THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPLICATION NO. 77/01 OF 2020

LILIAN JESUS FORTES ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

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

(Mmilla, Ndika and Kitusi, JJ.A.)

dated the 2nd day of September, 2020
in
Criminal Appeal No. 151 of 2018

.....

RULING OF THE COURT

12th July & 6th October, 2021

KOROSSO, J.A.:

The applicant, Lilian Jesus Fortes seeks to review the decision of this Court (Mmilla, J.A., Ndika, J.A and Kitusi, J.A.) arising from Criminal Appeal No. 151 of 2018 of 2/9/2020. The application is by way of a Notice of Motion made under Rule 66(1)(a), (5) and (6) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The same is supported by an affidavit sworn by the applicant.

The applicant has predicated the application on four grounds which are found in the Notice of Motion and paragraphs 6 of the applicant's affidavit, compressed they read; **One**, that the decision

of the Court of Appeal in Criminal Appeal No. 151 of 2018 was based on a manifest error on the face of the record, that is, failure to inform the applicant the nature of the charged offence at time of apprehension; **Two**, the applicant denied was the right to be heard that is, not according her an interpreter at the time of her arrest; **Three**, that the omissions and abnormalities occasioned in the trial and shifting the burden of proving the charge to the applicant rendered the decision of the Court a nullity; and **four**, that the contents of the original charge in PI No. 38 of 2016 before the court on 21/10/2016 and evidence tendered in Economic Crime Case No. 4 of 2017 differed and thus rendered the decision of the Court a nullity.

The background to the application albeit in brief is that, the applicant, a Cape Verde national, who was travelling from Sao Paolo Brazil to Malawi was arrested at the Julius Nyerere International Airport, Dar es Salaam (JNIA) on 18/10/2018, while on transit. Her arrest was on suspicions of being in possession of narcotic drugs. The arrest took place when the applicant was checking out her luggage at the JNIA. She was subsequently arraigned in the High Court of Tanzania, Division of Corruption and Economic Crimes

charged with Trafficking in Narcotic Drugs contrary to section 15(1)(b) of the Drug Control and Enforcement Act, No. 5 of 2015 (the DCEA) read together with paragraph 23 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 (the EOCCA).

The prosecution side alleged that the applicant had in her possession 2.38 kilograms of narcotic drugs known as cocaine hydrochloride, found hidden in one of her bags. In defence, the applicant denied the charges stating that she did not carry any narcotic drugs and denied ownership of the bag found with the alleged drugs. She claimed that she had only checked in one bag at Sao Paolo and had one hand luggage which she carried. Upon hearing both sides, the trial court was satisfied with the evidence presented by the prosecution and found the applicant guilty, convicted and sentenced her to life imprisonment. Disgruntled, the applicant filed an appeal to this Court which was unsuccessful, finding that the appeal lacked merit.

It is the decision of the Court which has given rise to the current application. The applicant apart from the Notice of Motion

and the affidavit in support thereof, also filed written submissions in support of the application.

At the hearing of the application, the applicant appeared in person, unrepresented whereas, Mr. Salim Msemo and Ms. Estazia Wilson, both learned State Attorneys represented the respondent Republic.

When given an opportunity to amplify the grounds of the application, the applicant adopted the written submissions and urged us to consider the Notice of Motion, supporting affidavit and the written submissions filed and grant the prayers sought therein.

The substance of the applicant's written submission is as follows: With respect to the first ground, the appellant's argument is that there is a manifest error on the face of the record. She also faults the Court arguing that it abdicated its duty when it failed to take into consideration the fact that when she was apprehended, there was no information provided to her regarding the nature of the offence charged. However, she did not expound on specific areas of dissatisfaction in what was deliberated by the Court on the issue. The second ground relates to faulting the Court for not considering that she was not provided with an interpreter upon

arrest and thus deprived of the opportunity to be heard at the earliest available stage. However, she conceded that this was well addressed by the Court as found in the judgment and did not reveal areas which should prompt a review by this Court.

Expounding on the third ground, the applicant argued that the decision of the Court is a nullity since it is one which arose from failure to consider the abnormalities and omissions occasioned at the trial including the court shifting the burden of proof to the applicant when assessing the evidence. In the fourth ground she faults the Court for not considering that the original charges as filed in P1 No. 38 of 2018 instituted on 21/10/2016 was at variance with the evidence tendered during the trial of Economic Crime Case No. 04 of 2017 and thus rendering the decision of the Court to be a nullity.

The applicant thus urged us to review the proceedings and Judgments of the Court and that of the High Court, and also clarify on points of law in terms of procedure, practice and facts that she alleged led to miscarriage of justice occasioned at the trial and also review the circumstances of her arrest.

On the side of the respondent Republic, Mr. Msemo who took lead and submitted for the respondent, commenced stating that the application was resisted. He urged the Court to dismiss the application for being misconceived since it is nothing but a disguised appeal inviting the Court to deliberate and determine the merits of its own judgment as an appellate court. The learned State Attorney pointed out that the grounds submitted are not within the ambit of Rule 66(1) of the Rules and referred the Court to the case of **Maulidi Fakihi Mohamed @Mashauri vs Republic**, Criminal Application No. 120/07 of 2018, on what a manifest error on the face of the record to warrant a review is.

The learned State Attorney contended further that the holding in the cited case emphasized that a review is not an appeal. According to him, the first and second grounds advanced by the applicant are essentially the grounds of appeal which were deliberated and determined by the Court in Criminal Appeal No. 151 of 2018 whose decision is subject to the current application as seen at pages 9-11, 14 and 28 of the judgment. With regard to the third and fourth grounds he contended that they were also considered and determined by the Court as grounds of appeal as found at

pages 14, 21 and 22 of the judgment. The learned State Attorney thus urged the Court to find that all the advanced grounds for review were properly considered and determined by the Court and that the application lacks merit. He prayed for the application to be dismissed.

The applicant's rejoinder was in essence to reiterate her stance that the written submissions be adopted and urged the Court to examine the proceedings and judgment of the Court and consider the grounds advanced to determine whether procedures and the law were adhered to at the time of arrest, the trial and at the first appeal.

On our part, having considered all the relevant documents, oral and written submissions and prayers before us, we commence by first addressing an anomaly which we have discerned, the fact that the applicant did not cite section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (the AJA) together with the cited provision with Rule 66(1)(a) of the Rules to move the Court to review our own decision as sought. Despite the fact that we find this not to be a fatal error, we have highlighted it to remind parties, that a party applying for review of the decision of this Court is

enjoined to cite section 4(4) of AJA in all applications since it is the provision conferring power on the Court to review its decisions as we observed in **Christopher Ryoba vs Republic**, Criminal Application No. 104/05 of 2019 (unreported).

Moving to the grounds and reasons for the current application, suffice to say, the law is well settled regarding the purview of the Court's powers to review it own decisions. Rule 66(1) of the Rules clearly propounds the scope of what this Court may review and sets down categories of the grounds for review under paragraphs (a) to (e), stating: -

> *"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 manifest error on the face of the record resulting in miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard; or*
>
> *(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."

The limitation of the Court when exercising its power to review are confined to the extent of only to review "*its judgment or order*" (See, **Abdi Adam Chakuu vs Republic**, Criminal Application No. 2 of 2012 (unreported). This means the said powers do not extend to the charge sheet, the applicant's plea during his trial nor the record of trial and appellate proceedings. In the case of **Abdi Adam Chakuu vs Republic** (supra), we stated:

> "*This means, it is out of jurisdictional grounds for an applicant, to ground a motion seeking a review on complaints based on charge sheet or what may be apparent on the record of proceedings.*"

The fact that grounds for review are not so unlimited was discussed in **Patrick Sanga vs Republic**, Criminal Appeal No. 8 of 2011 (unreported), we stated:

> "*No order of review can be granted by the Court outside the five grounds stipulated*

therein. The review process should never be allowed to be used as an appeal in disguise."

In the current application, the learned State Attorney argued that all the grounds are outside the scope of Rule 66(1) of the Rules and that they are more like grounds of appeal because the issues raised therein have already been determined by the Court, while the applicant, urges us to find the grounds to have adhered to the requirements of Rule 66(1) of the Rules and that this should prompt us to review our decision.

We start with the fourth ground which challenges the charge against the applicant as it was presented at the PI No. 38 of 2016 that it was at variance with the evidence tendered during the pendency of the trial. In view of what we have stated hereinabove, our power of review is confined to the judgment or order alone and not the charge sheet or pre-trial processes. Consequently, the complaint which faults the charge sheet and the proceedings in the trial court undoubtedly, goes beyond the scope of our powers. Nevertheless, our perusal of the judgment subject of the current application has discerned that this concern was deliberated on and determined by the Court (see pages 9-13 of the judgment). The

Court found the pre trial handling of the applicant did not prejudice her. The Court also took cognizance of the existence of previous proceedings related to PI No. 38 of 2016 and that the applicant was originally charged in court and found this fact not to have in any way affected the applicant's rights. To find any error if there is, it will mean to have to go and search for the records from the time of arrest. Taking all these facts into consideration, we find no error apparent in the said holding. This is apart from finding that the ground does not fall within the ambit of the grounds for review under Rule 66(1) of the Rules as guided by our decision in **Chandrakant Joshubai Patel vs Republic** [2004] T.L.R. 218 that the manifest error: -

> "... *must be obvious, self-evidence, etc., but not something that can be established by a long-drawn process of learned argument.*"

The second ground alleges that the applicant was denied an opportunity to be heard since she was not provided with an interpreter when she was arrested. This is another complaint which is grounded on what transpired during the pre-trial process. In the written submission, the applicant claims that failure to get an interpreter was prejudicial to her rights to be heard. The learned

State Attorney's contention was that this is a ground of appeal which was determined by the Court and is therefore no a ground for review and that it should be dismissed.

A scrutiny of the judgment and also a fact conceded by the applicant, the Court deliberated and determined on this issue. At page 14 of the judgment, the Court found not merit in the complaint and stated: -

> *"Furthermore, since it is on record that when the charge was formally read over to the appellant read over to the appellant there was an interpreter, the failure to comply fully with section 48(2)(a)(iii) of the Act at the time of the arrest being an exception under the circumstances, was not fatal, in our conclusion."*

The above excerpt informs us that the Court duly considered and determined the complaint. The instant application is not the appropriate forum to revisit the finding by the Court. Revisiting the same at this point will be similar to sitting in an appeal against our own decision contrary to the spirit of Rule 66(1) of the Rules. This is the position which the Court has continuously restated. In

Tanganyika Land Agency Limited and 7 Others vs Manohar Lai Aggrwal, Civil Application No. 17 of 2008, we stated: -

> *"For matters which were fully dealt with and decided upon on appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that would, not only be an abuse of the Court process, but would result to endless litigation. Like life litigation must come to an end."*

For the foregoing reason, we thus find no merit in the second ground, which also essentially does not fall within Rule 66(1)(b) of the Rules.

The third ground faults the Court for disregarding the abnormalities and omissions occasioned at the trial including shifting the burden of proving the charge against the applicant and argued that this should render the decision a nullity. The learned State Attorney's position was the same that the ground has no merit since it was also a ground of appeal in the challenged decision of this Court and thus should be dismissed for being devoid of merit.

In similar vein, we noted that neither in the Notice of Motion, applicant's affidavit nor written submissions filed are the alleged abnormalities and omissions alleged to have been occasioned at the trial amplified apart from reference to pages 19-21. In discussing the complaint on shifting the burden of proof to the applicant, the Court stated:

> "...*We have considered the complaint and we are increasingly of the view that what we see here is more a matter of style than failure on the part of the Judge to appreciate the principles of burden of proof in criminal cases. Again, the complaint is neither here nor there...*"

From the above excerpt, evidently the concern by the applicant was deliberated and determined by the Court and thus the same cannot be brought before us again as a ground for review as already alluded to above in the absence of any apparent error discerned from the said judgment. The Court had through various decisions discouraged parties to resort to review as a way to re-appeal through the back door and the end of litigation has been emphasized in **Patrick Sanga vs Republic** (supra) when the Court held:

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception. That is what sound public policy demands."*

Similarly, it is important to have in mind that issues concerning analysis of evidence are not subject of review. In **Peter Ng'homango vs Gerson A.K. Mwanga**, Civil Application No. 33 of 2002 (unreported) which quoted and adopted the holding in **Ex. F. 5842 D/C Maduhu vs Republic,** Criminal Application No. 40/06 of 2019 (unreported) it was stated:

> *"It is no gainsaying that no judgment, however elaborate it may be can satisfy*

each of the parties involved to the full extent. There may be errors or inadequacies here and there in the judgment, these errors would only justify a review of the Court's judgment if it shown that the errors are obvious and patent."

In light of the foregoing, taking into consideration all the grounds predicating the application, we are of firm view that they do not fall within the scope of what is envisaged under Rule 66(1) of the Rules. Obviously, the grounds of review challenging the merits of the Judgment of the Court which dismissed his appeal, cannot be relied upon as grounds for review. In the case of **Charles Barnabas vs Republic**, Criminal Application No. 13 of 2009 (unreported), the Court restated the position and held that:

"... *Review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party. Further to Justice Mandia's observation, I will add two other matters by way of emphasis. One, a review is not an appeal. It is not 'a second bite', so to speak. As it is, it appears the applicant intends to 'appeal' against the aforesaid decision through the*

back door. Our legal system has no provision for that. Two, with the coming into fore on 1/2/2010 of the Tanzania Court of Appeal Rules, 2009, rule 66 (1) thereof sets out the grounds for review."

In the upshot of our finding above, we hold that the applicant has failed to demonstrate the manifest error apparent to justify invoking our powers of review. In the end, the application fails and it is dismissed. It is so ordered.

DATED at **DAR ES SALAAM** this 8th 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 6th day of October, 2021 in the presence of the applicant in person linked via video conference at Segerea Prison and Ms. Kasana Maziku, learned Senior State Attorney for respondent Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL