IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MWARIJA, J. A., SEHEL, J.A And MAIGE, J. A.)

CRIMINAL APPLICATION NO. 08/04 OF 2021

CROSPERY NTAGALINDA @ KORO.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania at Bukoba)

(Mjasiri, Mmilla, Mziray, JJ.A.)

dated the 19th day of June, 2017
in
Criminal Appeal No. 312 of 2015

.....

RULING OF THE COURT

13th & 20th July, 2022.

SEHEL, J.A.:

In this application, the Court is asked to review its decision in Criminal Appeal No. 312 of 2015 (the Appeal) dated 19th June, 2015. The application is brought by a notice of motion and it is supported by an affidavit of Mr. Mathias Rweyemamu, learned advocate for the applicant. It is preferred under the provision of Rule 66 (1) of the Tanzania Court of Appeal Rules of 2009, as amended, (the Rules) on grounds that:

> *"a) The Preliminary hearing which was the basis of the case against the Applicant was based on the information of*

manslaughter and not murder, the offence the Applicant was finally convicted of by the High Court of Tanzania at Bukoba in Criminal Sessions case No. 85/2008 and sentenced to death in a Judgment of Hon. Matogolo, J. dated 26th June, 2015 which was later confirmed by the Court of Appeal of Tanzania at Bukoba on 3rd July, 2017 in Criminal Appeal No. 312 of 2015.

b) The Respondent's case against the Applicant throughout trial revealed that the fact that the cause of the deceased's death was the beating resulting from the deceased's engagement in an extramarital affair with the Applicant's daughter, a teenager and secondary student (who was referred by the prosecution as the deceased's girlfriend). According to the prosecution, the deceased was found by the Applicant in her daughter's bedroom at night and that as result the ***Applicant was very annoyed*** *and severely beaten the deceased at the scene before the deceased escaped.*

c) The Court of Appeal of Tanzania having found that the prosecution's case was entirely based on circumstantial evidence wrongly upheld the Applicant's conviction without regard to the sources of the deceased's death which if taken as advanced by the prosecution concludes that the death of the deceased was a result of injuries inflicted on the deceased by the Applicant after the later found the former in her daughter's bedroom at night, a fact which does not establish a 'mens rea' for murder.

d) That the elements of provocation as the trigger of the Applicant inflicting injuries to the deceased, although not pleaded by the Applicant, was apparent in the prosecution's case and the Court of Appeal of Tanzania did not consider that such provocation negated a prima facie case against the Applicant to warrant the Applicant to answer a murder case, this being an apparent error on the face of the record leading to miscarried of justice:

e) That the trial judge who correctly in his summing up to assessors highlighted inter alia, two main things, one that: " ***the accused can only be convicted on the strength of the prosecution evidence and not on the weakness of the accused's defence*** *" and two that:* ***the deceased was found by the accused inside his house together*** *with* ***daughter one Rozeta,... you have to consider also such act if was sufficient for the accused to the action he took against the deceased*** *" did not consider the implication of the above in his judgment, and further this honourable Court on its judgment on appeal mistakenly failed to consider the implications of the two aspects above in favouring the Applicant."*

Reading through the grounds for review, we find it convenient to reproduce the facts narrated in the Appeal as they are relevant to the application at hand. They are:

"The deceased, George Ngimbwa, was a Form Three (3) student at Ihungo Secondary School. On the material date, the deceased went to the appellant's house to visit the appellant's daughter who was a student of Omwami Secondary School. He was accompanied by one Gibson Mutakyamirwa (PW10). PW10 then left the house, leaving behind the deceased with the appellant's daughter. Shortly thereafter, the appellant arrived at his house and upon seeing the deceased in his daughter's bedroom, he was ***very annoyed****, and severely attacked him. The deceased managed to escape. At around 8.30 p.m on the same day, the appellant showed up at the deceased's residence. He seemed very angry and forcefully pounded the front gate, before going through the back door. He used similar force and stormed inside the house. He met the deceased's father, PW1 and his sister, Apolonia Ngimbwa (PW2) and his brother, Daniel Ngimbwa (PW8). The appellant uttered these words,* ***"Namtafuta George mpaka nimuuuwe" (I am looking for George and would not rest until I kill him).*** *The appellant also asked the members of deceased's family to go and collect George's items which were left at his residence when he fled. PW2, PW8 and the deceased's mother, who was not called as a witness and a neighbour, one Anatoria Nestory (PW6)*

went to the appellant's house. Upon arrival, the appellant informed them that he beat up the deceased and wanted to set him on fire. According to PW2 the appellant informed them that the deceased would not survive the beating he gave him. The appellant showed them a mobile phone, a shirt and sandals left behind by the deceased.

The deceased did not return to his parent's house instead he went to hide in the house of Aristides Bambanza (PW7). According to PW7, George, (the deceased) looked terrible and was in bad shape. He was badly beaten and had wounds in his head and legs. He was also spitting blood. The deceased informed PW7 that he was beaten up by the appellant. The deceased spent the night at PW7's house. The next morning PW7 took the deceased to the house of PW10. He asked PW10 for a shirt and was given one. However, PW10 decided to take him to PW9's house. PW9 was a close friend of the deceased. According to PW9, the deceased had a serious wound on his head, elbow and cheek. He also had a swelling below the abdomen. The deceased told PW9 that it was the appellant who assaulted him. On instruction from the deceased, he went to inform his family. When he came back, he found the deceased where he left him on the sofa. He was already dead. Upon seeking advice from a

neighbour as to what should be done, he was told to go and inform the person who assaulted the deceased, that is, the appellant, which he did. The appellant asked PW9 to wait. He went out and returned with two young men. The appellant accompanied by the young men, went to the house of PW9. He then staged the deceased's suicide by instructing the two lads to hang the body of the deceased. PW9 ran away from the village for fear of being implicated for causing the death of the deceased. Word went around throughout the village that the deceased was dead and people started gathering at the scene.

PW1 accompanied by his children, PW2 and PW8, also went to the scene of the incident. The deceased's body was found hanging, suspended by the neck and when it was brought down. They found wounds on the head, the leg and cheek."

The applicant was then arraigned before the High Court. A lot of things happened between the arrest and the trial of the applicant but suffices to state that he was found guilty as charged, convicted and sentenced as stated earlier.

He was aggrieved by the conviction and sentence. He unsuccessfully appealed to the Court. Following the dismissal of the

Appeal, the applicant has now preferred the present application for review on the grounds reproduced herein.

At the hearing of the application, Messrs. Mathias Rweyemamu and Respicius Didace, learned advocates appeared for the applicant, whereas the respondent Republic was represented by Messrs. Emmanuel Kahigi and Juma Mahona, learned State Attorneys.

Mr. Didace began his submission by adopting the grounds in the notice of motion and the accompanying affidavit. He then clarified that, although it is not indicated in the notice of motion, the applicant is pursuing the review remedy under the provisions of Rule 66 (1) (a) of the Rules.

Arguing the grounds in the notice of motion, Mr. Didace contended that the Court rightly stated in its decision that it is entitled to have its own consideration of the entire evidence but failed to do so. Explaining why it failed, starting with ground (a), he argued that had the Court properly re-evaluated the evidence, it would have noticed that the preliminary hearing which was the basis of the case against the applicant was based on the information of manslaughter and the facts read over to him did not support the offence of murder.

Next, he argued grounds (b) and (c) together that there is an apparent error on the face of the record as the Court held that malice aforethought was proved beyond reasonable doubt while the facts presented fall short of establishing malice aforethought, specifically an intention to cause death. He pointed out that the facts as presented showed that the applicant found the deceased in his daughter's bedroom and beat him before the deceased escaped and the deceased was found dead at his friend's home a day later. It was his submission that as there was no proof of malice aforethought as defined under section 200 of the Penal Code, then the Court committed a patent error on the face of record. He referred us to the case of **Uganda v. Mawa** [2017] UGHCCRD 105 where the High Court of Uganda restated the cardinal principle of criminal law that the prosecution has a burden to prove each and every ingredient of the offence against an accused person on the required standard of proof beyond reasonable doubt and that burden does not shift to the accused person.

Submitting on grounds (d) and (e), he argued that although the applicant did not raise the defence of provocation in terms of section 114 (1) of the Evidence Act, [Cap. 6 R.E. 2022], the Court is required to

investigate all the circumstances of the case including any possible defence especially where there is some evidence before the Court suggesting such a defence. He argued further that at page 3 of its judgment, the Court observed that the applicant *"was very annoyed"* after finding the deceased in his daughter's bedroom. With that fact in record, he argued, the Court ought to have found that the applicant was provoked. He submitted further that failure by the Court and the trial court to consider two issues highlighted by the learned trial Judge when summing up the case to the assessors, amounted to an error on the face of the record and the appellate decision of the Court should be quashed.

Finally, he pointed out that the respondent did not file any affidavit in reply. He therefore, urged the Court to find that the application is not opposed and prayed for it to be allowed by setting aside the conviction of murder and substitute it with manslaughter. Mr. Didace further prayed for an order of immediate release of the applicant as he had been incarcerated for more than eight (8) years and is now an old man.

On the other hand, Mr. Kahigi conceded that the respondent did not file any affidavit in reply but he would respond to the application on points of law, not on factual issues deposed in the affidavit in support of

motion. He responded generally to all five grounds listed by the applicant in the notice of motion by contending that the grounds do not qualify to be errors manifest on the face of record envisaged under Rule 66 (1) (a) of the Rules. He attacked the submission made by the learned counsel for the applicant that it tantamounted to an appeal and not error on the face of record. He referred us to the case of **Selemani Nassoro Mpeli v. The Republic**, Criminal Application No. 68/01 of 2020 (unreported) that quoted the case of **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R. 218 which defined what a manifest error on the face of the record entails.

On the ground of review regarding the state of the applicant when he found the deceased in his daughter's bedroom, Mr. Kahigi submitted that, when the Court sat as a first appellate court, exhaustively re-evaluated the entire evidence on record including the fact that "the applicant *"was very annoyed"*, his conduct after being annoyed and the injuries inflicted upon the deceased person and arrived at its own conclusion. He argued that the contention that the information in the preliminary hearing was manslaughter, does not qualify to be a manifest error on the face of record as it cannot be decided without looking at the

proceedings of the Preliminary hearing which is outside the mandate of the Court in review. With that submission, Mr. Kahigi urged the Court to find that the application is baseless deserving to be dismissed with costs.

In rejoinder, Mr. Didace reiterated his earlier submission that there is an error on the face of the record and that the facts showed that the applicant was very annoyed, which means that he was provoked and therefore, ought to have been convicted of the offence of manslaughter and not murder. He thus beseeched us to allow the application for review.

Having heard both parties and carefully considered the grounds raised in the notice of motion, we wish to start our deliberation by looking at the jurisdiction of the Court in review. Section 4 (4) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] provide:

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

Further, Rule 66 (1) of the Rules provides:

> *"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."

From the above, the jurisdiction of the Court in review is limited to its own decisions and not proceedings, evidence, submission or admitted exhibits.

From the submission of Mr. Didace, the application is premised under the heading of manifest error on the face of the record. An error manifest on the face of the record was considered by the Court in the case of **Chandrakant Joshubhai Patel v. Republic** (supra). In that application, the Court quoted in 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 that 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 options...Where the judgment did not effectively*

deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record...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 not ground for ordering review. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when It is obvious and self-evident and does not require an elaborate argument to be established."

Relating the above excerpt to the application at hand, we failed to go along with the submission of Mr. Didace that there was a manifest error on the face of the record. The argument advanced in ground (a) that there was an information of manslaughter in the preliminary hearing and the facts read over to him did not support the offence of murder, requires re-examination of the proceedings of the preliminary hearing which is outside the Court's power in review. As stated earlier, the power of the Court in review is limited to re-examination and reconsideration of its judgment with a view to correct or improve it, it does not extend into

re-considering its own decision on merit or else it would amount to the Court sitting in appeal against its own decision which is not permissible. We thus find that ground (a) lacks merit.

Next is the applicant's complaint under grounds (b) and (c) that malice aforethought, specifically intention to kill, was not proved as the facts presented fall short of establishing it. On our part, we find that these grounds are fit for appeal as they are not errors manifest on the face of the record. Besides, on a close look of our decision, we note that the issue of malice aforethought was adequately dealt with and determined.

From pages 251-256 of the record of review, the Court discussed in detail as to whether or not malice aforethought was established. In its discussion, it reviewed the import of section 200 of the Penal Code and considered the definition of malice aforethought as defined in the **Black's Law Dictionary**, 9th Edition. It further considered the factors establishing malice aforethought as stated in the cases of **Enock Kipela v. The Republic**, Criminal Appeal No. 150 of 1994 and **Saidi Ally Matola @ Chumila v. The Republic**, Criminal Appeal No. 129 of 2005 (both unreported). The Court also relied on its previous decisions in the cases of **Obadia Kijalo v. The Republic**, Criminal Appeal No. 95 of 2007 and

Moses Michael @ Tail v. The Republic [1994] T.L.R. 195, where it held that malice aforethought may be established by looking at the motive and the conduct of the suspect immediately before and after the act or omission. Having regard of all those principles and the evidence in the record of Appeal, the Court held:

> *"On the totality of the evidence on record we are satisfied, as did the trial Judge, that it was the appellant who assaulted the deceased. Again, on the same evidence we are satisfied that the trial court was justified in holding that malice aforethought was proved beyond reasonable doubt. This was clearly demonstrated by the appellant's conduct, utterances and the vulnerable parts of the body of the deceased were targeted by the appellant."*

From the above, it is evident that the Court considered the applicant's act of being *"very annoyed"* and related such act with his conduct, utterances and the injured parts of the deceased's body. We think, to re-argue the issue of malice aforethought in review is to invite the Court to sit on appeal on its own judgment. It is the position of the law that a review is not an appeal in disguise by a party in the aftermath of the dismissal of his/her appeal -see: for instance, the cases of **Miraji Seif v. The Republic**, Criminal Application No. 2 of 2009 and **Robert**

Moringe @ Kadogoo v. The Republic, Criminal Application No.9 of 2005 (both unreported). We therefore, find that grounds (b) and (c) are devoid of merit.

In grounds (d) and (e) of review, the applicant argued that there is a manifest error on the face of record as the Court having observed that the applicant was very annoyed, ought to have found that the case was manslaughter because the applicant was provoked by the deceased. Much as we agree, the Court noted that the applicant was "*very annoyed*" when he found the deceased in his daughter's bedroom but the Court went further to consider other factors and evidence to see whether there was an intention to kill or cause grievous harm to the deceased. Having found that the applicant acted with malice aforethought, it upheld the conviction and sentence and ruled out the defence of provocation which was not raised. Perhaps, we should repeat here, what we said in the case of **Mirumbe Elias @ Mwita v. The Republic**, Criminal Application No. 4 of 2015 (unreported) that:

> *"In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for the invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an*

alternative view is possible under the review jurisdiction."

Accordingly, we find that grounds (d) and (e) have no merit.

In view of what we have discussed, we agree with the submission of the learned State Attorney that the application has no merit as there is nothing to warrant the exercise of our review powers under Rule 66 (1) (a) of the Rules. We accordingly dismiss the application.

DATED at **BUKOBA** this 20th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2022 in the presence of Mr. Mathias Rweyemamu, learned counsel for the applicant and Mr. Juma Mahona, learned State Attorney for the respondent/ Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL