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. 31/01 OF 2020

OMARI IDDI MBEZI.....1ST APPLICANT
VICTOR CHARLES @ MPIGA PICHA .....2ND APPLICANT
ABDALLAH ISIAKA @ MANILA .....3RD 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 6th day of April, 2020
in
Criminal Appeal No. 214 of 2017

RULING OF THE COURT

6th July & 14 September, 2021

KENTE, J.A.:

The applicants namely Omari Iddi Mbezi, Victor Charles @Mpiga Picha and Abdallah Isiaka @ Manila (henceforth the first, second and third applicant respectively) appeared before the District Court of Morogoro where they were charged and subsequently convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 Revised Edition, 2002. They were each sentenced to thirty (30) years imprisonment together with twelve strokes of the cane. Aggrieved by the said conviction and sentence, they unsuccessfully

appealed to the High Court of Tanzania at Dar es Salaam Registry. The dauntless applicants further appealed to this Court but, as it turned out, the odds were, once again, not in their favour. On 5th May, 2020 their appeal was dismissed by the Court (Lila, Wambali and Korosso, JJ.A.) for lack of merit.

In a clear demonstration of unflinching determination, by way of a Notice of Motion, pursuant to Rule 66(1) and (b) **Tanzania Court of Appeal Rules, 2019** (the Rules), they lodged the present application seeking for review of the above mentioned judgment of this Court. The application is supported by three affidavits respectively deponed to by the applicants.

The grounds raised by the applicants in support of their application are clearly stated in the Notice of Motion. We think it is apposite to reproduce them as hereunder:-

> 1. *The decision was based on manifest errors on the face of the record which resulted into miscarriage of justice to the applicants as:-*

(i) *The evidence of visual identification of the crime for 1st and 2nd applicants was not watertight.*

(ii) *The Court applied double standards in upholding conviction for its 1st and 2nd applicants based on visual identification made at the crime of scene.*

(iii) *The doctrine of recent possession that was used to implicate the 3rd applicant was not proved to the hilt.*

(iv) *The case was not proved beyond reasonable doubt as*

(a) The used catridges from gunshots were not recovered at the scene to substantiate that gun were used at the scene.

(b) Seizure notice under section 38 (3) of the CPA was not prepaid and tendered to substantiate that exhibit P.E.1 (shools) and PE4 (firearms) were recovered from 1st and 2nd applicants and are the

ones (firearms) used at the scene.

(c) Ballistic expert report was tendered to prove that firearms were working properly and may be were used at the incident.

(v) Facts of the case was not read to 2nd application on 13.3.2007 (at page 34-36 of the court records).

The respondent, the Director of Public Prosecutions, in its turn, strongly opposed the application by filing an affidavit in reply. The same was sworn by Ms. Nancy Mushumbusi, learned State Attorney. Essentially, in her affidavit, the learned State Attorney disputed every material averment made by the applicants contending that they should be put to strict proof thereof.

At the hearing of the application, the applicants appeared in persons fending for themselves, whereas, respondent was represented by Ms. Nancy Mushumbusi learned State Attorney.

On being invited to expound on the grounds in support of the application, the applicants had nothing meaningful to say. They only

adopted the contents of their affidavits and urged the court to allow the application. In addition, in what seems to be an invitation to this Court to overturn its decision, the first applicant implored us to quash the said judgment, set aside the sentence and set him free.

Submitting in reply, Ms. Mushumbusi learned State Attorney sought to build her case on the argument that, essentially what the applicants had lodged in Court was a disguised appeal. She also defended the judgment of this Court which had finally put to rest the applicants' relentless efforts to overturn the concurrent decisions of the two courts below. According to the learned State Attorney, all the grounds advanced by the applicants in support of the present application were considered by the Court and found to have no merit. With regard to the contention by the applicants that the impugned decision of the Court was based on manifest errors on the face of the record, the learned State Attorney referred us to the case of **George Mwanyingile v. The Director of Public Prosecution,** Criminal Application No. 27/6 of 2019 (unreported) in which we held that, a manifest error must be an error that is clear, obvious and patent, the one which does not need to be established by a long drawn process of

reasoning. She also cited to us the case of **Emmanuel Kondrad Yosipati v. R.** Criminal Application No. 90/07 of 2019 (unreported). In the latter cited case, the Court cited with approval an extract from the Commentary on the **Indian Code of Civil Procedure, 1908 14th Edition** that:

> *" 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".*

The learned State Attorney drew our attention to Rule 66(1) of the Court of Appeal Rules, 2019 which deals with all applications of the present nature. She said that the applicants have fallen short of the required legal threshold to warrant review of the impugned decision of the Court. Ms. Mushumbusi thus implored us to dismiss the application for lack of merit.

Given the above competing arguments and in view of the single ground of complaint raised by the applicants, we think it is appropriate

at this juncture, to cite in extensor the provisions of Rule 66(1) (a) on which the application is predicated. It reads 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.*

The question which falls for determination here is whether or not, the applicants have shown, albeit on a balance of probabilities that, there was an error on the face of the record in respect of the judgment of this Court in Criminal Appeal No. 214 of 2017 which was handed down on 6th April, 2020.

Upon anxious and careful consideration of the above-posed question, we are satisfied that the application before us has failed to meet the requirements for purposes of review. In our opinion, the applicants have failed to demonstrate the existence of the main ground of complaint as contained in the Notice of Motion as we shall hereinafter demonstrate.

As it will be noted at once, the general complaint by the applicants that the decision of the Court dismissing their appeal was based on manifest errors on the face of the records which resulted into a miscarriage of justice, is followed by a list of grievances on which the applicants are virtually seeking to challenge the earlier decision of this Court. To recapitulate, the applicants had complained in the Notice of Motion that, **one,** the evidence of visual identification was not watertight. **Two,** that the Court had applied double standards in upholding their convictions. **Three,** that the doctrine of recent possession which was invoked to implicate the third applicant was not proved to the required standard and finally that, all in all, the case against them was not proved beyond reasonable doubt. With regard to the reason as to why the case against them was allegedly not proved to the required standard, the applicants are now contending thus:

> *a) The used catridges from gunshots were not recovered at the scene to substantiate that guns were used at the scene.*
>
> *b) Seizure notice under section 38(3) of the CPA was not prepaid (sic) and tendered to substantiate*

that exhibit PE.1 (shools) and PE 4 (firearms) were recovered from 1st and 2nd applicants and are the ones (firearms) used at the scene.

c) Ballistic expert report was tendered to prove that firearms were working properly and may be were used at the incident.

d) Facts of the case was not read to 2nd applicant on 13.3.2007 (at page 34-36 of the court records).

It should be noted that, in its judgment which is sought to be reviewed, this Court had summarized the grievances of the applicants as contained in their memorandum of appeal, as follows:

"All the appellants filed a joint memorandum of appeal with 17 grounds which have been paraphrased and now read as follows: ***First,*** *Insufficiency of evidence on visual identification against all the appellants (found in grounds 1, 5, 9, 10, 11 and 12).* ***Second,*** *confessions of the 1st 2nd 3rd 5th and 7th appellants relied upon by the trial court in convicting appellants and the first appellate court in upholding conviction were recorded and admitted un-procedurally (grounds 3 and 4). Third, failure of the trial and first courts to address inconstancies,*

discrepancies and contradictions in prosecution witnesses' testimonies and thus find their evidence questionable and lacking in credibility (grounds 2, 6, 13, 14 and 15). ***Fourth,*** *admissibility of exhibits without following procedures (ground 8).* ***Sixth,*** *failure to consider the defence evidence (ground 16) and* ***seventh,*** *failure to enter Pleas upon substitution of the charge against the appellants (ground 17)."*

Having analysed at length the evidence on record, the Court went on concluding thus:

"We are of the considered view that the charges levelled against Omari Mbezi, Victor Charles @ Mpiga Picha and Abdalla Isiaka @ Manila (1st 2nd and 7th appellants) were proved to the standard required. Therefore their appeal lacks merit and is dismissed in its entirety".

The above-quoted being the considered decision of the Court, and in view of the applicants' several complaints all clustered around one main ground of review, the impression we get from the position taken by the applicants in the instant application is that the Court

should now sit as an appellate Court, re-asses the evidence and determine the correctness or otherwise of its earlier decision. Obviously it is for this reason that, in his brief rejoinder, the first applicant implored us to quash the impugned decision of the Court and order for his immediate release from prison.

With due respect, we are not prepared to usurp the jurisdiction which we do not have. As amply demonstrated, the applicants have not shown how the decision of the Court dismissing their jointly preferred appeal was based on what they claim to be manifest errors on the face of the record as envisaged under Rule 66 (1) (a) of the Court Rules. It follows therefore that, we cannot indulge ourselves into an exercise which would amount to this Court reconstituting itself into an appellate court thereby extending to the applicants an undue advantage by treating them differently from other convicts who might have finally decided to contend with their convictions and serve the sentences.

There is one reason why we strongly hold the above opinion. It has been the stance of the Court in any application that bears some resemblance to the present one that, a judgment of the court is final

and review of such judgment is an exception. Moreover, it is the position of the law that, a court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. For, it would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard. (See **Blue Line Enterprises Ltd V. East African Development Bank (EADB)** Civil Application No. 21 of 2012.

Having said so, we find ourselves inclined to agree with Ms. Mushumbusi that indeed, the application before us is nothing but a disguised appeal. While we are live to the fact that each application for review will always be treated by the Court according to its own merit, we wish to remark in passing that, if not sparingly invoked, in deserving cases, as it has always been the case, the ripple effect of Rule 66 (1) of the Court Rules would have been an avalanche of similar applications preferred by the disgruntled convicts.

Taken as a whole, we find that the applicants have raised the same complaints which they had raised and were canvassed by the

Court in the impugned judgment. We think, with due respect, this misapprehends the good purpose of Rule 66 (1) (a) which is to ensure that a Court's decision is free from plain errors resulting into a gross unfair outcome in a judicial proceeding.

All said and done, we find the application before us to have no merit and we accordingly dismiss it.

It is so ordered.

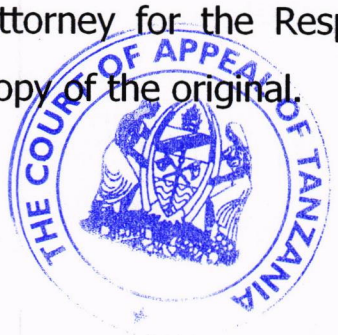
DATED at **DAR ES SALAAM** this 6th day of September, 2021.

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 September, 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.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL