IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., MWANDAMBO, J.A. And KENTE, J.A.)

CRIMINAL APPLICATION NO. 87/01 OF 2019

RAMADHANI SAID OMARY ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mziray, Ndika, And Mwambegele, JJ.A)

dated the 22nd day of July, 2019
in
Criminal Appeal No. 497 of 2016

.....

RULING OF THE COURT

11th & 21st July, 2022

NDIKA, J.A.:

By this application, the applicant, Ramadhani Said Omary, moves the Court to review its judgment dated 22nd July, 2019 dismissing his appeal from the judgment of the High Court of Tanzania dated 9th September, 2016. In its judgment, the High Court had upheld the applicant's conviction by the District Court of Morogoro for armed robbery which earned him the mandatory thirty years' imprisonment.

The facts of the case as summarized in the judgment sought to be reviewed are as follows: on 17th November, 2014 around 08:30 hours, PW3 Debora Kileo, while heading to a branch of the National Bank of Commerce to deposit the proceeds of sales of electricity, came across the applicant who was walking by the roadside as if he was about to cross the road. Another person emerged at the scene riding a motorcycle, which he then parked close to PW3 and the applicant. Suddenly, the applicant, holding a screwdriver, came directly to PW3 and threatened her with the screwdriver, warning her not to scream for help. There and then, he snatched her handbag containing TZS. 11,000,000.00 in cash and jumped onto the waiting motorcycle. The applicant and his confederate sped away from the scene. Left stranded, PW3 shouted for help. Some good Samaritans responded but their effort to apprehend the robbers proved futile.

The complainant averred further at the trial that she observed the applicant closely for about five minutes when he came face to face with her before he snatched her handbag and that she picked him out without any hesitation at an identification parade arranged subsequently by the police.

The applicant interposed the defence of general denial coupled with an *alibi.* The learned trial magistrate was satisfied, on the evidence on record, that the applicant was positively identified at the scene. Consequently, the court convicted the applicant and sentenced him as hinted earlier. The said outcome was upheld by the High Court, on the first appeal, as well as this Court, on the applicant's further appeal.

The applicant has predicated his application on four grounds:

1. *The decision was based on a manifest error on the face of the record resulting in miscarriage of justice.*
2. *The Court's decision is a nullity from the beginning.*
3. *The applicant was wrongly deprived of an opportunity to be heard at certain instances or was denied to rejoin or make rejoinder, if any, on the appeal ....*
4. *The judgment or decision is based on illegality or was procured by fraud or perjury ....*

In a written statement of his arguments in support of the application, the applicant, who was self-represented at the hearing before us, condensed his grounds of grievance into four issues. On the first issue, he contended that PW3's visual identification was uncertain and problematic. Elaborating, he claimed that PW3 failed to give any description of the robber nor did she describe the

motorcycle that was used by the assailants to escape from the scene. He relied upon four decisions, two of which were **Jaribu Abdallah v. Republic** [2003] T.L.R. 271 and **Marwa Wangiti and Another v. Republic** [2002] T.L.R. 39 for the propositions that in identification issues, the credibility of the identifying witness is so important and that his/her ability to name the offender at the earliest opportunity is a reassuring factor. He added that since PW3 did not describe the suspect in advance, her identification of the applicant at the parade was of no moment.

On the second issue, citing **Justine Kakuru Kasusura @ John Laizer v. Republic**, Criminal Appeal No. 175 of 2010 (unreported), the applicant faulted this Court for failing to observe that the owner of the money alleged to have been stolen was not called to testify on the alleged incident.

As regards the third issue, the applicant complained that he was wrongly deprived of an opportunity to be heard by this Court. Explaining, he argued that he was not accorded an opportunity to reply to the submissions made by the learned State Attorney. Referring us to page 5 of the impugned judgment, he argued that it was evident that after the Court had summarized the learned State

Attorney's submissions on the appeal, it went ahead to decide the issues of contention instead of allowing him to make a rejoinder. He bewailed that the course taken by the Court was an egregious abrogation of his basic right to be heard guaranteed by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

Rounding off with the fourth issue, the applicant bemoaned that the Court failed to adjudicate properly on his defence of *alibi*, which he had raised at the trial after he had issued a notice to that effect in consonance with the applicable procedure. He criticized the Court for not considering the said defence, despite it being a point of law, on the reason that it was not raised on the first appeal as a point of complaint.

Replying for the respondent, Mr. Tumaini Maingu Mafuru, learned State Attorney accompanying Ms. Mwasiti Athuman Ally, learned Senior State Attorney, fervently opposed the application. While contending that the application fell short of the threshold requirements under rule 66 (1) (a), (b), (c) and (e) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), he posited that the question of identification was duly considered and determined by the Court. He denied the claim that the applicant was not given an

opportunity to make a rejoinder and argued that the applicant's *alibi* was certainly a non-starter on the evidence on record.

Rejoining, the applicant reiterated his earlier submissions and emphasized that the omission by the prosecution to produce the owner of the stolen money as a witness at the trial was fatal to the impugned conviction.

As a starting point, it is logical and convenient to excerpt the provisions of rule 66 (1) of the Rules stipulating the grounds upon which the Court can review its judgment or order:

> *"**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;*
>
> *(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;*

(e) the judgment was procured illegally, or by

fraud or perjury."

It is evident from the notice of motion that the applicant cited paragraphs (a), (b), (c) and (e) of the above rule 66 (1) as the enabling provisions for the application. In our considered view, while the first, second and fourth issues canvassed by the applicant in his submissions question the impugned judgment on the first ground that it was based on a manifest error on the face of the record resulting in miscarriage of justice, the third issue fits neatly within the third ground on the notice of motion that the applicant was wrongly deprived of an opportunity to be heard.

Apparently, the applicant did not agitate the second ground of review contending that the judgment sought to be reviewed was a nullity nor did he canvass the fourth ground so as to substantiate the claim that the said judgment is based on an illegality or was procured by fraud or perjury. We are satisfied that these contentions are manifestly spurious and we treat them as abandoned.

We begin with the three issues alleging that the impugned judgment is manifestly erroneous and unjust. The appropriate

starting point is the definition of the term "a manifest error on the face of record resulting in injustice." It is an issue that was fully addressed by the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at 225. Having examined several authorities on the matter, the Court adopted from **Mulla on the Code of Civil Procedure** (14 Ed), at pages 2335 – 2336, the following abridged description of that term:

> *"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:*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GUJ 223] ...* ***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*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki*

> *(1922) 3 Lah. 127]. 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 ordering review: Utsaba v. Kandhuni (1973) AIR Ori. 94. 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*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372].*
> [Emphasis added]

See also the decisions of the Court in **Mashaka Henry v. Republic,** Criminal Application No. 2 of 2012, **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011 and **Jayantkumar Chandubhai Patel and 3 Others v. The Attorney General and 2 Others**, Civil Application No. 160 of 2016 (all unreported).

Gauged against the standpoint in **Chandrakant Joshubhai Patel** (*supra*), we are decidedly of the view that the three alleged

errors clearly fall short of the threshold. For, they are neither obvious nor self-evident. In fact, they cannot be established even if an elaborate argument for them is given.

Starting with the finding that the applicant was positively identified at the scene, the Court's impugned decision was soundly based upon the concurrent finding by the courts below that PW3's identification of the applicant at the scene and at the identification parade was impeccable and that it was not based upon any misapprehension of the evidence on record.

We find plainly untenable the contention that the applicant's conviction was unsustainable on the reason that the owner of the stolen money was not called as a witness. It is evident from the impugned judgment that the money was stolen from PW3 and that no one else was at the scene apart from the applicant and his partner-in-crime. Assuming that the stolen money was owned by a person other than PW3, the said owner could not have been a material witness given that he/she did not witness the commission of the robbery. At any rate, PW3 might have not been a general owner of the money but she was in the eyes of the law a special owner, hence a competent witness, as she had lawful possession or

custody of the money in terms of section 258 (1) and (2) of the Penal Code.

Equally flawed is the contention that the Court wrongly dismissed the applicant's *alibi* on the reason that it was raised as a new ground having not been canvassed on the first appeal to the High Court. In view of the impeccable evidence of PW3 placing the applicant at the scene of the crime, the purported *alibi* naturally dissipated as we held in **Edgar Kayumba v. Director of Public Prosecutions**, Criminal Appeal No. 498 of 2017 (unreported). See also **Venant Mapunda and Another v. Republic**, Criminal Appeal No. 16 of 2002; and **Fadhili Gumbo Malota & 3 Others v. Republic**, Criminal Appeal No. 52 of 2003 (both unreported).

Finally, we turn to the complaint that the applicant was deprived of the opportunity to rejoin to the learned Senior State Attorney's reply. We have read the whole impugned judgment and paid special attention to page 5 thereof to which the applicant referred us. Admittedly, it is apparent from the impugned judgment that after summarizing the submissions in reply made by the learned Senior State Attorney on behalf of the respondent the Court proceeded directly to the determination of the issues of contention

in the appeal without stating if the applicant had said anything in rejoinder. However, we do not think it would be proper to equate the judgment to a transcription of the proceedings that unfolded before the Court at the hearing of the appeal. What is most important, and is actually discernible from the judgment, is that the Court provided a balanced account of the arguments for and against the applicant's appeal before it interrogated them and dismissed the appeal.

By way of emphasis, we would reiterate that the appeal turned on whether or not the applicant was positively identified at the scene. This issue was properly considered and determined by the Court, which upheld the concurrent finding by the courts below, as it found it soundly based upon the evidence on record that the applicant was positively identified at the scene. In the circumstances, the claim that the applicant's right of rejoining was abrogated is plainly farfetched.

Concluding, we find it apt to reiterate our observation in a number of cases notably **Karim Kiara v. Republic**, Criminal Application No. 4 of 2007 (unreported) that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and

corrected. We should say that what the applicant moved us to do in the instant was to sit on appeal against our own decision because he was not satisfied with it. Without mincing words, we decline the motion.

For the reasons we have given, we find no merit in the application, which we hereby dismiss in its entirety.

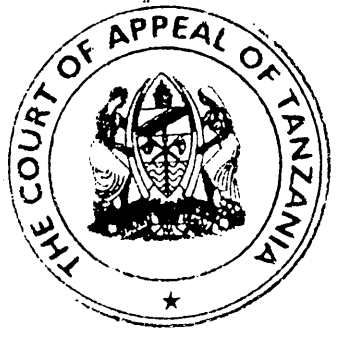
DATED at **DAR ES SALAAM** this 19th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of July, 2022 in the presence of appellant in person (via video Conference), in the absent of the State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL