

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPLICATION NO. 25 OF 2019

CHARLES BODE.....APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mmilla, Mwangesi and Mwambegele, JJ.A.)

dated the 6th day of March, 2019

in

Criminal Appeal No. 46 of 2016

RULING OF THE COURT

23rd, February & 1st March, 2022

KEREFU, J.A.

The applicant, Charles Bode was arraigned before the High Court of Tanzania at Dar es Salaam with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002], now R.E. 2019 (the Penal Code). Upon conviction, he was handed down the mandatory death sentence.

Aggrieved, the applicant unsuccessfully appealed to this Court vide Criminal Appeal No. 46 of 2016. Still dissatisfied, he has once more knocked on the door of the Court on an application for review. The application is by

way of notice of motion made under Rule 66 (1) (b) and (e) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) inviting the Court to review its decision made on 6th March, 2019 dismissing his appeal. The grounds upon which the review is sought are to the effect that: -

(a) The applicant was wrongly deprived of an opportunity to be heard in that: -

(i) The grounds of appeal raised and lodged by him, some were abandoned without him being asked neither by the Court nor by an advocate who was assigned by the Court to represent him, hence subjected to an unfair trial;

(ii) Following that error, the first, second, third and fourth grounds of appeal which were prepared by the applicant himself and filed before the Court were not argued at the hearing of the appeal;

(iii) The abandoned grounds of appeal were very crucial for the determination of the merit of the appeal.

(b) That the judgement of the Court was procured illegally, in that:-

(i) Since, it is apparently clear that the first, second, third and fourth grounds of appeal were not argued, then it is obvious that the procedure adopted by the Court for the hearing of appeal was illegal, therefore, there was no lawful judgment of the Court against the appellant.

The application is supported by an affidavit deposed by the applicant himself. In the said affidavit, the applicant has outlined the sequence of events culminating into this application and his dissatisfaction with the Court's decision.

On the other hand, the respondent Republic opposes the application contending that, it is misconceived as all grounds relied upon by the applicant, do not warrant the Court to exercise its jurisdiction to review the impugned decision.

It is noteworthy that upon filing his appeal before this Court, the applicant lodged a memorandum of appeal comprising of six grounds. For clarity, we find it apposite to reproduce the said six grounds herein below: -

- (1) That, the learned trial Judge erred in law and facts in taking and relying on uncorroborated evidence of Upendo Charles (PW1), who testified in Court without being sworn/affirmed;*
- (2) That, the learned trial Judge erred in law and facts in convicting the appellant basing on extra-judicial statement (exhibit P3) without taking into account that, the witnesses who testified during the trial within trial were not sworn/affirmed;*

- (3) That, the learned trial Judge erred in law and facts in taking and relying on cautioned statement (exhibit P3 (sic)), which was tendered and admitted in evidence without the appellant being given an opportunity to object to it or being informed as to its consequences;*
- (4) That, the learned trial Judge erred in law and facts for failing to draw an adverse inference against the prosecution side who deliberately and without any good reasons declined to call material witnesses and/or produce material exhibits;*
- (5) That, the learned trial Judge erred in law and facts by relying on post mortem report (exhibit P1), while the appellant was not informed of his right to have a doctor who performed the post mortem examination to the deceased to be summoned for cross examination; and*
- (6) That, the learned trial Judge erred in law and facts for allowing the assessors to cross examine the witnesses, the act which violated the mandatory requirement of the law of evidence governing the role of assessors.*

It is on record that, during the hearing of the appeal, the applicant had the services of Mr. Paschal Kamala, learned advocate who was assigned by the Court to represent him under Rule 31 (1) of the Rules. Prior

to the hearing of the appeal, Mr. Kamala sought leave of the Court under Rule 81 (1) of the Rules to add one ground given to him by the applicant on the very same day. The said prayer having been granted, the additional ground was added to the list of appellant's grounds. The additional ground was to the effect that: -

"That, the proceedings of the successor Judge were a nullity, since the proceedings were conducted without jurisdiction contrary to the provisions of the Criminal Procedure Act, Cap. 20 R.E. 2002, governing conviction where proceedings heard by one Judge and partly by another."

Furthermore, and still prior to the hearing of the appeal, Mr. Kamala, in consultation with the appellant, sought leave, which was granted for him to abandon the first, second, third and fourth grounds of appeal which were earlier on lodged by the applicant in the memorandum of appeal. As such, the learned counsel only argued on the new ground which was referred to as the first ground and the fifth and sixth grounds, which were referred to as the second and third grounds, respectively. Thus, in its judgment, the Court considered the submissions made by the parties on the said three grounds and found that the same had been adequately and properly

addressed by the trial court. Consequently, the appeal was dismissed in its entirety as indicated above, hence the current application.

At the hearing of the application, the applicant appeared in person without legal representation whereas the respondent Republic was represented by Ms. Mkunde Mshanga, learned Principal State Attorney.

When invited to argue his grounds of review, the appellant adopted the contents of the notice of motion together with the supporting affidavit and preferred to let the learned Principal State Attorney to respond first while reserving his right to rejoin, should there be the need to do so.

Ms. Mshanga resisted the application by arguing that, it has not met the threshold enshrined under Rule 66 (1) (b) and (e) of the Rules, as what has been stated in the notice of motion and the applicant's affidavit are not supported by the record. Submitting in response to ground (a) (i) of the grounds of review, Ms. Mshanga referred us to page 4 of the impugned decision and argued that, the record speaks for itself that, on the date of hearing of the appeal, the appellant was present in person before the Court and was dully represented by Mr. Kamala, learned advocate. She also referred us to page 5 of the impugned decision showing that on that date, the said advocate informed the Court that, after consultation with the

appellant, he added an additional ground and also abandoned the first, second, third and fourth grounds of appeal. It was her argument that, since the applicant was before the Court when the said grounds were abandoned but he never raised any concern or even complained about his advocate, he cannot be allowed to raise such complaints at this stage. In that regard, the learned Principal State Attorney submitted further that the applicant's claim at this stage is, nothing but an afterthought. To bolster her proposition, she cited the case of **Sudy Mashana @ Kasala v. The Director of Public Prosecution**, Criminal Application No. 2/09 of 2018 (unreported). She then submitted that ground (a) (i) of review is unfounded.

Ms. Mshanga did not submit much on ground (a) (ii) and (iii) as she argued that, on the basis of her submission on ground (a) (i), the two last items of ground (a) of review are equally devoid of merit.

In respect of ground (b) of the grounds of review, the learned Principal State Attorney submitted that, since the first, second, third and fourth grounds of appeal were abandoned after consultation between the applicant and his advocate, the contention that the impugned judgment was procured illegally, on account of the Court's failure to entertain the said grounds, is also devoid of merit. On the basis of her submission, the

learned Principal State Attorney urged us to dismiss the application for lack of merit.

In his brief rejoinder, the applicant, maintained that he was denied the right to be heard because some of his grounds of appeal were abandoned by his advocate. He however admitted that before the hearing of the appeal he had instructed his advocate to add the said new ground but contended that, there was no prior discussion with the said advocate to agree on the grounds of appeal to be argued and /or the option of abandoning some of the grounds. He thus insisted that, since his grounds of appeal were abandoned, without him being consulted by his advocate or the Court, he was denied the right to be heard. He thus urged the Court to find that the two grounds for review are sufficient to invoke its jurisdiction to review its earlier decision which had dismissed his appeal.

On our part, having examined the record of the application and submissions made by the parties, the issue for our determination is whether the grounds advanced by the applicant justify the review of the Court's decision.

It is not in dispute that the applicant appeared at the hearing of his appeal on 15th February, 2019. It is also on record that on that day the

applicant was represented by Mr. Pascal Kamala, learned advocate who argued the appeal on his behalf. It is also not in dispute that there was a memorandum of appeal lodged by the applicant, prior to the hearing date, containing six grounds of appeal. However, during the hearing of the appeal, the applicant's advocate in consultation with the applicant added a new ground and abandoned the first, second, third and fourth grounds of appeal. Therefore, the submission of the said advocate before the Court centred only on the new ground, the fifth and sixth grounds which were referred to as the first, second and third grounds, respectively. This can be gleaned from page 5 of the impugned judgment where it is clearly indicated that: -

"Before he could embark on arguing the grounds of appeal, Mr. Kamala, after consultation with the appellant abandoned the first, second, third and fourth grounds of appeal and thereby, proceeded to argue on the supplementary ground of appeal which henceforth will be referred to as the first ground of appeal, and fifth and sixth grounds of appeal, which will be referred to as the second and third grounds of appeal respectively."

It is evidenced from the record of the application that advocate Kamala consulted the applicant before he abandoned the four grounds of

appeal. Indeed, we have not discerned anything from the record of the application indicating that the appellant, who was present at the hearing before the Court, raised any concern regarding the course taken by his advocate. We are therefore, in agreement with Ms. Mshanga that the applicant's claim, at this stage, that he was not consulted by his advocate prior to the hearing date, is an afterthought. We say so, because, since the applicant was present at the hearing of the appeal, he was at liberty, if he deemed so, to raise that concern when his advocate addressed the Court.

The complaint of this nature was also raised in **Godfrey Gabinus @ Ndimba and 2 Others v. Republic**, Criminal Application No. 91/07 of 2019 (unreported). In that application, the three applicants who had the services of an advocate at the hearing of the appeal, complained, among other things, that they were not accorded the right to be heard, on account that, after the advocate being assigned to represent them, he abandoned their original grounds of appeal filed in the memorandum of appeal and argued only the grounds lodged in a supplementary memorandum. Dismissing that complaint, the Court observed as follows: -

*"... In any event, **since the applicants were all present in Court during the hearing of the appeal, they had the right to bring to the Court's attention***

to their grounds of appeal had they wished to canvass then. In so far as they did not express their wish to do so, their complaint cannot qualify to be a ground for invoking the Court's jurisdiction to review its decision on the alleged wrongful deprivation of the opportunity to be heard."
[Emphasis added].

-see also **W.D.R. Macdonald Kimambo @ Aden v. Republic**, Criminal Application No. 36/1 of 2019 (unreported).

Guided by the above authority, we agree with Ms. Mshanga that the applicant's right to be heard was not infringed. On the basis of the foregoing reasons, we do not find merit in ground (a) of the grounds of review submitted by the applicant, as he has failed to demonstrate that he was denied the right to be heard as alleged.

We have as well considered ground (b) of the grounds of review and the contents of paragraph 6 of the applicant's affidavit, which are based on the applicant's claim that the judgment of the Court was procured illegally on account that some of his grounds were not considered and determined by the Court. Having perused the record of application while discussing ground (a) above on what exactly transpired during the trial and how the

said four grounds of appeal were abandoned, we equally agree with Ms. Mshanga that ground (b) of the grounds of review is unfounded.

In the circumstances, and for the foregoing reasons, we see no merit in the applicant's application to warrant this Court to review its decision in Criminal Appeal No. 46 of 2016. Accordingly, this application fails in its entirety and it is hereby dismissed.

DATED at DAR ES SALAAM this 25th day of February, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The ruling delivered this 1st day of March, 2022 in the presence of applicant in person linked via video conference at Ukonga Prison and Ms. Jackline Werema, 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