IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And KENTE, J.A.)

CRIMINAL APPLICATION NO. 22/01 OF 2020

SALEHE SIASA.....APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Lila, Wambali, Korosso JJ.A)

Dated 12th day of March, 2020
in
Criminal Appeal No. 281 of 2017

RULING OF THE COURT

30th June, & 14th September, 2021

KENTE, J.A.:

The applicant Saleh Siasa was arraigned before the District Court of Kisarawe for armed robbery contrary to section 287A of the **Penal Code chapter 16 Revised Edition 2002.** He was convicted and sentenced to thirty (30) years imprisonment. Deeply aggrieved by the decision of the trial court he unsuccessfully appealed to the High Court of Tanzania sitting at Dar es Salaam. Still convinced that he was innocent, he appealed to this Court in Criminal Appeal No. 281 of 2017 but once again, his appeal was dismissed by the Court. (Lila, Wambali and Korosso JJ.A).

In the present application purportedly brought under Rule 66(1), (a) (b), (2) and (3) of the **Court of Appeal Rules 2019** (the Rules), the applicant is seeking the review of the above said Court's judgment dated 12th March, 2020.

As can be gleaned from the Notice of Motion and the applicant's affidavit, there are three grounds in support of the application. The applicant is complaining thus:

i) The decision of the Court was based on a manifest error on the face of the record resulting in a miscarriage of justice.

ii) The Court erred in not taking into account that applicant was deprived of his rights as the court failed to see and find that particulars of the charge sheet is lacking essential ingredients which constitutes an offence.

iii) The Court erred when failed to take that defect in the charge sheet is incurable in law hence the Court wrongly made look good while curing the same in disregard and contravened well settled precedents (s) and cardinal principal in criminal justice which recognises charge sheet as a foundation of a criminal charge hence the court's decision is a nullity.

Yet the applicant seems to have some more grievances with the Court's decision as he would later aver, under paragraphs 10 and 12 of his affidavit that, in its judgment which is sought to be reviewed, the Court failed to follow the established precedents and that the charge sheet was silent with regard to the person to whom he had directed threats in order to obtain the stolen motorcycle.

When this matter was called on for hearing, the applicant appeared in person to prosecute his case. However, he had no much to say. He implored us to allow the application contending that although he knows well that he was convicted of the charged offence and sentenced according to law, still he was requesting for the present application to be allowed. He insisted that the charge against him was defective by any standards.

The respondent Republic was represented by Ms. Imelda Mushi and Ms. Rachel Balilemwa, learned State Attorneys. As expected, Ms. Balilemwa who addressed the Court was strongly opposed to the application. She therefore urged us to dismiss it contending that the applicant had failed to point out the specific error claimed to be apparent on the face of the record. The learned State Attorney was of the view that the second and third grounds fronted in support of the application were essentially

intended to fault the decision of the Court dismissing the appeal. With regard to what constitutes an error on the face of the record, she referred us to our earlier decision in **George Mwanyingili v. The Director of Public Prosecutions,** Criminal Application No. 27/6/of 2019 (unreported) in which we held, *inter alia* that, a manifest error on the face of the record must be an error that is clear, obvious and patent, one which does not need to be established by a long drawn process of reasoning. With due respect, we entirely agree with Ms. Balilemwa as we shall hereinafter demonstrate.

To start with, we wish to observe that, although the application is purportedly brought under Rule 66(1) (a) (b) (2) and (3) of the **Court Rules,** we find sub-rules (2) and (3) to be irrelevant in view of the applicant's complaints as contained in the Notice of Motion and the supporting affidavit. We shall therefore proceed to consider the application as having been preferred under Rule 66(1) (a) and (b) which provides as follows:

> *"66 (1) The Court may review its judgment or order, but no application for review shall be entertained except 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."

Now, as it will be gathered from legal literature and jurisprudence, both legal authors and the appellate courts in various jurisdictions have endeavoured to define the phrase error on the face of the record and it appears to us that there has never been any conceptual difficulties nor confusions arising from this common legal phrase. (see for instance **Chandrankat Joshubhai Patel v. Republic** [2004] TLR 2018, and the Kenyan case of **National Bank of Kenya v. Ndungu Njau [1997] eKLR** which we cited with approval in **Elia Kasalile & Seventeen Others v. Institute of Social Work,** Civil Application No. 187/18 of 2018 (unreported)).For our part, we would say that, it is now universally accepted that, an error on the face of the record simply means a plain error which is so obvious and substantial. And, for purposes of review of the decision of the court in any criminal trial, an error on the face of the record must be both discernible and considerable. Of much importance, such an error must have occasioned injustice to the party seeking the review.

Reverting now to the present case, there is no evidence showing, albeit on a balance of probabilities that, there was an error on the record of the proceeding and the three concurrent decisions of respectively the trial, the first appellate and finally this Court. Rather it appears to us that the allegation that the decision of the Court had a patent error on the face of the record as to require to be reviewed, is an attempt by the applicant to sanitise the unprocedural route which he has taken with a view to have his appeal re-heard and re-determined by this Court. We find, upon the above observation, that the complaint on this ground has no merit and we dismiss it.

As to the second and third grounds fronted by the applicant in support of this application, it is obvious to us that his ultimate aim is as plain as shown in the Notice of Motion. That is to say, he wants the conviction and sentence confirmed by this Court to be quashed and that we let him free. The question that we have to determine here is whether or not we have the jurisdiction to do so.

It must be noted that in any application of the present nature, the Court is enjoined to tread a tight rope trying as much as we can to avert the danger of reconstituting ourselves into an appellate court and re-hearing the already finally determined appeal. It is for this reason that we

pungently held in the case of **James @Shadrack Mkulingwa & another v. R, Criminal Application No. 1 of 2012** (unreported) that:-

> *"it is settled law that a review of the judgment of the highest Court of the land should be an exception. The review jurisdiction should be exercised in the rarest of cases and in the most deserving cases which meet the specific benchmarks stipulated in Rule 66(1). A review application, therefore, should not be lightly entertained when it is obvious that what is being sought therein is a disguised re-hearing of the already determined appeal ...."*

In the case now under consideration, it appears to us that the grounds advanced in support of this application essentially called on us to consider if our decision in Criminal Appeal No. 281 of 2017 was correct both in law and in fact. That would entail the conducting of a hearing once again and rewriting judgment, taking into account the grounds which the applicant has raised. To that request, we think there is only one possible answer and that is, we cannot. As we have amply demonstrated, we have no jurisdiction to do so.

Since the applicant has failed to establish on a balance of probabilities that there is an error on the face of the impugned decision of this Court and as such, he has sought to challenge the decision of the Court by way of a disguised appeal, we have no jurisdiction to grant him the reliefs sought. We therefore find the present application to have no merit and we accordingly dismiss it.

It is so ordered.

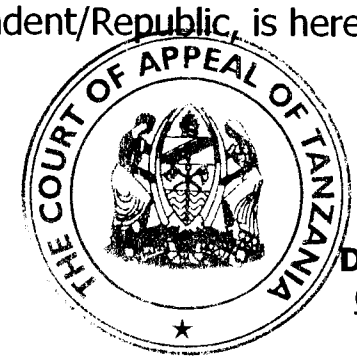
DATED at **DAR ES SALAAM** this 6th day of September, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 14th day of August, 2021, in the Presence of Appellants in person and Ms. Nura Manja, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL