IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KHAMIS, J.A.)

CRIMINAL APPLICATION NO. 84/01 OF 2020

TWAHA SALUM ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwarija, Korosso, And Sehel, JJ.A)

dated the 6th day of October, 2020
in
Criminal Appeal No. 21 of 2018

.....

RULING OF THE COURT

12th & 25th July, 2023

NDIKA, J.A.:

The applicant, Twaha Salum, seeks a review of the judgment of the Court handed down on 6th October, 2020 in Criminal Appeal No. 21 of 2018 dismissing his appeal from the judgment of the High Court of Tanzania sitting at Dar es Salaam dated 15th September, 2017. The High Court had upheld his conviction by the District Court of Temeke for unnatural offence. Besides, the High Court enhanced the sentence of thirty-five years imprisonment originally levied by the trial court to the mandatory penalty of life imprisonment.

The elemental facts of the case as summarized in the impugned judgment are as follows: on a certain unspecified day, two boys aged eight and ten years respectively, who testified at the trial as PW1 and PW5, were playing football at Mwembe Yanga pitch in Temeke, Dar es Salaam. According to PW1, the applicant approached them at the pitch and lured them to his home where they met two people, namely Abuu and Bony, who were smoking bhang at the time. As soon as the boys got into the home, the applicant closed the door, gagged them with a piece of cloth and proceeded to undress and sodomise PW1 while Abuu was ravishing PW5. In the end, each boy was given TZS. 100 and left the scene.

PW5's testimony differed in some details with that of PW1. According to him, he and PW1 ran into both the applicant and Abuu at the pitch who then asked them to get them cigarettes from a nearby shop. On their way back, Abuu forcefully took them to the scene of the crime where they found the applicant and Bony smoking cigarettes. The boys were forced inside the home and upon Abuu's command they stripped naked. Then, Abuu sodomized PW5 while the applicant ravished PW1. Bony took his turn after the applicant and Abuu were through. Thereafter, each boy was given TZS. 500 along with a warning against spilling the

beans. From that day, it became a habit for the boys visiting the applicant's home, singly or together, for anal intercourse with the applicant or his confederates.

Subsequently, PW1's aunt (PW2 Sharifa Hassan) learnt that PW1's academic performance at school was very poor partly because of truancy. After being chastised and queried, PW1 disclosed to PW2 about the plight he shared with PW5. PW2 went to PW5's home and disclosed the distressing news to his mother (PW4 Tuli Hassan). Then, both PW2 and PW4 paced to the scene of the crime and arrested the applicant who was later taken to the police.

PW3 Deogratius Mathew Kallanga, a medic who examined PW1 and PW5, testified at the trial that both boys exhibited loose anal sphincter tone consistent with their anal orifices having been penetrated constantly by a blunt object. He posted these findings in the medical examination reports (Exhibits P1 and P2) admitted in evidence.

The applicant interposed the defence of general denial. While admitting that he was arrested on 23rd March, 2016 at Mwembe Yanga where he had gone to see a witch doctor, he strenuously denied having ravished the two complainants.

The trial court was satisfied that the applicant was, on the evidence on record, guilty of unnatural offence. Consequently, the court convicted and sentenced him as hinted earlier. It is worth to note that the court recorded a blanket conviction without tagging it either to the first count or the second count. The said conviction was upheld, on the first appeal, by the High Court, which also enhanced the initial sentence to life imprisonment. Finally, this Court dismissed the applicant's further appeal in its entirety.

Still discontented, the applicant now moves for a review of the Court's judgment on the ground that it is based on manifest errors on the face of the record that occasioned injustice as follows:

(a) The Court mistakenly held that the general conviction entered by the trial court did not occasion any failure of justice while:

i. The evidence on record is clear that PW5's evidence did not mention or describe penetration by the applicant [which] was an essential ingredient of the charged offence.

ii. The second count was not proved against the applicant to the required standard.

(b) The applicant's plea to the second count after amendment of the charge is ambiguous as it is not on record whether he pleaded guilty or not guilty.

Arguing in support of the application, the applicant, who was self-represented at the hearing, revisited the evidence as summarized in the impugned judgment. His essential contention was that the prosecution case, built on the testimonies of PW1, PW2, PW4 and PW7, was incongruous and unreliable. On that basis, he urged us to vacate the impugned judgment.

Replying for the respondent, Ms. Flora Masawe, learned Principal State Attorney, stoutly opposed the motion. Apart from arguing that the application disclosed no manifest error within the purview of rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), she contended that the complaints raised by the applicant faulting the Court's evidential findings constituted no more than grounds of appeal that cannot be considered at this stage. Citing our decision in **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, the learned Principal State Attorney submitted that an error on the face of the record must be one that is obvious and patent but not something which can only be established by a long-drawn process of reasoning. She was resolute that

the impugned judgment established clearly that PW1 and PW5 proved that the applicant sodomised them at the scene of the crime on several occasions. On the complaint that the applicant's plea to the charge on the second count was defective, Ms. Masawe countered that the said grievance was neither raised by the applicant at the hearing of the appeal nor was it decided by the Court in the impugned judgment, implying that it cannot be raised at this stage as a basis of review.

Rejoining, the applicant reiterated his earlier contention that the impugned judgment was flawed because the conviction lay on contradictory and unreliable evidence.

At the outset, it is imperative to note that this application is predicated on rule 66 (1) (a) of the Rules, which provides thus:

> *"**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."*

As indicated earlier, it is the applicant's main contention that the impugned judgment is manifestly erroneous and unjust. To determine this complaint, we must, at first, understand what the phrase *"manifest error*

on the face of record resulting in injustice" entails. In **Chandrakant Joshubhai Patel** (*supra*) at 225, the Court, having examined several authorities on the matter, adopted from **Mulla on the Code of Civil Procedure** (14 Ed), at pages 2335 – 2336, the following abridged description of that expression:

> *"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 estabiished 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]

The above position has been reiterated in numerous decisions of the Court: see, for example, **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011, **Mashaka Henry v. Republic,** Criminal Application No. 2 of 2012, and **Jayantkumar Chandubhai Patel and 3 Others v. The Attorney General and 2 Others**, Civil Application No. 160 of 2016 (all unreported).

We have dispassionately considered the arguments for and against the application through the prism of the settled position enunciated in **Chandrakant Joshubhai Patel** (*supra*). Without any hesitation, we uphold Ms. Masawe's submission that the errors complained of clearly fall short of the threshold. We are emphatically of the opinion that they cannot

be established even if, for the sake of argument, an elaborate argument for them is attempted. Certainly, the evidence on record was overwhelming that the applicant sodomized both boys at the scene of the crime on several occasions. This finding firmly rested upon the concurrent findings by the trial court and the High Court. To be sure, the two courts below took the view that the evidence by the two complainants was spontaneous, credible, and reliable. Most importantly, this Court did not find any misapprehension of the evidence on record on the aspect of penetration.

To advance the point further, we wish to excerpt our reasoning and conclusion from page 16 of the typed judgment:

> *"It follows then that the trial magistrate after analysing the evidence was convinced that the appellant [the applicant herein]* ***committed the offence to both victims, PW1 and PW5****. We are therefore satisfied that when the trial magistrate was entering the conviction [she]* ***had in mind the two counts of unnatural offence.*** *As such,* ***the general conviction entered by the trial court did not occasion any failure of justice to the appellant."*** [Emphasis added]

On the authority of our decision in **Mussa Mohamed v. Republic**, Criminal Appeal No. 216 of 2005 (unreported) invoking an equitable rule that "equity treats as done what ought to have been done", we held in the impugned judgment that the trial magistrate's failure to enter conviction on each count was an innocuous irregularity that caused no injustice. Consequently, we implied that a conviction was entered on each count for which the applicant earned the mandatory life imprisonment.

Equally of no moment is the contention that the applicant's plea to the charge on the second count was defective. Ms. Masawe is quite right that the applicant did not raise any such complaint at the hearing of the appeal and, consequently, the Court did not interrogate and determine it in the judgment. The contention is, therefore, an afterthought. It cannot be raised and determined at this stage as a foundation of review.

Before we take leave of the matter, we find it apt to underscore as we did in several 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. It is apparent that what the applicant moved us to do in the instant matter was to sit on appeal against our own decision because he was not contented with it. He simply seized the occasion to regurgitate

the grounds of appeal he raised on the appeal before us. Without doubt, his quest was plainly misconceived.

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

DATED at **DAR ES SALAAM** this 21st day of July, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The judgment delivered this 25th day of July, 2023 in the presence of the applicant in person and Mr. Adolf Kissima, learned State Attorney for the respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL