IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPLICATION NO. 31/01 OF 2021

TWALAHA ALLY HASSAN.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review from the Judgment of the Court of Appeal of Tanzania)
(Ndika, Kwariko and Sehel, JJA)
dated 9th June, 2021
in
Criminal Appeal No 127 of 2019

.....

RULING OF THE COURT

3rd & 7th October, 2022

KWARIKO, JA:

Initially, the applicant, Twalaha Ally Hassan was arraigned before the District Court of Rufiji at Kibiti charged with the offence of rape contrary to section 130 (1)(2)(b) and 131(1) of the Penal Code. He denied the charge but at the end of the trial, he was found guilty, convicted and sentenced to a statutory punishment of thirty years imprisonment. The applicant was aggrieved by the decision of the trial court. However, his appeal to the High Court of Tanzania at Dar es Salaam District Registry was unsuccessful. Still discontented, the appellant appealed to this Court but the appeal was found unmerited and was accordingly dismissed in its entirety on 9th June, 2021.

The applicant is again before the Court seeking review of its decision in terms of section 4 (4) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and rule 66 (1) (a) (b) and (c) of the Tanzania Court of Appeal Rules (the Rules). The application is by way of a notice of motion supported by the affidavit of the applicant. In the notice of motion, the following three grounds have been raised to support the application, that; **one,** the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice because the Court did not consider the appellant's defence of *alibi* and also the victim (PW1) was not credible to be relied upon to ground the applicant's conviction; **two,** the applicant was denied an opportunity to be heard, as he was not allowed to make a rejoinder during the hearing of the appeal, his written submissions and list of authorities were not considered; and **three,** the Court's decision is a nullity from the beginning because the lower court's judgment was defective as it contravened the provisions of section 312 (1) (2) of the Criminal Procedure Act [CAP 20 R.E. 2022] (the CPA) and Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution).

In his supporting affidavit, essentially, the applicant reiterated the above-mentioned grounds for review. On the other hand, the respondent Republic resisted the application via an affidavit in reply

sworn by Fidesta Arumasi Uisso, learned State Attorney where it was averred that the grounds raised by the applicant do not fit for review but an appeal.

When the application was placed before us for hearing, the applicant appeared in person, without legal representation, whilst on the adversary side, the respondent Republic was represented by Ms. Aurelia Makundi assisted by Ms. Fidesta Uisso, both learned State Attorneys.

On taking the stage to argue the application, the applicant only adopted the notice of motion and the supporting affidavit together with his written submissions he had filed in Court on 27th September, 2021 and urged us to grant the application.

In response, Ms. Makundi for the respondent pointed out that the application lacks merit in that the grounds of complaint are not grounds for review rather are grounds of appeal. She argued that, non-consideration of defence of *alibi* is fit to be a ground of appeal. She had similar view concerning the second ground of complaint. In support of her arguments, the learned State Attorney referred us to the previous decision of the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218.

As regards the ground that the applicant was denied an opportunity to be heard, Ms. Makundi contended that at page 7 of the

impugned judgment of the Court it was indicated that the applicant requested the Court to adopt his grounds of appeal. She argued that, in his affidavit, the applicant did not explain if he asked the Court to make a rejoinder after the reply by the respondent and was denied. Further, the learned State Attorney submitted that the Court considered the applicant's written arguments. As to whether the judgment of the lower court was defective, it was Ms. Makundi's argument that the same is misconceived as it would require the Court to go to the records of the lower courts which is outside of the Court's jurisdiction of review that is limited to its own decisions and not proceedings, evidence, submissions and/or exhibits admitted in evidence. In support of this argument, she referred us to the Court's decision in **Crospery Ntagalinda @ Koro v. Republic** Criminal Application No. 08/04 of 2021 (unreported).

Based on her submissions, the learned State Attorney reiterated that the grounds supporting this application are not fit for review thus she prayed that the application be dismissed. In rejoinder, the applicant had nothing useful to add rather than insisting on his earlier submission.

Having considered the grounds for review, the supporting affidavit and the submissions by both parties, the crucial issue for our determination is whether the applicant's grounds are sufficient to warrant the Court to review its impugned decision. The Court has

powers to review its own decisions in terms of Rule 66 (1) of the Rules thus:

> *"(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".*

What is provided under this rule is more or less similar to what the Court held in **Chandrakant Joshubhai Patel** (supra) that:

> *"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):*
>
> *(a) where the decision was obtained by fraud;*
>
> *(b) where a party was wrongly deprived of the opportunity to be heard; and*

(c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."

In the present application, the applicant has invoked sub-rule (1) (a) (b) and (c) of Rule 66 of the Rules, that is, the impugned decision was based on a manifest error on the face of the record which occasioned injustice to him; he was denied opportunity of being heard; and that the Court's decision was a nullity.

We begin with the first ground, that the impugned judgment of the Court has manifest error on the face of the record. From the applicant's submissions, the so-called manifest error is that the Court misdirected itself regarding the applicant's defence of *alibi* and that it grounded its decision on the incredible evidence of the victim. It is trite law that, for a decision to be based on manifest error apparent on the face of the record, the error must be clear to the reader not requiring a long- drawn argument or reasoning. Some of the Court's decisions to that effect include: **Chandrakant Joshubhai Patel** (supra), **Godfrey Gabinus @ Ndimba v. Republic** Criminal Application No. 91/07 of 2019, **Masudi Said Selemani v. Republic,** Criminal Application No. 92/07 of 2019 and **Said Shabani v. R,** Criminal Appeal No. 7 of 2011 (all unreported). For instance, in the first case, the Court cited with

approval *Mulla, Indian Civil Procedure Code,* 14th Edition at pages 2335-36 and stated that:

> *"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 o f the record...But it is no ground for review that the judgment proceeds on an incorrect exposition o f 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 a 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."*

Reverting to the case at hand, as rightly argued by Ms. Makundi, that the applicant's complaints do not fall in the ambit of manifest error. The complaint in the first ground that the applicant's defence of *alibi*

was not sufficiently considered and PW1 was not a credible witness, requires the re-examination of the evidence thus drawing a long-drawn reasoning which is not in the purview of the manifest error apparent on the face of the record. The complaints are fit to be grounds of appeal and the law is clear that the Court cannot sit as an appellate court on its own decision. The defunct Court of Appeal of East Africa in **Lakhamshi Brothers Ltd v. R. Raja** [1966] 1 EA 313 observed that:

> *"In a review the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

-See also **Karim Kiara v. Republic,** Criminal Application No. 4 of 2007 (unreported).

From the above authorities, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. It follows therefore that, the two points in the first ground as fronted by the applicant are not fit for review but fit for appeal of which this Court at this stage lacks jurisdiction to do.

In the second ground, the applicant's complaint is that he was wrongly deprived of an opportunity to be heard by the Court because he was not given an opportunity to make a rejoinder. And, that his written arguments and list of authorities were not sufficiently considered. We have perused the whole of the impugned judgment and particularly at page 7 thereof where the Court indicated that at the hearing of the appeal, the applicant had adopted his grounds of appeal and urged the Court to allow the appeal. This was followed by the submissions from the respondent Republic and thereafter, the Court proceeded to consider the grounds of appeal and the submissions and finally determined the appeal. The impugned judgment is silent on the issue of rejoinder. However, and by any standard, that could not amount to a denial of a right to be heard because at the initial stages of the hearing of the appeal, the applicant had adopted his written submissions and indicated that he had nothing else to add.

Regarding the second limb of the complaint about insufficient consideration of the written submissions and list of authorities, we hold that it is a pure ground of appeal and not a ground for review and its consequences have been explained in our resolution of the first ground of complaint.

On the last ground, the applicant contended that the Court's decision is a nullity for having based on the lower court's judgment which was defective as it contravened the provisions of section 312 (1) (2) of the CPA and Article 13 (6) (a) of the Constitution. We need not spend much time on this ground simply because, as intimated above, our limitation in review is only on our own decision and not otherwise. And in any case, this complaint ought to have been raised in the appeal for the Court to consider it. As such, this ground too, fails.

In the event, since the applicant has failed to prove his grounds for review, we find the application devoid of merit and we hereby dismiss it.

DATED at **DAR ES SALAAM** this 6th day of October, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 7th day of October, 2022 in the presence of the appellant in person linked-Via Video from Ukonga Prison and Mkunde Mshanga, learned Principal State Attorney linked-Via Video from Kibaha for the respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL