.***

It is noteworthy that the applicant's grounds are further expounded in paragraphs five, six, seven and eight of the affidavit thus:-

"5. That while contemplating on the decision of the Court (A1) I noted a manifest error on the same prompting me to prepare an application before the Court seeking to move the Court to correct the miscarriage of justice occasioned by this manifest error.

6. That the judgment of the Court (A1) was based on a manifest error which occasioned injustice on my part in that the Court did not note that I was not accorded a fair trial at the time I was tried before the trial court.

7. That the error stated on paragraph 6 of this affidavit is apparent on page 10-11 of the record of appeal.

8. That reading through A1, it shows that the error stated in paragraph 6 above escaped the Court's otherwise always keen eye."

It is from the above grounds, particulars and the respective paragraphs of the affidavit that the applicant seeks to move the Court to review its own judgment.

In response to the applicant's application, the respondent lodged the affidavit in reply in Court contesting the applicant's contention that there is an error on the face of the record and that the judgment of the Court is a nullity.

When the application was called on for hearing, the applicant entered appearance in person, with no legal representation whereas on the adversary side, Ms. Salome Mbughuni, learned Senior State Attorney, Ms. Mercy Ngowi and Ms. Caroline Mushi both learned State Attorneys appeared for the respondent Republic.

When we invited the applicant to submit in support of the application, he had nothing substantial to add as he essentially urged the Court to consider his grounds for review in the notice of motion as

expounded by the particulars and his affidavit and allow his application. Thereafter, he opted to let the counsel for the respondent to reply to his grounds, but retained the right to rejoin if the need arose.

Responding on behalf of the respondent Republic, Ms. Ngowi spiritedly, resisted the applicant's application on the contention that the grounds in the notice of motion do not fall within the ambits of Rule 66 (1) (a) and (c) of the Rules. She stated that it is apparent that the applicant's major complaint is that the charge was not read over to him before the trial commenced and that he was not called upon to plead as required by law. In the premises, she argued that the particulars in support of the grounds for review make reference to the record of appeal which is not before the Court, for what is before the Court is the judgment of the Court, the subject of the instant application for review.

Ms. Ngowi further argued that the complaints of the applicant in the particulars supporting the two grounds of review in the notice of motion were not before the Court during the hearing and determination of the appeal. In short, she argued, the applicant has brought new complaints which were not before the Court and that this amounts to an invitation to this Court to sit as an appellate court over its own judgment. To support her contention, Ms. Ngowi referred us to the

decision of this Court in **Mashaka Mussa v. The Republic**, Criminal Application No.10/01 of 2018 (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."*

To this end, Ms. Ngowi submitted that as the applicant has completely failed to show any error apparent on the face of the judgment which would have occasioned miscarriage of justice, we should find that the application has no merit and ultimately dismiss it in its entirety.

Rejoining the submission of Ms. Ngowi, the applicant reiterated his earlier submission that the application has merit as he has demonstrated through the grounds and particulars that the judgment of the Court contains apparent errors occasioning injustice and that it is therefore a nullity. He thus prayed the Court to allow the application.

We have carefully heard and considered the rival submissions of the parties for and against the application. We think the crucial issue for determination is whether the applicant's grounds suffice to move the Court to review its own decision dated 19th November, 2018.

It is settled law that for this Court to review its own decision, the grounds in support of the application for review must specifically comply with the dictates of Rule 66 of the Rules.

It is obvious from the record of application that the applicant's grounds are mainly pegged on Rule 66(1) (a) and (c). Notably, the applicant contends that the judgment of the Court is based on manifest error apparent on the face of record which resulted in miscarriage of justice and that the same is a nullity. However, upon a close scrutiny of the applicant's grounds and particulars in the notice of motion and the supporting affidavit, we have no hesitation to state that there is no evidence of the alleged errors on the judgment of the Court.

Moreover, our perusal of the impugned judgment indicates that the complaints of the applicant in the notice of motion were not before this Court during the hearing of the appeal as per the memorandum of appeal. To demonstrate our observation, it is appropriate at this

juncture to reproduce the applicant's grounds of appeal before this Court as they appear at pages 5-6 of the judgment of the Court: -

1. *That the trial and first appellate court had grossly erred in law and fact by disregarded (sic) the identification of the appellant through unfairly conducted identification parade which was/is a crucial issue in determining/resolving the case under the instant appeal.*
2. *That the trial and first appellate court had wrongly relied on incredible witnesses i. e PW7, victim, whose evidence was rather dragged and or succumbing to pressure by the PW's so unworthy belief.*
3. *That the PW1, victim's failure to mention her rapist at the earliest possible opportunities i.e. PW2 and PW3, renders the prosecution case to be shaky.*
4. *That the first appellate court erred when ignored (sic) the incurable intricacies between PW5 and PW1 and PW2, pertaining when the crime was committed as well as the time the suspect was mentioned as the rapist.*

Admittedly, the above reproduced applicant's complaints in the particulars in the notice of motion are not among the grounds of appeal raised during the appeal before this Court. On the other hand, we are settled that all the grounds of appeal were fully settled by the Court in its judgment and we think that is why the applicant has not complained

on the substance of what was decided by the Court in his second appeal. Particularly, we take note of the fact that even the fourth ground (reproduced above) which concerned complaint on the variance between the testimony of the prosecution witnesses and the charge with regard to the date of the commission of the offence was fully dealt with by the Court as reflected at pages 8-9 of the judgment. In the premises, it seems to us that by introducing the issue of the alleged failure of the trial court to read over the charge to him before the prosecution witnesses started to testify, the appellant is inviting the Court to sit as an appellate court over an issue which was not brought to its attention (see **Charles Barnaba v. The Republic**, Criminal Application No.13 of 2009 (unreported)). This invitation, we hasten to state, cannot be accepted as it is contrary to the requirement of the law. We wish to emphasize that in this application as the grounds of the applicant are that there is an error apparent on the face of the record and that the decision of the Court is a nullity, he is duty bound to justify his contention instead of introducing a new issue which essentially requires the Court deal with new grounds which were not raised before the first appellate court and this Court. In this regard, in **Tanganyika Land Agency Limited and 7 Othersv. Manohar Lal Aggrawal,** Civil Application No.17 of 2008 (unreported), the Court stated that: -

"An application for review is by no means an appeal through a back door whereby an erroneous decision is reheard and corrected at the instance of a litigant who becomes aggrieved by such a decision".

Notably, in the **Tanganyika Land Agency Limited and 7 Others** (supra) decision, the Court relied on an Indian case of **M/S Thunga Bhadra Industries Limited v. The Government of Andra Pradesh,** AIR 1964 SC 1372 in which at page 1377 it was stated that: -

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for the patent error. We do not consider that this furnishes a suitable occasion for dealing with difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stare one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out".

To be fair, in the instant application, we have no hesitation to state that the applicant has not shown any manifest error on the face of the judgment which would have attracted us to review it. Equally, he has

not sufficiently demonstrated that the Court's judgment is a nullity. We must emphasize that in an application for review, the applicant is required to 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. More particularly, the Court with approval referred to an excerpt from Mulla, 14th Edition at pages 2335-36 which is to the following effect: -

> *"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 is capable of occasioning miscarriage of justice to the applicant.

On the contrary, in the instant application, apart from the failure of the applicant to show the errors apparent on the face of the record, he has failed to show how the alleged error, if any, has resulted in the miscarriage of justice. What he has done, we observe, is to bring a fresh matter concerning the proceedings of the trial court which was not brought to the attention of the Court during the hearing of the appeal.

To this end, in **Patrick Sanga v. The Republic,** Criminal Application No.8 of 2011 (unreported), the Court 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).

From the foregoing deliberation, as the applicant has simply and persistently pegged his complaints on the issue of the failure of the trial court to read over the charge to him which was not among his complaints before the first appellate court and the Court during the hearing of the appeal, we are settled that the applicant's grounds and the supporting particulars in the notice of motion and the affidavit which do not show the alleged manifest errors on the face of the judgment have no basis to justify a review of the Court's judgment. Basically, we have no doubt that the applicant has failed to prove that there was miscarriage of justice. To be precise, the complaint of the applicant in paragraph 4 of the particulars in support of the grounds that the fact that in its judgment *"This Court dismissed the applicant's appeal for being wholly bereft of merit is indeed a manifest error",* does not in our settled opinion support his desire to have the decision reviewed. Similarly, we find that the applicant has totally failed to show how the judgment of the Court was a nullity as required under Rule 66 (1) (c) of the Rules. Indeed, the complaint that he was not given a right to be heard is unfounded as he has failed to link that complaint with the specific part of the decision of the Court.

In the circumstances, we entirely agree with the learned State Attorney for the respondent Republic that the applicant's application has no merits. We say so because; the applicant's grounds are not fit to be grounds for review and thus his complaints which are predicated under the provisions of Rule 66 (1) (a) and (c) remain unsupported. We therefore find that the application has no merit.

In the result, we are left with no other option than to dismiss the application in its entirety, as we hereby do.

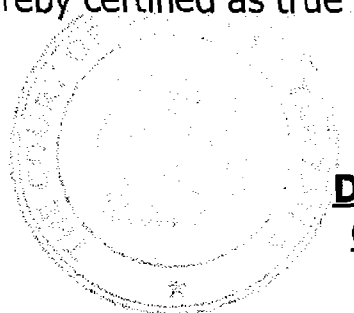
DATED at **DAR ES SALAAM** this 25th day of August, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Jairo assisted by Ms. Wampumbulya Shani, learned State Attorneys for Respondent/Republic, is hereby certified as true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL