IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: JUMA, C.J., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPLICATION NO 59/12 OF 2020

KILEO BAKARI KILEO & 4 OTHERS.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review from the Judgment of the Court of Appeal Tanzania at Tanga)

(Hon. LUANDA, JUMA, MUGASHA, JJA.)

dated the 10th day of Sept, 2015

in

Consolidated Criminal Appeals No. 82 of 2013 & 330 of 2015

RULING OF THE COURT

11th & 13th May, 2022

JUMA, C.J.:

In the Criminal Sessions No. 19B of 2011, the High Court of Tanzania at Tanga (Mussa, J.) convicted KILEO BAKARI KILEO, YAHAYA S/O ZUMO MAKAME, MOHAMMADAL S/O GHOLAMGHADER POURDAD, SALUM S/O MOHAMED MPARAKASI and SAID S/O IBRAHIM HAMIS (from now on referred to as first, second, third, fourth and fifth applicants), for the offence of trafficking narcotic drugs contrary to section 16 (1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap. 95 RE 2002 (the Drugs Act).

Following the applicants' conviction on 10/08/2012, the trial High Court ordered each applicant to pay Tshs. 1,438,364,400/= being an amount equal to three times the value of drugs involved. In addition, the trial court sentenced each applicant to a prison sentence of 25 years.

Aggrieved by their conviction and sentence, the applicants duly filed their separate appeals to this Court. In his memorandum of appeal, the first applicant raised ten grounds. The second and third applicants jointly filed four grounds of appeal, whereas the second and third applicants jointly filed seven grounds of appeal. The appellate Court consolidated these separate appeals to become Consolidated Criminal Appeals No. 82 of 2013 and 330 of 2015. After the hearing, the Court dismissed their appeal on 8/9/2015.

The applicants have come back to this Court. On 13/03/2020 the applicants filed a Notice of Motion for Review under section 4(4) of the Appellate Jurisdiction Act Cap 141 R.E. 2002, now R.E. 2019 (the AJA) and Rule 66(1)(a)(b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicants cited three grounds and swore an affidavit to support their motion seeking a review of the Court's decision.

In the first ground of motion (a), they assert that the decision of the Court that dismissed their appeal has serious errors manifest on the face of the record, which occasion miscarriage of justice.

In the second ground (b) supporting the motion, the applicants claim that the Court deprived their opportunity to be heard on the defence of *alibi*, which they raised earlier during their trial. In the third ground (c), the applicants assert that the Court's decision in their appeal is null because it emanated from the trial High Court proceedings, which were themselves vitiated and were a nullity.

This application for a review came up for hearing for the first time on 08/06/2021, during which Mr. Nehemia Nkoko, learned advocate for the applicants, prayed for an adjournment under rule 59 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to amend and align the motion to the mandatory conditions under rule 66(1) of the Rules governing applications for a review. In compliance with the Order of the Court granting the adjournment, on 27/07/2021, the applicants filed a Supplementary Motion for Review, which identified the following grounds for review:

"(a) That the decision of the Court has serious manifest errors on the face of the record resulting in miscarriage of justice as follows:-

i) The decision was based on the High Court proceedings that were not authentic, since the trial judge failed to append his signature after taking down the evidence of every witness. Thus, there was no material proceedings upon which the appeal could be determined.

ii) That, the decision was based on manifest error on the face of the record as the Court found out the Applicants were acting under a common design and relied on the evidence of PW9 and also acquitted 1st Applicant's father who was also in the company of the 1st Applicant when arrested at Kabuku.

iii) The decision of the Court confirmed the sentence of imprisonment and fine meted against the Applicants without taking into considerations the provisions of section 29 of the Penal Code [Cap 16 R.E. 2002], and that the sentence of 25 years was excessive taking into account the Applicants' were first offenders and their mitigation was not taken into account and no reasons were assigned by the trial Judge, including also not taking into account the time

the Applicants' stayed in remand prison prior to their committal and hearing of the case."

At the hearing of this application for Review on 11/05/2022, Mr. Nehemiah Nkoko, learned advocate, represented the applicants. Mr. Saraji Iboru, Principal State Attorney and Mr. Paul Kusekwa, State Attorney, appeared for the respondent Republic.

Before submitting, Mr. Nkoko referred us to the supplementary notice of motion and informed the Court he was abandoning two grounds, (a) (i) and (a) (ii). He said that these were more appeal grounds than grounds for a review. He promised to submit on the remaining ground (a) (iii), through which the applicants raise what their motion describes as *"serious manifest errors on the face of the record resulting in miscarriage of justice."* The remaining ground, upon which Mr. Nkoko predicated his submissions supporting this application for a review, stated:

"iii) The decision of the Court confirmed the sentence of imprisonment and fine meted against the Applicants without taking into considerations the provisions of section 29 of the Penal Code [Cap 16 R.E. 2002], and that the sentence of 25 years was excessive taking into account the Applicants' were first offenders and their mitigation was not taken into

account and no reasons were assigned by the trial Judge, including also not taking into account the time the Applicants' stayed in remand prison prior to their committal and hearing of the case."

Mr. Nkoko referred us to the supporting affidavit, which he swore. He adopted the paragraphs that expound on the above ground of review. In his affidavit, the learned advocate stated that as he was reading the Court's appellate decision, he found many errors manifest on the face of the decision. He realized that unless these errors are subject to review, they will prejudice the applicants and result in a miscarriage of justice. The learned advocate identified one of the errors on the face of the record, where the Court confirmed the sentence against the applicants even though exhibit P14 did not contain narcotic drugs. Mr. Nkoko reserved particular blame on the issue of fines, especially when the Court failed to say anything about what happens when, upon completion of their sentence, the applicants fail to pay fines.

In his brief oral submission, the learned advocate added that the applicants did not seek review to oppose their 25-year sentences. They are only concerned with the lack of clarity on the fines and how the Government

will issue distress orders to recover the fines, considering the third applicant is a foreigner.

Mr. Nkoko concluded his submissions by urging us to grant the order of review.

In the respondent Republic's counter-affidavit sworn to by learned State Attorney Paul Kusekwa, the respondent opposed the review. He rejected the claim that the Court's appellate decision had errors on its face, resulting in a miscarriage of justice for the applicants. Mr. Kusekwa also stated that the complaint that exhibit P.14 did not contain narcotic drugs is not an error of law but an argument over a matter the appellate Court heard and determined.

In reply, Mr. Iboru, learned Principal State Attorney, opposed the application, describing it as devoid of legs to stand on. He referred to page 33 of the appellate court judgment, where it clarified any doubt over the sentence. The remaining grounds of motion, he submitted, do not comply with any of paragraphs (a) to (e) of rule 66 (1) of the Rules to move the Court to review its appellate decision. The learned Principal State Attorney saw nothing wrong with how the Court concluded that the sentences were

not excessive. This conclusion, he submitted, does manifest any error on the face of the record resulting in a miscarriage of justice.

Citing the case of **MAULIDI FAKIHI MOHAMED @ MASHAURI V. R** [2019] TZCA 376 (TANZLII) for support, Mr. Iboru submitted that this application does not fit within the scope for review under rule 66 (1) of the Rules. He urges us not to allow the applicants to transform a review into another chance to express their disappointment with the final appellate decision of the Court. Even if the appellate Court failed to clarify the aspect of payment of fines in addition to the 25-year sentences Mr. Iboru submitted, applicants could not seek the remedy of a review.

Mr. Nkoko, in his brief rejoinder, submitted that the applicants have laid out sufficient grounds for this Court to allow their application for a review.

After hearing the submissions of the two learned counsel, it is appropriate to note that the right to seek a review jurisdiction of the Court of Appeal under section 4(4) of the AJA is limited to decisions, judgments, or orders of the Court of Appeal. Therefore, the applicants' complaints about matters requiring us to search through the appeal record and judgment of the trial High Court are outside the jurisdiction of a review Court. Section

4(4) of the AJA, which empowers the Court to review its decisions or orders, clearly restricts its review jurisdiction to its own decisions only:

> *"4 (4) The Court of Appeal shall have the **power to review its own decisions.**"* [Emphasis added].

Further, paragraphs (a) to (e) of rule 66 (1) of the Rules identifies five grounds within which applicants must fit their applications for a review. Rule 66 (1) states:

> *"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, or*
>
> *(c) the courts 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."*

We must also note although their Notice of Motion indicates that the applicants would rely on the grounds of review under paragraphs (a), (b), and (c) of rule 66 (1) of the Rules, their supporting affidavit and Mr. Nkoko's oral submissions relied on the ground under paragraph (a). This ground relates to manifest error resulting in miscarriage of justice.

Therefore, an inevitable issue for our determination is whether what the applicants alleged under the ground supporting their motion disclosed manifests errors in the Court's appellate decision, which occasioned a miscarriage of justice. There is no shortage of jurisprudence on what constitutes a manifest error on the face of the record resulting in the miscarriage of justice.

Obtaining an order of a review from the Court is not easy. In the case of **BLUELINE ENTERPRISES LIMITED V. EAST AFRICAN DEVELOPMENT BANK,** CIVIL APPLICATION NO. 21 OF 2012 (unreported), the Court reminded applicants of the threshold they must meet when moving the Court to review its decision under rule 66(1)(a) of the Rules. They must sufficiently demonstrate that there is an error or errors, and that error must be manifest on the face of the record. And importantly, the error or errors must have resulted in a miscarriage of justice. In other words, after

showing an error apparent on the record, the applicant must also show how it resulted in a miscarriage of justice.

For the applicants before us, they identified their first manifest error to be the appellate Court's failure to consider section 29 of the Penal Code, Cap 16 R.E. 2019 when it confirmed their sentence of imprisonment and fines. Their second error centres on the sentence of 25 years imprisonment. According to the applicants, this was excessive, taking into account that the applicants were first offenders, and the Court did not consider their mitigation. The third error is the failure of the appellate Court to consider the time they spent in custody before the hearing of their case.

We agree with Mr. Iboru, learned Principal State Attorney, the grounds which the applicants raised are not grounds that can sustain a review. Apart from being purely grounds of appeal, which were addressed by the appellate Court, they do not qualify to be labelled as manifest errors on the face of the appellate judgment. Mr. Nkoko, for the applicants, did not go so far as to link what he considered errors to a miscarriage of justice. Apart from seeking clarity on when the applicants would be required to pay their fines, he did not, for example, elaborate whether if the Court had considered

section 29 of the Penal Code (Cap 16) the consideration would have any impact on either fine or the 25-year sentence.

This Court had an occasion provided in **EFFICIENT INTERNATIONAL FREIGHT LTD. & DR. GIDEON HOSEA KAUNDA VS. OFFICE DU THE DU BURUNDI**, CIVIL APPLICATION NO. 23 OF 2005 (unreported) to ask itself the scope of the phrase "*a manifest error on the face of the record.*" The Court answered by referring the case of **CHANDRAKANT JOSHUBHAI PATEL V R.** [2004] T.L.R. 218:- a manifest error "*...must be obvious, self-evident, etc., but not something that can be established by a long-drawn process of learned argument.*"

We failed to grasp why Mr. Nkoko wanted the appellate Court to force section 29 of the Penal Code into the provision of section 16(1)(b)(i) of the Drugs Act which clearly defines the sentences on conviction for drug trafficking. Section 29 of the Penal Code is a general provision governing imposition of fines. It covers various situations where any written law imposes a fine, but does not go so far as to provide the amount of fine to be paid.

Section 16 (1)(b)(i) of the Drugs Act states:

"16.-(1) Any person who-

(a)...

(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable-

> *(i) in respect of any narcotic drug or psychotropic substance to* ***a fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition to imprisonment for life but shall not in every case be less than twenty years****;* [Emphasis added].

Section 16 (1)(b)(i) of the Drugs Act is clear and self-sufficient on punishment; applicants seeking a review cannot imagine manifest errors which do not exist or force manifest errors where there are none. It is not for this review Court to help out the applicants to clarify the punishment that paragraph (i) of section 16 (1)(b) of the Drugs Act specifies.

As Mr. Iboru correctly submitted, the first applicant raised the question of excessive punishment in his grounds of appeal and the Court in Consolidated Criminal Appeals No. 82 of 2013 and 330 of 2015 dealt with it. The appellate Court considered and answered this question when it stated: *"In sum, the appeal is devoid of merits.* ***The sentence imposed is not excessive.*** *The same is dismissed in its entirety."* [Emphasis added]

The above conclusion means that after dismissing the applicants' appeal, the sentence which the trial High Court in Criminal Sessions No. 19B of 2011 imposed on the applicants is the applicable sentence. We could not hold ourselves from wondering why Mr. Jeremiah Nkoko, the learned Advocate for applicants, brought up a ground of review based on sentence and fines which the trial and first appellate courts considered and settled. We reproduce here the sentence which the trial court imposed, and which the appellate Court did not disturb:

"Sentence

> *In sentencing, I have taken into account all what has been said on behalf of the accused persons. More particularly, the fact that the accused persons are first offenders; their respective personal and family particulars and;*

the period of their custodial incarceration. Nonetheless, I have equally taken into account the seriousness of the offence and the particular requirements of the law. Accordingly, in terms of item (i) of section 16(1)(b) of the Drugs Act as well as section 73 of chapter 1 of the laws; the accused persons are sentenced as follows:-

> *i). This being a joint trial, the accused persons are collectively fined to pay a total sum of shs,. 7,191,822,000/=; being an amount equal to three times the value of the drugs involved. That is to say, each accused person is, individually, liable to a sum of shs. 1,438,364,400/=.*
>
> *ii). In addition to the fine, each accused person is to individually serve a sentence of twenty-five (25) years imprisonment.*
>
> *iii). The two cars that were involved in the ferrying [exhibit P.14] are forfeited to the Government.*

K.M. MUSSA, J.

10/8/2012."

There can be no error apparent on the face of the appellate Court's judgment where the appellate Court confirmed the sentence imposed by the trial court. Dissatisfaction with the Court's decision cannot be translated into manifest errors on the face of the record for purpose of review.

Mr. Iboru was correct to submit that the applicants' complaint about exhibit P14 was heard and determined by the Court and is outside the jurisdiction of the Court on a review. We agree that the question of whether exhibit P14 contained narcotic drugs is evidential and belongs to the trial and first appellate courts for final determination. It can neither be an error apparent on the face of record nor can it be a ground supporting a review. This Court has always insisted that a motion in a review cannot raise a ground of appeal that an appellate court considered. Similarly, an applicant in a review cannot bring a ground of appeal which he failed to include in the memorandum of appeal. In **HALMASHAURI YA KIJIJI CHA VILIMA VITATU & OTHERS V. UDAGHWENGA BAYAY & OTHERS** [2016] TZCA 16 (TANZLII) the Court referred to a persuasive guide from the Court of

Appeal of Kenya in **NATIONAL BANK OF KENYA LIMITED V NDUNGU NJAU** [1997] Eklr to the effect that:

> *"...in the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent.* ***If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.*** *Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.* ***An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.****" [Emphasis added].*

All the matters which the applicants raised under paragraph (a) (iii) of their Notice of Motion were dealt with by this Court when it sat to hear the applicants' appeal. The applicants cannot raise same matters in a review. As we said in **HERMANUS P. STEYN V. CHARLES THYS** [2021] TZCA 445 (TANZLII); an application for a review in this Court is not an opportunity to open up new appeals grounds that applicants failed to raise before the appellate Court.

We finally find that the applicants have failed to show the errors manifest on the face of the record of the appellate Court. They have similarly failed to show how those alleged errors occasioned a miscarriage of justice. We, therefore, dismiss this application.

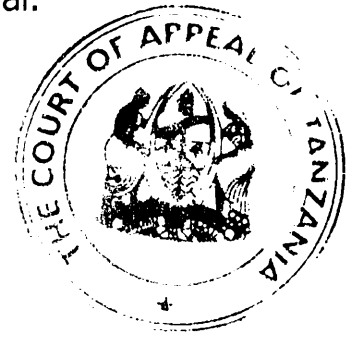
DATED at **TANGA** this 13th day of May, 2022.

I. H. JUMA
CHIEF JUSTICE

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 13th day of May, 2022 in the presence of Mr. Yona Lucas, Advocate holding brief for Mr. Nehemia Nkoko, Advocate for the Applicants and Mr. Emmanuel Barigila, State Attorney for the respondent. The Appellants are also present in person, is hereby certified as a true copy of the original.



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