IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A, GALEBA, J.A And MGONYA, J.A)

CRIMINAL APPLICATION NO. 82/01 OF 2020

ALLY HUSSEIN.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mugasha, Mwangesi and Mwambegele, JJA)

dated the 6th October, 2020

in

Criminal Appeal No. 293 of 2018

RULING OF THE COURT

11th & 26 July, 2023

MGONYA, J.A.:

From the material gathered from the record of this application, Ally Hussein the applicant, was arraigned with the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 [R.E. 2002] (the Code). It was the prosecution's case that, on 29th day of November, 2016 at about 20:00 hours at Mangesani area within Bagamoyo District in Coast Region, the applicant did have carnal knowledge of a girl aged four; and at the end of the trial, the trial court found the applicant guilty hence he was convicted with the offence

charged and sentenced to serve life imprisonment.

Dissatisfied with the decision, the appellant preferred an appeal to the High Court of Tanzania at Dar es Salaam Registry vide Criminal Appeal No. 350 of 2017. However, the said appeal was dismissed on 10th August, 2018 for being unmerited. Still dissatisfied, the appellant unsuccessfully lodged an Appeal to this Court via Criminal Appeal No. 293 of 2018, nonetheless the same was dismissed on 8th October, 2020. Not amused, the applicant is once again before this Court seeking review on two grounds predicated on rule 66 (1) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as paraphrased hereunder:

1. That the applicant was wrongly deprived of an opportunity to be heard by denial of his right to make a rejoinder after the respondent's reply which is said to have occasioned injustice and prejudice to him.
2. That the decision of the Court is nullity, since after the evidence of PW3 having been expunged from the record, no other evidence could corroborate or support the prosecution case.

At the hearing of the application, the applicant appeared in person unrepresented, while Ms. Anna Chimpaye, learned Senior State Attorney assisted by Ms. Anna Medard, learned State Attorney represented the respondent.

When given an opportunity to address the Court on the raised grounds of the application, the applicant had nothing to explain other than insisting that he is a layman. He left the matter in the hands of the Court to decide basing on what he deponed in his affidavit and amplified in his written submissions which he adopted.

Going through the filed affidavit, it is under paragraphs 4 and 5 where the applicant deponed that; during the hearing of the appeal, the scale was not balanced as he was not given an opportunity to make a rejoinder after the learned state attorney had submitted in opposing the appeal. With regard to the second ground, he complained that the decision of the Court is a nullity because the evidence of the victim of rape (PW3) was expunged from the record by the Court. Therefore, the remaining evidence of PW1 and PW2 must die a natural death as the same had no evidential value upon which to base a conviction, without being corroborated.

Equally, the substance of the applicant's written submissions centred on the above two complaints where he argued that, PW1 gave

hearsay evidence whereas PW2 failed to describe his physical features like body structure, height, complexion, attire and his general appearance. It was the applicant's prayer that, due to the complained irregularities in the Court's proceedings, the Court should allow the application.

In response, Ms. Chimpaye, at the outset resisted the application. On the second ground, she submitted that, the same does not fit as a ground for revision. It was rather the learned State Attorney's contention that, the complaint qualified to be a ground of appeal which does not have room in an application for review. To bolster her stance, she relied on the case of **Lilian Jesus Fortes vs. Republic,** Criminal Application No. 77/01 of 2020 (unreported).

Responding on the first ground, Ms. Chimpaye was not certain as she was in and out. However, she settled on the position that the applicant was given a chance to be heard on his all grounds of appeal and if he did not rejoin, then the omission is a minor lapse which did not occasion any injustice to him. She concluded her submission by the prayer that the application be dismissed for being meritless.

When the applicant was invited to rejoin, he insisted that, he was denied his right to be heard as he was not given a chance to rejoin.

We have taken time to examine the notice of motion, the affidavit and we have considered the written and oral submissions for and against this application. The remaining task of this Court is to determine whether the raised issues are really the grounds of review and if they are, whether they are meritorious.

It is the position of the law that, powers of the Court to review its own decisions is predicated under section 4 (4) of Appellate Jurisdiction Act, Cap 141 (AJA). The grounds which the Court considers when determining an application for review are provided under rule 66 (1) of the Rules which states:

> *"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."*

As alluded to above, in this application, the notice of motion is based on rule 66 (1) (b) and (c) of the Rules, where the applicant complains that; One, he was denied a right to be heard and; two, the Court's decision is nullity. On the first ground, we have keenly scrutinised the impugned judgment. Definitely, there is no express paragraph which indicates that the applicant was invited to rejoin. However, since the limitation of the Court when exercising its power to review are confined to review its judgment or order only, one may not find the express word showing that the applicant was invited to make his rejoinder, but may be realized upon reading the whole decision as it appears in the judgment subject to this application. That is so because most of the time, those sketches are disclosed in the proceedings. See; **Jumanne Kilongola @ Askofu vs. The Republic,** Criminal Application No. 64/01 of 2020 (unreported).

In the instant application, after a thorough examination of the whole judgment of the Court, it is clear that the applicant was given a chance to argue the appeal and also the court directed itself properly in determination of all grounds and the arguments for and against those grounds of appeal. Even if we are to agree that he was not accorded chance to rejoin, we do not find any clear prejudice to the applicant. It was stated by this Court when faced with an akin scenario

in the case of **Ramadhani Said Omary vs. Republic,** Criminal Application No. 87/01 of 2019 (unreported) that:

> *"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 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 interrogated them and dismissed the appeal."*

This Court, on several occasions has emphasize that, review process should never be allowed to be used as a disguised appeal. See: **Patrick Sanga vs. Republic**, Criminal Application No. 8 of 2011 and **Ansaar Muslim Youth Centre vs. Ilela Village Council & Another**, Civil Application No. 310/01 of 2021 (both unreported). In the latter case, this Court observed that:

> *"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. A call to re-assess the evidence, in our respectful opinion; is an appeal through the back door."*

To emphasize, public policy is that, there must be an end to every litigation. In any event, it is therefore our considered position that, in order for the applicant to seek review redress relying on an omission to rejoin, he has to demonstrate that, during a reply by the respondent there emerged a very peculiar point which needed his reply in order to clear out and explain on the advanced matter by the respondent. A mere assertion that he was not given an opportunity to rejoin would not, in our view, constitute an abrogation of the right to be heard.

Turning to the 2nd ground, it is the applicant's concern that, the trial court's decision is a nullity as the evidence of the victim of rape who testified as PW3 was expunged, hence the remaining evidence which is uncorroborated was weak to warrant conviction.

When it comes to the complaint that, the judgment is a nullity within the ambit of rule 66 (1) (c) the Rules, the law is clear that, the decision is a nullity if it is defective on its face. See; **Hassan Marua vs. Tanzania Cigarette Company Limited, Civil** Application No. 338/01 of 2019 (unreported).

Now turning to the application at hand, the applicant's explanation that the impugned decision is a nullity, attracts an assessment of the evidence adduced by all the witnesses before the

trial court. In our view, this ground suffices to be a ground of appeal as the Court cannot resolve it without re-assessing the remaining evidence from other witnesses and documents tendered, if any.

It is trite law that review is not intended to challenge the merits of the decision or an alternative to appeal. See the cases of **Blueline Enterprise Ltd vs. The East African Development Bank (EADB)**, Civil Application No. 219 of 2012, **Jumanne Kilongola @ Askofu vs. The Republic,** (Supra) Application No. 64/01 of 2020 (unreported) where this Court was referred to what was stated in **George Mwanyingili vs. DPP,** Criminal Application No. 27/6 of 2019 (unreported) that:

> *"Our scrutiny of the arguments clearly shows that the complaint dictates evaluation of evidence, as such, the applicant seeks this court to re-hear the appeal which amounts to overturn our decision which we have no jurisdiction to".*

Considering the course taken by the applicant in this application, we are persuaded that he wished this court to set aside the judgment simply because the applicant conceived himself to be aggrieved by the decision of the Court. This act is against the rationale behind review,

as courts do not review judgments simply because a losing litigant is not satisfied.

In line with the above position, we wish to refer to this Court's decision of **Muzzammil Mussa Kalokola vs. The Minister of Justice & Constitutional Affairs & Another**, Civil Application No. 256 of 2019 (unreported) where it was held that:

> *"In the premises, the review should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case for finding the error, as that is tantamount the exercise of appellate jurisdiction which is not permissible. Thus, the Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard."*

From the above analysis, we find the grounds in the notice of motion meritless. Therefore, the issue raised in this ruling attracts negative response and, in the event therefore, the instant application

is hereby declared devoid of merit and we accordingly dismiss it in its entirety.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th Day of July, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 26th day of July, 2023 in the presence of the applicant in person and Ms. Edith Mauya, learned counsel for the respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL