IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPLICATION NO. 73/02 OF 2020

SAMWEL GITAU SAITOTI @ SAIMOO @ JOSE.....1ST APPLICANT
MICHAEL KIMANI PETER @ KIMU @ MIKE.....2ND APPLICANT
CALIST JOSEPH KAMILI KISAMBU KANJE.....3RD APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

(Application for review of judgment of the Court of Appeal of Tanzania, at Arusha)

(Mbarouk, Luanda, Mussa JJ.A.)

Dated the 29th day of March, 2016
in
Criminal Appeal No. 275 of 2015

.....

RULING OF THE COURT

17th September, & 1st October, 2021

MKUYE, J.A.:

The applicants, Samwel Gitau Saitoti @ Saimoo @ Jose, Michael Kimani Peter @ Kimu @ Mike and Calist Joseph Kamili Kisambu Kanje (hereinafter the 1st, 2nd and 3rd applicants respectively) have, under a certificate of urgency, filed a notice of motion in terms of Rules 66 (1) (a) and (b) and 48 (1) of the Tanzania Court of Appeal Rule, 2009 (hereinafter "the Rules"), seeking review of the judgment of this Court

in Criminal Appeal No. 275 of 2015 (Mbarouk, Luanda and Mussa, JJ.A.) on the following grounds:

> *1) That, the decision of the Court in Criminal Appeal No. 275 of 2015 resulting into retrial of the case only quashed the proceedings of the trial court but did not comment on the judgment and sentence and thus contains manifest errors on the face of the record which occasioned miscarriage of justice to the applicants as the trial has not proceeded yet since the Republic content that the judgment and sentence are still valid.*
>
> *2) That the 3rd applicant withdrew his appeal in Criminal Case No. 6 of 2011 (sic) but still the judgment on appeal in Criminal Appeal No. 275 of 2015 ordered he be tried as well, hence wrongly deprived an opportunity to be heard."*

The notice of motion is supported by a joint affidavit deponed by the applicants. The respondent Republic did not file an affidavit in reply.

The brief background of this application is as follows:

The applicants herein were together with nine others charged with murder contrary to section 196 of the Penal Code, Cap 16, R.E. 2002 (now R.E. 2019). After the prosecution closed its case, the nine accused person were acquitted and the trial proceeded against the applicants

herein. At the end of the trial, the 1st and 2nd applicants were convicted of the offence of murder and were each sentenced to the mandatory sentence of death by hanging while the 3rd applicant was convicted with a minor offence of accessory after the fact to murder and was sentenced to five years imprisonment.

All the applicants appealed to the Court against their respective convictions and sentences but on 12/2/2016 before the hearing of the said appeal, the 3rd applicant while in prison wrote a letter to the Registrar of the High Court that he did not wish to prosecute his appeal and the same was dismissed in terms of Rule 4 (2) (a) of the Rules. This, therefore, meant that the appeal by the 1st and 2nd applicants remained.

The applicants had initially lodged a joint memorandum of appeal which was self-crafted containing 18 grounds which was followed by the first supplementary memorandum of appeal with two grounds lodged by Mr. Edmund Ngemela, learned advocate who could not attend at the hearing due to bereavement of his mother. Yet, Advocate John Materu who was assigned the case after him lodged another supplementary memorandum of appeal consisting of two grounds to the effect that: **one,** the assessors were not fully involved in the trial; and **two,** that the

trial judge failed to direct the assessors on the issues involved in the case against the applicants during the summing up.

The Court heard the appeal in respect of the 1st and 2nd applicants based on the latter supplementary memorandum of appeal particularly on the issue of improper involvement of the assessors in the trial as they were not given opportunity to ask questions to the witnesses and failure by the trial judge to explain to the assessors the vital elements of law and at the end the Court found that the involvement of assessors was flawed. In its decision handed down on 29/2/2016 the Court declared the proceedings of the High Court a nullity. For ease of reference, we take the liberty to reproduce what the Court stated:

> *"...we entirely agree with both learned counsel that the omissions explained above are fatal and went to the root of trial.* ***We declare the proceedings a nullity."*** [Emphasis added].

Then, the Court went on to say that:

> *"We have given deep thought as to whether we should order a retrial. Given the fact that a human life was lost, the interests of justice demand that we should order a retrial. (See* ***Fatehali Manji v. Republic****, [1966] E.A. 343). We order the appellants*

and the one who withdrew his appeal be retried afresh as expeditiously as possible before another judge and a new set of assessors."

In compliance with the order of the Court referred to above, the matter was remitted to the High Court for a fresh hearing.

When the matter was placed before the trial court for the hearing as ordered, the respondent herein brought to the attention of the court that following the nullification of the proceedings by the Court, the conviction and sentence were left intact and as such the trial court lacked jurisdiction to entertain the said matter. The trial court heard the arguments for and against the point raised and delivered its ruling to the effect that the conviction and sentence were affected by the nullification of the proceedings and, thus, it ordered a retrial of the matter to commence.

According to the record of this application for review, the respondent was aggrieved by the ruiing of the High Court and lodged Criminal Appeal No. 119 of 2018 challenging the said ruling. However, when the appeal was called on for hearing the respondent applied to have the same withdrawn and as there was no objection from the other side (the applicants herein), the said appeal was marked withdrawn

under Rule 77(4) of the Rules. Thereafter, the applicants sought and were granted extension of time within which to lodge the application for review (Criminal Application No. 39/05 of 2020). Hence, the present application for review.

When the application was called on for hearing, the 1st and 2nd applicants appeared in person and unrepresented and the 3rd applicant was represented by Ms. Fay Grace Sadala. On the other hand, the respondent Republic was represented by Mr. Kassim Nassir Daudi and Ms. Verediana Peter Mlenza, both learned Senior State Attorneys who, incidentally, readily conceded to the application and urged the Court to grant it.

Amplifying the reasons for the concession to the application, Mr. Kassim contended that the application was in compliance with Rule 66 (1) (a) and (b) of the Rules in the sense that the omission by the Court to quash the conviction and set aside the sentence after having nullified the proceedings was a manifest error which occasioned miscarriage of justice to the applicants. He submitted further that, it was wrong to include the 3rd applicant to be retried since having withdrawn his appeal he was neither a party in the said appeal nor was he given an opportunity to be heard.

As to the way forward, the learned Senior State Attorney forcefully and at length, while citing a number of authorities, urged the Court to invoke Rule 66 (6) of the Rules and order for a re-hearing of the appeal (Civil Appeal No. 275 of 2015) because, the 3rd applicant was not given a chance to be heard as he was not a party. He was of the view that the only remedy was for him to be heard on the issue of assessors. He added that, the other reason for the proposition of re-hearing is to advance the overriding objective principle for the Court to dispense justice and develop jurisprudence on the issue of assessors.

The 1st applicant welcomed the learned Senior State Attorney's concession to the application for review. However, he strongly contested his prayer for re-hearing of the appeal arguing that it does not augur well with the interest of justice as he has been in custody since the issuance of said order without the matter being retried. Instead, he urged the Court to remove the offending part of the judgment and leave the order for a retrial as was ordered before.

The 2nd applicant insisted to the Court to rectify the Courts' decision by quashing the conviction and setting aside the sentence in that case to enable a retrial to proceed.

On her part, Ms. Sadala, concurred with what was presented by Mr. Kassim arguing that as the 3rd applicant was not heard not being a party in the said appeal, it was wrong to include him in the order for the retrial. Nevertheless, she added that, considering that the 3rd applicant has completed to serve his five years term of imprisonment and has been in custody due to the Courts' order, the retrial that was ordered was prejudicial to him. At any rate, like the learned Senior State Attorney, she urged the Court to order a re-hearing of the appeal.

We have considered the notice of motion, the supporting affidavit and the submissions from both sides and, we think, now we are in a position to deliberate on the matter before us.

The power of this Court to review its decisions is stipulated by section 4 (4) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (now R.E. 2019). Rule 66 (1) of the Rules provides for the circumstances under which the application for review can be premised. It states thus:

> *"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; or

(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; or

(e) the judgment was procured illegally, or by fraud or perjury".

As to what constitutes a manifest error apparent on the face of the record occasioning injustice was clearly explained by the Court in the land mark case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R 218 while adopting with approval the commentaries by **Mulla, Indian Civil Procedure Code,** 14th Edition as follows:

> *"**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...But it is no ground for review that the judgment proceeds on an incorrect exposition of the law...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 review....**it must further be an error apparent on the face of the record.**"*
[Emphasis added]

See also **Maulid Fakihi Mohamed @ Mashauri (supra), African Marble Company Ltd v. Tanzania Saruji Corporation Limited,** Civil Application No. 132 of 2005, **Said Shaban v. Republic,** Criminal Application No 7 of 2011 and **Issa Hassani Uki v. Republic,** Criminal Application No 122/07 of 2018.

What is notable from the above cited authorities is that in order for an error to warrant review, it must be apparent on the face of the record not requiring long-drawn arguments from the adversary parties.

In the application at hand, the applicants have invoked Rule 66 (1) (a) and (b) of the Rules, to the effect, that the impugned decision contains manifest errors on the face of the record which occasioned miscarriage of justice to the applicants following the failure by the Court to quash the conviction and to set aside the sentence; and that the 3rd applicant was ordered to be retried while he was not a party to the

appeal and was not heard. The issue for our consideration is whether the complaints raised fall squarely within the grounds of review.

As indicated earlier on, the parties are agreed that the Order of the Court was problematic. The Court in Civil Appeal No. 275 of 2015 after having deliberated that the involvement of the assessors in the trial was flawed it declared the proceedings a nullity. To use its wording as shown at page 43 of the record of application, it said as follows:

> *"We entirely agree with both learned counsel that the omissions explained above are fatal and went to the root of the trial.* ***We declare the proceedings a nullity.***" [Emphasis added].

Looking closely at the excerpt above, two issues emerge. **One,** the Court agreed with counsel from both sides that the omissions were fatal as they went to the root of the trial; and **two,** the Court declared the proceedings a nullity. We asked ourselves whether if the said statement connoted that the proceedings were nullified. We wish to digress a bit on the issue relating to the terms null, nullity, nullify and nullification in order to determine whether a declaration of nullity was synonymous with nullification.

According to **Blacks' Law Dictionary,** Eighth Edition, Bryan A. Garner at page 1098, the term "null" has been defined to mean "having no legal effect; or without binding force"; the term "nullity" has been defined to mean "something that is legally void; or the fact of being legally void; the term "nullify" has been defined to mean "to make void or to render invalid" and the term "nullification" has been defined to mean "the act of making something void."

As already hinted above, the Court at that stage just declared the proceedings to be a nullity. Going by the definitions above it means that the Court made a formal pronouncement that the proceedings were legally void. In effect this meant that the act of nullifying or nullification was not yet done because having regard to the definition of the term "nullification" the proceedings were not made void.

We have perused the impugned decision but we have been unable to locate where the Court nullified or rather made the proceedings and the judgment thereof void. We are mindful of a long-settled practice where the Court finds proceedings a nullity, it proceeds to nullify it – (See **Aluha Ally @ Asha v. Republic,** Criminal Appeal No. 501 of 2017; **Apolinary Matheo and 2 Others v. Republic,** Criminal Appeal No. 436 of 2016; **Ferdinand s/o Kamande and 5 Others v.**

Republic, Criminal Appeal No. 390 of 2017; and **Malambi Lukwaja** v. **Republic,** Criminal Appeal No. 70 of 2018 (all unreported). In this matter, inspired by the various deceased court, much as the Court declared the proceedings a nullity, it is our considered view that the said declaration was not synonymous with nullification of proceedings. Hence, we find that the proceedings and its judgment were still intact for not having been expressly nullified.

Besides that, as was alluded to earlier on, the Court made an order that the appellants (the 1st and 2nd applicants) together with the one who withdrew his appeal (3rd appellant) be tried afresh as expeditiously as possible before another judge and a new set of assessors. It is obvious that the 3rd applicant was not heard in the impugned appeal as he was not a party therein having withdrawn his appeal and condemned dismissed by this Court as we shall see in the course of this Ruling.

Assuming the proceedings and judgment were nullified, it is evident that the conviction and sentence were left unattended as neither the conviction was quashed nor the sentence set aside following the declaration of the proceedings a nullity. It is a long-settled practice of this Court that where the proceedings and judgment are nullified, to be

followed by quashing of the conviction and setting aside the sentence - (See **Lazaro Katende v. Republic,** Criminal Appeal No. 146 of 2018; and **Matokeo Mboya v. Republic,** Criminal Appeal No. 299 of 2017 (both unreported). For example, in the latter case, the Court having faced with a similar scenario had this to say:

> *"In that regard, as proposed by Mr. Nkoko, the need to order for retrial after nullifying the proceedings of the trial court, does not arise. We allow the appeal by nullifying the proceedings of the trial court, quash the judgment and set aside the sentence. Consequently, the appellant is set at liberty forthwith unless he is otherwise held for other lawful reasons"*

Guided by the above cited authorities, it goes without saying that the Court, after having nullified the proceedings, it ought to have quashed the conviction and set aside the sentence emanating from nullity proceedings and judgment. Failure to do so had the effect of rendering the conviction and sentence intact. In our view, the omission by the Court to nullify the proceedings and judgment as well as quashing the conviction and setting aside the sentence amounted to manifest error on the face of the record which occasioned miscarriage of justice as per Rule 66 (1) (a) of the Rules. Apart from that it prejudiced

the applicants as the retrial which was ordered has not been able to commence to date as informed by the applicants at the hearing. Indeed, this was a fatal irregularity calling upon this Court to review its decision by inclusion of the statement to the effect of nullifying the proceedings and judgment, quashing the conviction and setting aside the sentence.

With regard to the 2nd ground of review that the 3nd applicant was ordered to be tried afresh although he had withdrawn his appeal and not been heard, we equally agree with both sides. It is true that the 3rd applicant had indeed withdrawn his appeal. This is clearly evidenced at page 36 of the record of review where it shown how his appeal was dismissed following his prayer to withdraw it. The Court stated as follows:

> *"On 12/2/2016 before the date for hearing of the appeal, the 3rd appellant wrote a letter while in prison which was endorsed by the Officer In charge of prison, Arusha to the Registrar of the High Court that he no longer wishes to prosecute his appeal. He accordingly prayed to withdraw the appeal. Since the application to withdraw the appeal was made when the case had already been cause listed, we invoked Rule 4 (2) (a) of*

the Court of Appeal Rules, 2009 (the Rules) and dismiss the appeal. So, we remain with the 1st and 2nd appellants."

However, in the order of the Courts' impugned decision, despite the fact that the 3rd applicant had his appeal dismissed, the Court subsequent to declaring the proceedings a nullity, made an order for the trial to start afresh against the 1st and 2nd applicants together with the 3rd applicant whom the Court had observed earlier on that he had withdrawn his appeal. It means that, as was correctly argued by both sides, in the said appeal, the 3rd applicant was not afforded an opportunity to be heard. Neither was he a party to the said appeal.

The right to be heard or fair trial is among the fundamental rights enshrined under Article 13 (6) (a) (ii) of the Constitution of the United Republic of Tanzania Cap 2 R.E. 2002. The said provision states as follows:

"(6) (a) (ii) when the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned."

See the cases of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251 and **Ausdrili Tanzania Ltd v. Mussa Joseph Kumili and Another,** Civil Appeal No. 78 of 2014 (unreported).

In the matter at hand, the 3rd appellant was not heard in the appeal after he had withdrawn his appeal. This irregularity falls squearly under Rule 66 (1) of the Rules. It therefore implies that, including the 3rd appellant in the order for a retrial without having been heard on the issue of involvement of the assessors was not proper. It is obvious that it prejudiced the 3rd applicant.

In this regard, we are satisfied that the application for review is merited and we grant it.

On the way forward, Mr. Kassim tried to convince this Court to invoke Rule 66(6) of the Rules and order a re-hearing of the appeal, particularly, because the 3rd applicant was denied the right to be heard arguing had it been for the 1st and 2nd appellant's ground, he would not have made such a prayer. We do not have qualms with that because it is a settled principle where a party is denied the right to be heard, the only available remedy is to give him an opportunity of being heard. On

the other hand, the 1st and 2nd applicants insisted for the Court to rectify the offending part of the order to pave the way for a retrial to commence, of course, with the exclusion of the 3rd applicant who has completed to serve his sentence.

Rules 66 (6) of the Rules provides as follows:

> *"Where the application for review is granted, the Court may rehear the matter, reverse or modify its former decision on the ground stipulated in sub rule (1) or make such other order as it thinks fit."*

It is notable that under the above cited provision, the Court is empowered should it be minded to grant the application for review to rehear the matter which was sought to be reviewed or to reverse or to modify it or to make such other order as it may deem fit.

We have considered the circumstances of this matter, and we have found that there was an error on the face of the record for the Court failing to nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentences against the 1st and 2nd appellant. As to the 3rd applicant, despite the fact that there was a clear violation of Rules 66 (1)(b) of the Rules for being included in the order

for retrial while he was not heard on the matter that he was not a party, he was still prejudiced with an order of the Court which resulted from an error on face of the record and occasioned miscarriage to the applicant. We say so because the 1st and 2nd applicant's retrial is at halt since 2016 as it could not commence due to such anomaly. Regarding the 3rd applicant, while we admit that the proper remedy would have been re-hearing of the appeal, we think, the order for retrial has prejudiced him for being condemned unheard and more importantly, because he is still languishing in jail despite the fact that he has completed to serve his sentence. In this regard, we think, this matter should be considered in accordance to its own circumstances end in the interest of justice.

Consequently, in terms of Rule 66 (6) of the Rules, we accordingly, modify the decision of the Court in Criminal Appeal No. 275 of 2015 by adding immediately after the last word of the 2nd paragraph at page 9 of the typed judgment the words so as to read: *"In the event we nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentences meted out against the 1st and 2nd appellants."* Further to that, we delete the phrase *"and the one who withdrew his appeal"* appearing in the last sentence of the judgment.

For evidence of doubt, we wish to stress that, this order does not extend to the 3rd applicant who had withdrawn his appeal and should he be still in custody, we order that he be released forthwith unless he is held for other lawful reasons.

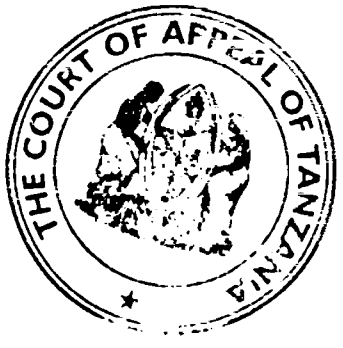
DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered on 1st day of October, 2021 in the presence of the applicants in person via video conference from Kisongo Prison, and Ms. Neema Mbwana, learned State Attorney for respondent Republic respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL

Meanwhile, in terms of Rule 38A (1) of the Rules, we adjourn the hearing of this appeal to another convenient session to be fixed by the Registrar. Each party to bear own costs for the adjournment.

It is so ordered.

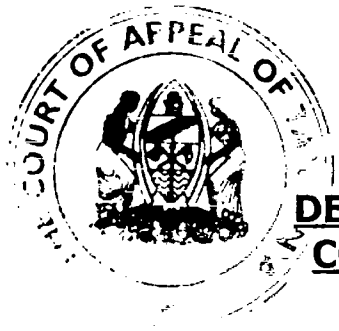
DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 1st day of October, 2021 in the presence of Mr. Alpha Ngóndya, learned counsel for the appellants and Ms. Alfredina Manga, learned counsel for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL