IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 98/01 OF 2018

CHUKWUNDI DENNIS OKWECHUKWU .... APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mmilla, Mwangesi and Ndika JJA.)

dated the 22nd day of September, 2018

in

Criminal Appeal No 507 of 2015

....

RULING OF THE COURT

13th July, & 18th October, 2022

KOROSSO, J.A.:

Before the Court is an application brought by way of notice of motion pursuant to 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) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In the application Chukwundi Dennis Okechukwu, the applicant seeks the Court to review the Judgment (Mmilla, JA., Mwangesi, JA., and Ndika, JA.) dated 17/9/2018 in Criminal Appeal No. 507 of 2015. The notice of motion is supported by an affidavit deponed by the applicant himself.

According to the notice of motion the application is founded on the following grounds:

1. *That the applicant was wrongly deprived of an opportunity to be heard for:*
   a. *That, his memorandum of appeal, and supplementary memorandum of appeal he lodged and filed before the Court as the grounds of appeal were not argued at the hearing of the appeal.*
   b. *That, before abandoning his grounds of appeal in memorandum of appeal and in supplementary memorandum of appeal, the applicant was not involved and/or consulted neither by the Court nor his advocate as to that regard.*
   c. *That, there has been traverse of justice in that, the applicant was denied equal opportunity and fair rights of hearing since he was not granted leave by the Court to argue grounds of appeal which he lodged and filed before the Court.*
2. *That the decision of the Court was based on manifest error on the face of the record resulting in miscarriage of justice for:*

(a) *That the allegedly narcotic drugs, 81 sachets of suspected cocaine hydrochloride which was the 'fact in issue' of the case were neither identified before the court nor tendered and admitted as exhibit before the court.*

(b) *That, contrary to aforesaid, the judgment of the court wrongly referred exh. P1 as 81 sachets of cocaine hydrochloride while the record clearly shows that what was tendered and admitted as exhibit P.1 were 2 boxes.*

(c) *That even the judgment of the Court is not consistent as regards to exh. P1 since at one time, exh. P1 was referred as two draft sulphate bags, a second time as two boxes and the third time as 81 packets of cocaine hydrochloride. This is evident that narcotic drugs alleged to have been found in the house of the applicant were not tendered and admitted as exhibit before the court.*

(d) *That as the first appellate court, the Court failed to re-hear and re-adjudicate the appeal as its obligation in law otherwise the Court ought to have seen that the burden of proof in criminal cases was not attained.*

(e) *That the improper or absence of a proper account of chain of custody of the stuffs allegedly to have been found from*

the house of the applicant leaves open possibility that the stuffs seized from therein were not the same ones which were handed over to the exhibit keeper (PW5) and to the Government Chemist since their description did not tally with that given by the independent witness (PW3).

(f) *That the judgment of the Court did not comply with the mandatory provisions of section 34B (2) of the Evidence Act since the decision of the court was based on exhibit P7 which was tendered and admitted unprocedural.*

Before proceeding any further, for ease of reference, a brief background is important. The applicant and three others were arraigned in the High Court of Tanzania at Dar es Salaam for the offence of Trafficking in Narcotic Drugs contrary to section 16(1) (b) (1) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap 95 R.E. 2002, now 2019]. The prosecution side alleged that on 11/3/2011 at Kunduchi Mtongani area within Kinondoni District in Dar es Salaam Region, the applicant and his three colleagues (parties to the appeal but not this application) jointly trafficked in the United Republic of Tanzania 78542.47 grams of narcotic drugs, namely, cocaine hydrochloride valued at Tshs. 3,141,698,800/-. The applicant and his colleagues contested the allegation. After a full trial, the High Court found the case against the applicant and the three others

proved beyond reasonable doubt, convicted them, and sentenced each to a term of thirty (30) years imprisonment. The Applicant and his three colleagues' appeal to this Court was unsuccessful, which prompted the current application for review by the applicant.

On the day of the hearing, that is 13/7/2022, the applicant appeared in person, unrepresented. Mr. Nassoro Katuga and Ms. Elizabeth Mkunde, both learned Senior State Attorneys, represented the respondent Republic.

At the inception of the hearing, the applicant rose up and sought the leave of the Court to abandon the notice to withdraw the application filed on 23/7/2020 because he had inadvertently cited the details of the present application, which was not intended, and the withdrawal notice had been for another application and not the instant one. The Court granted the uncontested prayer and proceeded to mark it as withdrawn.

Upon being granted an opportunity to amplify his application, the applicant commenced by adopting the notice of motion and the affidavit supporting it, the list of authorities and the written submission filed to form part of his overall submissions. He then urged us to consider all the documents supporting the application and grant his prayers for the sentence to be reviewed. Concluding his brief oral submissions, the

applicant urged the Court in determining the application to consider the fact that he has been incarcerated for more than twelve years and that his health condition has deteriorated. He beseeched the Court to consider the fact that he has repented, and thus begged for mercy and leniency.

Mr. Katuga on the other part asserted that much as he might have sympathized with the applicant's plight, however, before the Court is an application for review whose determination is subject to the law and the rules of the Court. He contended that Rule 66(1) of the Rules provides the grounds for which the Court may review its previous judgment. With regard to the first ground of review, the learned Senior State Attorney contended that the applicant essentially faults the Court for depriving him the opportunity to be heard in terms of Rule 66(1)(b) of the Rules, having marked abandoned some of his grounds of appeal without his leave and failing to properly analyze his grievances to the detriment of his appeal.

According to Mr. Katuga, the applicant's complaints on the first ground are not supported by the record of the application for review because as can be discerned from the impugned judgment of the Court, at the hearing of the appeal the applicant was represented by an advocate who submitted on all the grounds of appeal on his behalf and the same were considered and determined by the Court. To cement his argument,

he cited the case of **Maulid Fakihi Mohamed @Mashauri v. Republic,** Criminal Application No. 120/7 of 2018 (unreported), where a similar concern was discussed by the Court.

In response to the second ground raised by the applicant, Mr. Katuga stated that having gone through the notice of motion, supporting affidavit, and oral and written submissions of the applicant he has failed to discern anything that can be adjudged to show manifest error/s on the face of the decision of the Court. The learned Senior State Attorney pointed out that what has been presented by the applicant are not errors but grounds for appeal. He argued that most of the complaints found in the notice of motion and supporting affidavit are matters which were addressed by the Court as can be found in the judgment. Mr. Katuga pointed out that the complaint that the 81 sachets were not properly identified in the trial court was not raised as a ground in the appeal. Besides, he added, the record does not show there was any miscarriage of justice, since the parties were aware that the content of the 81 sachets were narcotic drugs, that is, cocaine hydrochloride as expounded by the prosecution witnesses.

Regarding the complaint on an incorrect application of section 34B (2) of the Evidence Act by the trial court, Mr. Katuga submitted that this

issue was sufficiently addressed by the Court on appeal as found in its Judgment and that the applicant has failed to show any manifest error in the deliberation of the Court and/or its determination of the issue, thus there are no grounds to warrant a review as prayed. He thus prayed for the application to be dismissed because it lacked merit.

The applicant did not have anything further to respond in his rejoinder about the complaints at hand.

The application before us for determination is founded on 2 grounds that address 2 concerns pursuant to Rule 66 (1)(a) and (b) of the Rules. On the first ground, the applicant's complaint is that he was wrongly deprived of an opportunity to be heard and expounded three scenarios; one, that his grounds of appeal filed before the Court were not argued at the hearing. Two, some of his grounds of appeal were abandoned without having been consulted and three, he was denied the right of hearing since some of the grounds he filed on the date of hearing were not argued. Mr. Katuga on the other hand resisted the application arguing that the fronted grounds lacked substance and were an afterthought since the applicant was represented by an advocate throughout the appeal.

In the determination of an application for review, it is important to reflect on the observations of this Court in a number of cases including

the case of **James @Shadrack Mkungilwa and Another v. Republic,** Criminal Application No. 1 of 2012 (unreported) that:

> *"It is settled law that a review of the judgment of the highest Court of the land should be an exception. The review jurisdiction should be exercised in the rarest of cases and in the most deserving cases which meet the specific benchmarks stipulated in Rule 66 (1). A review application, therefore, should not be lightly entertained when it is obvious that what is being sought therein is a disguised re-hearing of the already determined appeal, as is obviously the case in these proceedings".*

We also find it pertinent to reproduce Rule 66(1) of the Rules, which states:

> *"The Court may review its judgment or order, but no application for review shall be maintained 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 apparent that the powers of review by the Court are limited. In the case of **Adam Chakuu v. Republic**, Criminal Application No. 2 of 2012 (unreported) the Court held that:

> *"It is apparent from the plain reading of Rule 66 (1) of the Rules governing review; the jurisdiction of the Court is firstly very limited to "review its judgment or order" and it neither extends to reviewing the charge sheet, the applicant's plea during his trial nor to the record of trial and appellate proceedings. This means, it is out of jurisdictional bounds for an applicant, to ground a Motion seeking a review on complaints based on charge sheet or what may be apparent on the record of proceedings."*

In addressing ground one, lest be reminded that the Court has consistently emphasized on the need for courts to observe the cardinal principles of natural justice when conducting trials and hearings. In **Barnabas William @Mathayo v. Republic**, Criminal Appeal No. 254 of 2018 (unreported), the Court stated that the emphasis on observance of the principles of natural justice is rooted in the understanding that those principles are the footing upon which our judicial system operates. In the

case of **Rukwa Auto Parts and Transport v. Jestina Mwakyoma** [2003] T.L.R. 250, the Court held:

> *"It is a cardinal practice of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In Ridge v. Baldwin [1964] AC 40 the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in Furnell v. Whangarei High School Board [1973] AC 660, "Natural justice is but fairness writ large and judicially."*

We gather from the above excerpts that courts are guardians of rights protection and that infringement of the right to be heard is not only a breach of natural justice, but it controverts constitutional guarantees.

In the instant case, having revisited the impugned judgment, we are of the view that the complaint by the applicant of not being heard is not supported by the record of the application for review. We have gathered from pages 10 and 11 of the impugned judgment that on the day of its hearing, the applicant together with the other three appellants was

represented by Mr. Jamhuri Johnson learned advocate. It is recorded thus:

> *"In the oral submission to expound the grounds of appeal before us, Mr. Johnson argued together grounds 1, 2, 3, 4 and 6 which, are in respect of the probative value of the evidence that was relied upon by the learned trial judge to hold the appellant's culpable for the charged offence. The crux of the complaint by the appellants is basically two-fold, firstly, that the evidence of prosecution witnesses was full of discrepancies and inconsistencies, and secondly, that the chain of custody of the narcotic drugs allegedly found in possession of the appellants and examined by the Government Chemist to be narcotic hydrochloride, was not established."*

Therefore, the grounds related to inconsistencies, contradictions, and credibility of witnesses were joined together, and those concerning discrepancies in the chain of custody were also dealt with conjointly. Furthermore, about the grounds of appeal at page 9 of the impugned judgment, it states:

> *"The first and fourth appellants filed a joint amended memorandum of appeal which was lodged on the 26th August, 2018, comprising of nine grounds namely...... ".*

The Court then went on to observe the fact that the third appellant had filed a memorandum of appeal with thirteen grounds and upon scrutiny, it was found that most of the grounds tally with those filed by the 1st and 4th appellants. In that regard, the Court decided to consider the two sets of grounds of appeal by the appellants together. It should be noted that the applicant was the 1st appellant.

Therefore, from the record of the application for review, what we gather is that all the grounds of appeal found in the filed memorandum of appeal were argued by the applicant's counsel and responded to by the counsel for the respondent Republic. Thus, the Court provided an opportunity for the parties to amplify and respond to the grounds in any way they found plausible. We further note that after the arguments of the counsel for the parties, the Court extensively dealt with all issues in respect of all the consolidated grounds and determined them as reflected on pages 17 to 27 of the record of review. In that regard, we are satisfied that the complaint that the applicant's rights to be heard was curtailed, is not supported by the record.

Suffice it to note that the purpose of the review is not to rehear an appeal. In **Patrick Sanga v. Republic**, Criminal Application No 8 of 2011 (unreported) it was held:

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings."*

As a result, we find ground one, on being denied the right to be heard regarding the grounds of appeal filed by the applicant lacks merit and thus fails.

The second ground raised was that the decision of the Court was based on a manifest error on the face of the record which resulted in a miscarriage of justice. The incidences presented to establish the allegations included allegations of failure by the prosecution side to tender the 81 sachets suspected to contain cocaine hydrochloride and that they were neither identified before the court. Another issue raised was that the judgment of the Court wrongly referred to exhibit P1 as 81 sachets of cocaine hydrochloride. He challenged the judgment of the Court as not being consistent as regards exhibit P1 since it had different references as regards it, as two draft sulphate bags or 81 packets of cocaine hydrochloride, which according to him meant they were not tendered as exhibits. According to the applicant, there was no evidence on record to show the reception of the 81 packets of cocaine hydrochloride and the

Court did not consider the contradictions in the references to cocaine hydrochloride, which was the subject matter of the case.

The other grievance was that the first appellate Court failed to consider the fact that there was noncompliance with the provisions of section 34B (2) of the Evidence Act since the trial court had relied on exhibit P7, the statement of ASP Daniel Shilla which was tendered and admitted in an unprocedural manner. He contended that there was no evidence tendered to prove that ASP Shilla was sick as alleged to necessitate the application of section 34B (2) of the Evidence Act to admit the statement. He cited the cases of **Bukenya v. Uganda** (1972) EA 549 and **Azizi Abdallah v. Republic** (1991) T.L.R. 71, to cement his argument that the person who alleges a fact must prove it. According to the applicant, exhibit P7 was not authenticated before being admitted and the statement of ASP Shilla was not served to him prior to the hearing within the prescribed period but produced during the pendency of the trial, which he argued was an irregularity to render the statement to be inadmissible. He concluded by arguing that the irregularities he presented should lead the Court to review its decision and quash the conviction and set aside the sentence.

There are numerous decisions of this Court that have discussed the criteria to be met before concluding that there is a manifest error on the face of the record. It is acknowledged that such an error must be manifest in the judgment and be obvious and perceptible. In **East African Development Bank v. Blueline Enterprises Tanzania Limited**, Civil Application No. 47 of 2019 (unreported), the case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 was cited in reference to its holding that:

> *"We think apparently that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this lest disguised appeals pass off for application for review. We say so for the well-known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be, beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review."*

Indeed, the decision of the Court in **East African Development Bank** (supra) amplified the requirements of Rule 66(1)(a) of the Rules on what a manifest error on the face of the record stated therein refers to,

that is, one which does not need to be established by the long-drawn process of reasoning. This position has been restated in several decisions of the Court including **Masudi Said Selemani v. Republic**, Criminal Application No. 92/07 of 2019, **Issa Hassan Uki v. Republic**, Criminal Application No. 122/07 of 2018 and **Ex. F. 5842 D/C Maduhu v. DPP**, Criminal Application No. 46/06 of 2019 (all unreported).

Applying the expounded legal position above to the instant application, we are of the view that the purported errors raised by the applicant are matters targeting the analysis of the evidence by the Court. In brief, the raised manifest errors are, one, that the narcotic drugs or 81 sachets were not identified, tendered, or admitted in court hence being referred to differently as found in the notice of motion paragraph (2(a), (b) and (c). Two, failure to rehear and adjudicate as shown in paragraph 2(d). Three, the chain of custody of the narcotic drugs and other items found in the house of the applicant was not established as stated in paragraph 2 (e), and four, there was noncompliance with section 34B (2) of the Evidence Act expounded in paragraph 2(g).

Our perusal of the record of the application for review particularly the impugned judgment has shown that the listed alleged errors in the Court's decision raised by the applicant as manifest errors, do not qualify

to be categorized as such. As rightly argued by the learned Senior State Attorney those matters were fully addressed by the Court in the impugned judgment of the Court in Criminal Appeal No. 507 of 2015. Suffice it to say, the propriety of admitting the narcotic drugs, the 81 sachets, and its chain of custody, can be discerned on page 26 of the impugned judgment where the Court stated:

> *"On the contrary, the narcotic drugs involved in the instant case that is, exhibit P1, its handling from the time of its seizure at Kunduchi Mtongani, to the exhibit room at the ADU, and later to the Government Chemist, was well articulated by PW1, PW2, PW4 and PW5 and thereby, leaving no shadow of doubt that, the substance that was seized, is the very one which was examined by the Government Chemist and tendered in evidence."*

Certainly, from the foregoing, the concern about exhibit P1 not being admitted has no legs to stand on since the Court clearly stated that exhibit P1 contains admitted narcotic drugs found in 81 sachets in two boxes. The applicant's invitation for the Court to review its finding on this issue is plainly a request to rehear and re-analyze the evidence, an undertaking not expected of this Court during the review. We have failed to gauge any error apparent in the impugned judgment as it relates to the admissibility of exhibit P1. Clearly referring to the narcotic drugs

differently did not do away with the fact that what was referred to and admitted was the cocaine hydrochloride as found in the 81 sachets.

In the same vein, in the complaint alleging manifest error in the application of section 34B (2) of the Evidence Act which relates to the admissibility of exhibit P7, the statement of ASP Shilla, we have been unable to discern any apparent error as alleged. We are satisfied that the Court fully discussed and analyzed the evidence related to the complaint and determined the matter as can be seen from pages 27 to 31 of the impugned judgment. On page 30 of the impugned judgment, it is stated:

> "*Our understanding of the provision of section 34 B (2) (e) of TEA is that, the one who had the duty to lodge a notice or raise an objection to the admission of the statement of ASP Shilla were the appellants. Since the record is clear that, they neither raised an objection to its admission, nor prayed for leave to lodge a notice, they cannot now be heard to complain that, the statement and the corresponding materials, were admitted irregularly without due notice. In that regard, we find this ground of appeal by the appellants to be baseless.*"

Plainly, the above complaint was considered and determined by the Court. The fact that the applicant has raised it again in this application

shows his dissatisfaction with the decision of the Court. We are unable to see any error on the face of the judgment warranting intervention by this Court by way of review. It is unfortunate that apart from listing the issues in respect of the two grounds of review in the notice of motion, the applicant has not fully substantiated or offered an explanation in the affidavit in support of the application. This has also greatly disabled the Court to have a clear understanding of his complaints.

It is noted that the applicant's invitation and arguments would be tantamount to us sitting as an appellate court against our own decision which is contrary to what a review of the Court's decision entails. We thus refrain from accepting the invitation to do so. In **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggarwal**, Civil Application No. 17 of 2008 (unreported), the Court stated categorically that an application for review is by no means an appeal through the back door whereby an erroneous decision is reheard and corrected at the instance of a litigant aggrieved by the Court's decision. We thus find no merit in the second ground of review.

Before concluding, we wish to acknowledge having heard the applicant's prayer for mercy and his words of repentance, but our hands

are tied, this being an application for review and not the proper forum for such prayers.

In the end, we are constrained to dismiss the application in its entirety for being devoid of merit.

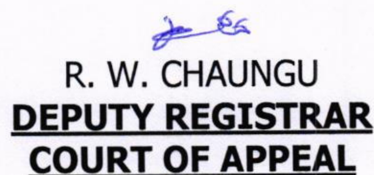
DATED at **DAR ES SALAAM** this 13th day of October, 2022.

F.L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 18th day of October, 2022 in the presence of appellant in person vide video link from Ukonga Prison and Jaribu Bahati, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL