

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., AND MAKUNGU, J.A.,)

CRIMINAL APPLICATION NO. 23/01 OF 2021

BERNARD THOBIAS JOSEPH.....APPLICANT

VERSUS

THE REPUBLICRESPONDENT

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

(Mkuye, Korosso and Mwandambo, JJA.,)

dated the 9th day of April, 2021

in

Criminal Appeal No. 414 of 2018

.....

RULING OF THE COURT

19th & 28th July, 2023

MKUYE, J.A.:

The applicant was charged before the District Court for Kinondoni District with the offence of armed robbery contrary to section 287A of the Penal Code (the Penal Code). Upon conviction, he was sentenced to thirty years imprisonment. Aggrieved, the applicant unsuccessfully appealed to the High Court and a further appeal to this Court proved fruitless. Still dissatisfied, he has once more approached this Court with an application for review by way of notice of motion made under Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") seeking the Court to review its decision made

on 9th April, 2021 dismissing his appeal. The grounds upon which the review is sought are as follows:

- 1. The decision of the Court was based on manifest error on the face of record resulting in miscarriage of justice:*
 - a. The decision of the Court was based on evidence of witnesses who were not procured.*
 - b. That, the witnesses alleged to have witnessed the recovery of the items in the applicants home did not testify, hence, the doctrine of recent possession was wrongly invoked.*
- 2. The applicant was deprived opportunity to be heard in that the supplementary memorandum of appeal was not considered.*

The application is supported by an affidavit deposed by the applicant himself, in which he has narrated the sequence of events leading to this application and a brief account of his dissatisfaction with the Court's decision. On the other hand, the respondent Republic has opposed the application.

At the hearing of the application, the applicant appeared in person without legal representation while the respondent Republic was represented by Mr. Laiton Mhesa, learned Principal State Attorney assisted by Ms. Jenipher Masue, learned Senior State Attorney together

with Ms. Edith Mauya and Mr. Cuthbert Mbilingi, both learned State Attorneys.

On being invited to argue his grounds of review, the applicant adopted the contents of the notice of motion together with the supporting affidavit and preferred to let the respondent Republic respond first while reserving his right to make a rejoinder, if need to do so would arise.

Ms. Masue commenced by stating that the scope of the powers of review from decisions of this Court is premised on the dictates of Rule 66(1) (a) to (e) of the Rules. On this position, she relied on the case of **The Grand Alliance Limited v. Wilfred Lucas Tarimo and 4 Others**, Civil Application No. 229 of 2020 (unreported). Responding to ground 1 (a) and (b), Ms. Masue submitted that the complaint that the Court relied on evidence of a witness who had not been called to testify during the trial, was factual. It was her argument that, the evidence of the witness who could not be found was properly received by the trial court under the provisions of section 34B of the Evidence Act, and was rightly relied upon by this Court in its decision. Submitting further, she maintained that the manifest error on the face of record has not been established, beseeching the Court to find that the ground lacks merit.

In relation to ground No. 2, Ms. Masue referred us to page 4 of the impugned decision and argued that, it is clear that the applicant had presented five grounds of appeal which were adequately considered by the Court and that the said grounds of appeal had sufficiently proved the offence of armed robbery against the applicant. In the alternative, Ms. Masue argued that, in the event it is agreed that the applicant's grounds of appeal in the supplementary memorandum of appeal were not considered, their consideration would not have changed the outcome in the appeal. She argued that the Court was satisfied by the evidence on record that, the applicant had been positively identified and that the stolen items were sufficiently identified.

In this regard, it was Ms. Masue's contention that the applicant has not been able to establish the existence of manifest error on the face of record and wrongful deprivation of opportunity to be heard to warrant the Court to review its decision. She stressed that, the purpose of review is to correct errors found in the decision rather than allowing an aggrieved litigant to argue an appeal again. In conclusion, she stressed that this application does not fall within the dictates of Rule 66(1) of the Rules and implored us to dismiss it.

In his rejoinder, the applicant insisted that he was denied the right to be heard because the Court did not give him a chance to address it on his supplementary memorandum of appeal containing seven grounds of appeal. He further argued that the ten-cell leader who is said to have been present at the time when the alleged stolen items were retrieved from his room, was not called to testify, rather, only his statement was produced. The applicant wound up by praying that his application be allowed. He also urged the Court for reduction of the sentence if his application will not be sustained.

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

We shall begin our discussion with the scope of the Court's power to review its decision. Rule 66(1) (a) to (e) of the Rules lays down specific grounds upon which an application for review may be premised. It reads as follows:

"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;

(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”.

Apart from the above quoted provision of the law, we need to emphasize that the purpose of review is to re-examine the judgment with a view to amending or correcting an inadvertent error which, if not re-considered, will result into a miscarriage of justice - See: **Rizali Rajabu v. Republic**, Criminal Application No. 4 of 2011 and **Hassani Ng'anzi Khalfan v. Njama Juma Mbega (legal personal representative of the late Mwanahamisi Njama & Another**, Civil Application No. 336/12 of 2020 (both unreported). In the case of **The Grand Alliance Limited** (supra) cited by the learned State Attorney, the Court reiterated the principles guiding review as follows:

"In exercising its powers in review, the Court is guided by a number of principles including but

not limited to the following: **One**, the review jurisdiction is not by way of appeal and its purpose is not to provide a back door method to unsuccessful litigants to re-argue their case or seek a re-appraisal of the entire evidence on record; **Two**, the power of review is limited in scope and normally used for correction of a mistake but not to substitute view in law; **Three**, a judgment of a final court is final and review of such judgment is an exception; **Four**, in review, a mere disagreement with the view of the judgment cannot be a ground for review and where a point has already been dealt with and answered parties cannot challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction; **Five**, an erroneous view justifies an appeal and the power of review can therefore not be exercised on the ground that the decision was erroneous on merit; **Six**, it will not be a sufficient ground for review that another judge would have taken a different view, nor can it be a ground for review that the court proceeded on incorrect exposition of the law and **Seven**, a manifest error on the face of the record should be an error that is obvious and patent and not something which can be established by a long drawn process of reasoning

*on points which may conceivably be two opinions. See- **Elia Kasalile and 17 Others v. Institute of Social Works**, Civil Application No. 187/18 of 2016, **Golden Globe International Services and Another v. Millicom (Tanzania) N.V and Another**, Civil Application No. 195/01 of 2017 and **Dismas Bunyerere v. The Republic**, Criminal Application No. 92/08 of 2018 (all unreported)".*

In the matter at hand, the applicant's first ground is to the effect that the decision subject of review is marred with manifest errors on the face of record occasioning miscarriage of justice on him. The substance of the complaint is that the Court in its decision relied on the evidence of a witness who did not testify, rather, his statement was tendered, in lieu of evidence *viva voce*.

It is plain from the judgment that in the grounds of appeal, the applicant never complained against the reception of evidence under section 34B of the Evidence Act, in which case then, faulting the lower courts for relying on evidence that had been received in that manner. In our view, this complaint is an afterthought calculated to invite the Court to sit in its own appeal. As alluded to earlier on, review is not an avenue for an applicant to argue his appeal a second time - **The Grand**

Alliance Limited (supra) and **Abel Mwamwezi v. Republic**, Criminal Appeal No. 1 of 2013 (unreported). It would appear to us that the complaint that a particular witness ought to have testified cannot be canvassed as ground for review. It is a complaint which should have been raised before the first and second appellate courts. Besides, that ground as raised calls for re-assessment of evidence which is tantamount to re-opening the appeal. In the circumstances, this ground fails.

With regard to the second ground, as rightly submitted by Ms. Masue, the impugned judgment does not bear out that there was any supplementary memorandum presented before the Court for determination of the grounds contained in it. Even if, assuming that there was such supplementary memorandum, in view of the fact that the Court was satisfied that the applicant was positively identified under favourable conditions and that the stolen items found in possession of the applicant were sufficiently identified by the victim (PW1), the said grounds of appeal would not have had any impact on the outcome of the appeal in favour of the applicant.

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. 414 of 2018. Accordingly, this application fails in its entirety and it is hereby dismissed.

DATED at DAR ES SALAAM this 25th day of July, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 28th day of July, 2023 in the presence of the appellant in person and Ms. Salome Matunga, learned State Attorney for the respondent/Solicitor General, is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL