IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPLICATION NO. 75/01 OF 2020

ABBAS KONDO GEDE ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mmilla, Mkuye and Wambali, JJA.)

dated the 6th day of August, 2020
in
Criminal Appeal No. 472 of 2017

RULING OF THE COURT

5th July, & 1st February, 2022

MASHAKA, J.A.:

The applicant Abbas Kondo Gede is seeking a review of the decision of this Court in Criminal Appeal No. 472 of 2017 (Mmilla, Mkuye and Wambali, JJA), dated 6th August, 2020, which dismissed the appeal against the decision of the High Court in Criminal Sessions Case No. 16 of 2015. On the 15th October, 2020, the applicant lodged this application by way of a notice of motion founded on the provisions of section 4 (4) of the Appellate Jurisdiction Act [Cap 141 Revised Edition 2002], now R.E. 2019, (the AJA)

and Rule 66(1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by the applicant.

A brief background of the application is that, before the High Court of Tanzania at Dar es Salaam, the applicant was charged and convicted contrary to section 16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, [Cap 95 R.E. 2002] on the offence of trafficking in narcotic drugs. He was sentenced to serve twenty years imprisonment which he is currently serving and to pay a fine of TZS. 175,754,000.00. Dissatisfied by the conviction and sentence, the applicant preferred this appeal vide Criminal Appeal No. 472 of 2017, which was found to be wanting in merit and dismissed. The applicant has knocked our doors again seeking for review of our decision.

The respondent Republic did not file any reply, however during the hearing relied on the list of authorities lodged before the hearing to resist the application.

In the notice of motion, the applicant raised two grounds. Ground two is divided into two paragraphs. For convenience, we have rephrased as follows: -

1. *That he was wrongly deprived of an opportunity to be heard as the Court omitted to discuss ground no. 2 from the substantive memorandum of appeal which is a matter of law.*
2. *That the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice as:*

a. *The pellets were defecated in lots, under the circumstances, labeling/marking and proper handling of each pellet produced in a single lot was mandatory. Failure to that, the chain of custody was compromised/at risk.*

b. *The Court overlooked the effect of excluding the oral evidence of PW7 who played a great role in the case as he witnessed and handled 58 pellets out of 77".*

When this application was placed before us for hearing, the applicant appeared in person and fended for himself. The respondent Republic had the services of Ms. Cecilia Shelly, learned Senior State Attorney assisted by Mr. Salim Msemo, learned State Attorney.

When the applicant took the floor, he adopted the grounds of appeal and the supporting affidavit. In his submission, he complained that the Court omitted to discuss ground no. 2 which was on a matter of law. That

the Court in compressing the sixteen grounds of appeal from the substantive and ten grounds from the supplementary memorandum of appeal skipped ground no. 2. The applicant further argued that he canvassed the said ground in his written submission but the Court failed to discuss it, hence he was wrongly deprived of an opportunity to be properly heard contrary to Articles 13 (6) (a) and 117 (1) of the Constitution of the United Republic of Tanzania as amended. He elaborated that the essence of his complaint was that PW1 who tendered Exhibit P1 (77 pellets) failed to lay the foundation regarding the place she got the exhibit on the date they were tendered in the trial, while she was not the custodian and dealt with the same for only one day. That even the custodian (PW2) failed to give plausible explanation as to whom she handed the exhibit for tendering. He urged the Court to expunge exhibit P1 from the record of proceedings of the trial court, as it was tendered by an unreliable witness.

The second ground is founded on the complaint that there is a manifest error on the face of the record resulted in the miscarriage of justice, in the evidence of the 77 pellets which were defecated in eleven intervals from the 14th to 18th of May, 2011. He submitted that the labelling and recording of the number of pellets defecated in each interval was a mandatory requirement to assure the proper handling of the pellets before

transferring them to PW2 at the ADU office situated at Kurasini. He argued that since the labeling of said pellets was done in contravention of Police General Orders (PGO) No. 229, the chain of custody was at risk. The second limb of his complaint is that the Court arrived at a wrong decision after the oral evidence of PW7 and the exhibit P6 were expunged. He contended that the Court overlooked the role played by PW7 and came to a wrong conclusion that it had not prejudiced the applicant. He contended further that the 16 pellets witnessed and handled by PW7 and Charles Chacha (exhibit P11), in the absence of their oral evidence were not accounted for and there was no explanation how they reached PW2 after defecation.

In reply, Mr. Msemo strongly opposed the application which he categorically stated was totally devoid of merit. He argued that the application is moved under Rule 66 (1) (a) and (b) of the Rules and has not satisfied the requirements for a review of an impugned decision. He explained that any review sought should not be an appeal in disguise and that the applicant is bound to show the patent and obvious errors on the face of the record. Further, he elaborated that any such error has to cause a miscarriage of justice on the part of the applicant and it should be a clear case of apparent error on the face of the record. He emphasized that an application for review is not intended to challenge merits of a decision.

Submitting further on the first ground that the applicant was wrongly deprived of an opportunity to be heard as the Court omitted to discuss the second ground of appeal from the substantive memorandum of appeal, Mr. Msemo clarified that the Court dealt with the complaint raised on the mandatory labeling and proper handling of each pellet produced in a single lot. He maintained that the Court deliberated on the said ground as found in the impugned judgment at pages 4 to 5, 15, 18 to 24. He reiterated that this contention is unwarranted and not supported by the record of appeal which displays that the Court accorded him an opportunity to submit on the said ground, heard him and determined the second ground in the impugned decision.

In his rejoinder, the applicant maintained his complaints and submitted that the Court has an obligation to correct the wrongs in the impugned judgment. He urged the Court to evaluate the evidence as there was a violation of the PGO, that the statement of Chacha was not challenged in the trial court, hence the need for the Court to correct the wrongs.

We have carefully considered the submissions of both the applicant and learned State Attorney for and against this application. The issue for

consideration and determination is whether the applicant has made a case warranting review.

It is settled that, for an application for review to succeed, a party moving the Court to grant such order must establish any of the grounds prescribed under Rule 66 (1) (a) to (e) of the Rules which stipulates that: -

> *"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; 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."*

The grounds which have been raised by the applicant center on the paragraphs (a) and (b) of Rule 66 (1) of the Rules. Rule 66 (1) (a) is dedicated to a decision was based on a manifest error on the face of the record resulting in miscarriage of justice and (b) concerns deprivation of an

opportunity to be heard. We wish to begin with the second ground predicated on Rule 66 (1) (a) of the Rules.

We find it necessary, to first appraise ourselves on what is meant by a manifest error on the face of the record, given the nature in which the second ground has been raised by the applicant. We have addressed and expounded extensively in a range of cases reflecting on the principles governing the exercise of review. What constitutes a manifest error was considered by the Court in **Chandrankant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at page 225, where it quoted with approval an excerpt from MULLA, 14th edition at pages 2335 – 36 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...A mere error of law is not a ground for ordering review."*

We laid the same emphasis in **Tanganyika Land Agency Limited and Seven Others v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008; **Karim Ramadhani v. Republic**, Criminal Application No.25 of 2012 (both unreported). The applicant is inviting the Court to revisit and re -

evaluate the evidence adduced at the trial court so as to establish the propriety or otherwise of the chain of custody and labelling and handling of the defecated pellets. Obviously, when it involves a long-drawn process of reasoning on points raised on which there may conceivably be two views, it does not qualify to be a manifest error apparent on the face of the record. An error has to be self-apparent on the face of the record, obvious and self-evident and does not require an elaborate argument to be established.

In this application, we see no manifest errors on the face of the record in second ground (a) and (b). In elaborating the apparent error, the complaint raised by the applicant concerns improper labelling and handling of the exhibits; the defecated pellets, that the chain of custody was compromised. Even in his rejoinder, the applicant implored the Court to re - evaluate the evidence. After thorough consideration of this ground, it is clear that the applicant is challenging the evidence adduced at the trial court and was determined by the Court on appeal. The mere fact that the Court did not agree with the applicant on the grounds of appeal cannot constitute apparent error on the face of the record to justify a review. See – **Said Shabani v. The Republic**, Criminal Application No. 7 of 2011 (unreported). The issues raised as manifest errors on the face of the record fall short of being obvious and patent errors that can be seen on the face of the record.

We are satisfied that, in bringing this application, the applicant has expressed his dissatisfaction with the decision of the Court which dismissed his appeal. The applicant is before us to exploit the remedy of review of the impugned decision to reargue his appeal in which a review is by no means an appeal in disguise. Technically therefore, he is asking the Court to sit in appeal in respect of its own decision which is not tenable. We held in **Charles Barnaba v. Republic,** Criminal Application No. 13 of 2009 (unreported) that: -

> *"Review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party."*

Further, the Court enunciated in **Tanganyika Land Agency Limited and Seven Others v. Manohar Lai Aggrawal** (supra), that: -

> *"For matters which were dealt with and decided upon 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."*

We entirely agree with learned State Attorney that the application has failed to satisfy the requirements for a review of an impugned decision and

is intended to challenge the merits of the decision. A mere error of the law is no ground for ordering review; it must be an error apparent on the face of the record. As we have discussed above, the second ground fails.

We now turn to the first ground which concerns Rule 66(1) (b) of the Rules that the applicant was deprived of an opportunity to be heard. As averred in paras 5, 6 and 7 of the affidavit, the applicant's complaint is premised on the alleged omission by the Court to discuss the second ground of appeal from the substantive memorandum of appeal, based on the chain of custody. We totally agree with Mr. Msemo that the Court dealt with the complaint raised on the mandatory labeling and proper handling of each pellet produced in a single lot as found in the impugned judgment. The Court held that the trial judge properly evaluated the oral evidence of the prosecution witnesses and exhibit P2 and the defence of the appellant and came with a proper conclusion that the witnesses were credible and reliable. We find that this contention is unwarranted and not supported by the record of appeal which displays that the Court accorded the applicant an opportunity to submit on the said ground, heard him and determined the second ground of appeal in the impugned decision.

Notwithstanding the aforesaid, looking at the impugned decision, the Court deliberated at length the second ground of appeal raised by the applicant at pages 4 to 5 and 15 to 24 and we found that though PW7 and exhibit P6 were expunged, the remaining evidence of PW4, PW5 PW8, PW9, PW10, PW11 and the statement of Chacha admitted in evidence as exhibit P13 being eye witnesses were credible and clearly demonstrated that they were present during the whole process of defecation. They recognized and identified the applicant at the trial and were consistent in their story even when challenged during cross examination. PW1 confirmed that she received exhibit P1 from PW2 and after the laboratory analysis she returned them to PW2 together with exhibit P2. PW1 identified exhibit P2 at the trial court as the same which she returned to PW2 for safe custody. It is worthy to note that the evidence of PW1 was not seriously challenged by the applicant's counsel during cross examination. Thus, both the exhibits P1 and P2 were admitted in evidence without any objection hence the applicant cannot complain that he was wrongly deprived an opportunity to be heard. The Court found that PW1 was fully cross examined by the applicant's counsel after exhibits P1 and P2 were admitted in evidence without any objection. The oral evidence sufficed in the absence of paper trail documentation.

Thus, the complaints raised by the applicant had been adequately dealt with by the Court. In the circumstances, the complaint that he was deprived an opportunity to be heard is unfounded. This ground too is devoid of merit.

For the reasons we have endeavored to discuss, we find that, the applicant has not made out a case to warrant the exercise of review powers. The application fails and is accordingly dismissed.

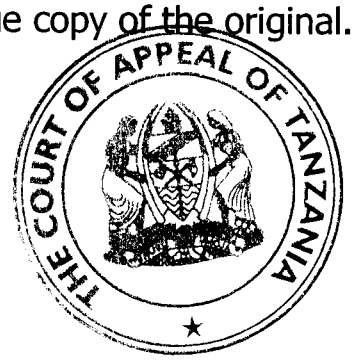
DATED at **DAR ES SALAAM** this 20th day of December, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 1st day of February, 2022 in the presence of applicant linked via video conference from Ukonga Prison and Ms. Monica Ndakidemi, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL