IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MWAMPASHI, J.A.)

CRIMINAL APPLICATION NO. 35/05 OF 2020

ARMAND GUEHI...APPLICANT

VERSUS

THE REPUBLIC...RESPONDENT

(Application for Review from the Judgment of the Court of Appeal at Arusha)

(Kimaro, Luanda, Mmilla, JJ.A.)

dated the 28th day of February, 2014

in

Criminal Appeal No. 242 of 2010

....

RULING OF THE COURT

23rd & 31st August, 2023

FIKIRINI, J.A.:

The applicant, Armand Guehi, preferred this application for review under rule 66 (1) (a) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The gist of the application is for the Court's decision, dated 28th February, 2014 in Criminal Appeal No. 242 of 2010, to be reviewed. In support of his application, the applicant filed an affidavit dated 12th December, 2019, a supplementary affidavit filed on 5th May, 2021, in terms of rule 49 (2) of Rules and written submissions lodged on 14th April, 2021, 5th May, 2021, and 18th

August, 2023 to replace the one filed on 11th August, 2023, plus a list of authorities. On its part, the respondent Republic, through Mr. Kassim Nassir Daud, learned State Attorney, filed an affidavit in reply contesting the application.

A short background to this application, as discerned from the record, is that the applicant was charged with murder contrary to section 196 of the Penal Code in Criminal Sessions Case No. 40 of 2007. He was convicted and sentenced in terms of section 197 of the Penal Code to suffer death. Aggrieved, he appealed to this Court vide Criminal Appeal No. 242 of 2010. The Court upheld the conviction and the sentence meted by the trial court in its judgment dated 28th February, 2014. Perturbed and not convinced the applicant has preferred this application for review.

In his notice of motion, the applicant had raised six (6) grounds which upon scrutiny we find that they cover three main areas, namely: **one,** that he was deprived of his right to be heard, **two,** there was a manifest error apparent on the face of record and **three,** that the decision was a nullity.

On 23rd August, 2023, when this application came on for hearing, the applicant appeared himself, unrepresented and Ms. Cecilia Mkonongo, learned Principal State Attorney, Ms. Agatha Pima and Mr. Peter Utafu, learned State Attorneys, appeared for the respondent Republic.

Convincing the Court that he was submitting in support of the application for review and not arguing an appeal, the applicant, after adopting his notice of motion, affidavits in support, the written submissions and list of authorities filed, his opening remarks were that the respondent did support his appeal before the Court, unfortunately the Court had a different view. His anticipation to be released died out. However, based on the respondent's previous stance of supporting his appeal, he was expecting them not to oppose the present application.

Taking us through the reasons as why he thinks his application deserves to be granted, the applicant argued, on the first ground that he was denied the right to be heard. This argument was based on the fact that while he appreciates that the Court when sitting as a 1st appellate court had a right to re-assess and re-evaluate the evidence and come up with its own conclusion, in the present instance, the Court, when doing so, relied on the email evidence. This evidence was never relied on by the trial court. Yet the applicant was not given a chance to oppose the email evidence the Court relied on in upholding the trial court's conviction. This deprived the applicant, Mr. Nelson Merinyo and Elvaison Maro, the two learned advocates representing him, of challenging that evidence on appeal as no ground was raised to that effect.

Admitting that he was aware that the Court could depend on any document on record in its re-evaluation and re-assessment of the evidence, but under the principle of natural justice on the right to be heard as well as under Article 13 (b) of the Constitution of the United Republic of Tanzania, 1977, on the principle of equality before the law, the Court ought to have allowed him to be heard or at least put to him or his advocates questions regarding the email evidence, instead of asking itself question in the course of composing its judgment. Strengthening his submission, he referred us to the case of **G.9963 Raphael Paul @ Makongojo v. R,** Criminal Appeal No. 250 of 2017 (unreported) in which the Court underlined that a party's right is not only to be heard but be heard thoroughly. Since this did not happen, the solution is to rehear the matter; of course, this should depend on the circumstances of each case. The applicant fortified his submission by citing the case of **Samwel Gitau Saitoti @ Saimoo @ Jose & 2 Others v. The DPP**, Criminal Application No. 73/02 of 2020 (unreported).

Given his submission, the applicant was convinced his application has merit and stressed that he be released for the following reasons: (i) that his right to be heard guaranteed by the Constitution was violated, (ii) that the Court should consider the time he had already spent in prison, which is good eighteen (18) years and (iii) lastly, his poor health.

His second ground was that there was a manifest error apparent on the face of the record. On this, the applicant relying on the case of **Said Haruna Mapeyo v. R,** Criminal Application No. 21/01 of 2020 (unreported), that once the Court has not effectively dealt with or determined a critical issue in the case, that decision can be reviewed. The applicant thus invited the Court to do so in the present application.

Regarding the third ground on the nullity of the decision, the applicant contended through his written submission that the sentence of death by hanging pursuant to section 197 of the Penal Code meted to him was unconstitutional as it goes contrary to Articles 4 (1) (2); 107 B; 12 (2) and 13 (1) (2) of the Constitution. Therefore, the decision upholding such an invalid sentence is equally invalid in law, improper, null and void. He concluded his submission by pressing upon the Court to grant his application and consequently set him free.

Countering the submission, Mr. Utafu, on behalf of the respondent's team, outrightly informed the Court that they were opposing the application, even though they previously supported the appeal. Continuing with the submission, apart from adopting the affidavit in reply and making it part of their submission, Mr. Utafu, addressing the 1st ground on the right to be heard, contended that besides the applicant being represented by two learned advocates, the issue of email was not dealt with by the trial court. He was,

however, quick to submit that the email evidence was not the only evidence relied on by the Court in arriving at its decision when re-evaluating the evidence while sitting as the 1st appellate court. While undertaking its obligation, the Court reconsidered the whole evidence. The email evidence was thus considered together with the other evidence and the Court came up with the judgment upholding the trial court decision. He concluded by submitting that the ground had no merit.

Responding to the second ground that there was a manifest error on the face of the record, he maintained that it was equally of no merit. Critiquing the submission that the evidence on record did not support the Court's conclusion or that the facts used to prove the prosecution case never met the required standard in a criminal case and that conviction was based on weaknesses of the defence case, Mr. Utafu contended that nowhere in the applicant's submission he had been able to point out any error or errors. Instead, the applicant had essentially been inviting the Court to rehear his appeal. That, according to him, was in contravention with the dictates of rule 66 (1) (a) – (e) of the Rules, insisted Mr. Utafu. Furthering his submission, he argued that in a review, typically, the Court looks at the apparent errors and does not go back to the proceedings and re-evaluate the evidence.

Mr. Utafu, also criticized the averment in paragraph 11 of the affidavit in support, in which the applicant had insinuated fraud by the prosecution for

concealing some of the vital information. Still, in his submission, the applicant had not expounded on the point. Buttressing his proposition, the learned State Attorney referred us to the case of **Patrick Sanga v. R**, Criminal Application No. 8 of 2011 and **Lilian Jesus Fortes v. R,** Criminal Application No. 77/01 of 2020 (both unreported), in which the Court discouraged the invitation to re-assess the evidence, which involves a long drawn process, equivalent to bringing an appeal through the back door, sternly holding that cases should come to an end, and review should always be an exception. The Court, also considered and clearly pronounced that a review should not be to challenge the merits of the decision but rectify irregularity in the decision or proceedings, emphasized by the learned State Attorney.

Distinguishing the cases cited by the applicant, Mr. Utafu contended that in **Makongojo** (supra) the issue was a right to be heard, which in that case was not afforded, the situation which was different in the present application since the applicant was availed a right to be heard through the learned advocates representing him. The right to be heard was also discussed in the case of **Saitoti** (supra). In that case rehearing was advocated once right to be heard was not given. However, that could not apply in the present application, as nothing called for rehearing, submitted, the learned State Attorney.

On why the applicant should be released instead of rehearing as prayed by the applicant, the learned State Attorney, argued that none of the reasons advanced carried weight. The sentence could not be reduced or altered without overturning the conviction, although the applicant had long stayed in prison awaiting execution of his sentence. After all, being in prison for a long time was in itself not a ground of review, remarked the learned State Attorney.

The last point that the decision from which a review was sought was a nullity did not fascinate Mr. Utafu. He contended that the raised point was baseless, as the decision resulted from the thorough evaluation and re-evaluate of evidence by both the trial court and this Court. After he was convicted, he was sentenced according to the provisions of the Penal Code. Based on his submission, he implored us to decline the request to review the decision.

In his short rejoinder, the applicant admitted that he had two advocates representing him, but reiterated that the Court never inquired from the learned advocates or the applicant on email evidence. Failure by the Court to ensure that the applicant was given chance to address the email evidence, had denied him his right to be heard. He further argued that since the trial court did not use the email evidence in its decision, the Court should have

given him the opportunity to be heard on the email evidence, as was stated in the **Makongojo's** case (supra).

In replying to the submission by Mr. Utafu, on the manifest error apparent on the face of the record, the applicant insisted that there was an error apparent on the face of the record, after the Court failed to determine some of the issues. Citing the following examples, the Court did not resolve the conflict on the two dates pointed out when exactly the deceased body was found. Was it on the 5th or 6th October, 2004. The applicant is convinced that had the Court determined that issue probably would have resolved it in his favour, as that would have conclusively backed the applicant's account of where he was at the time of the murder, on the one hand and on the other when exactly the deceased was killed. Another concern was directed to the evidence by the investigator. It was the applicant's submission that had the Court reevaluated that evidence as a whole, they would have come up with a different finding, argued the applicant.

Regarding the nullity of the decision, the applicant urged us to rely on his filed written submission.

The law on applications for review is now well settled. A review,is not an appeal in disguise whereby an erroneous decision is reheard and corrected. There is a long list of cases to that effect such as, **Chandrakant**

Joshubhai Patel v. R [2004] T. L. R. 218, **Marcky Mhango & 684 Others v. Tanzania Shoe Company Limited & Another**, Civil Application No. 90 of 1999, **Karim Kiara v. R**, Criminal Application No. 4 of 2007, **Tanganyika Land Agency Limited & 7 Others v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008, **Patrick Sanga v. R,** Criminal Application No. 8 of 2011 and **Omari Mussa @ Selemani @Akwishi** and **Maulidi Fakihi Mohamed @ Mashauri v. R,** Criminal Application No. 120 of 2018 (all unreported). In all those cases, the Court has elaborately elucidated under what circumstances an application for review can be entertained. We shall discuss this more a bit later in this ruling.

It is noteworthy that in a properly functioning legal system, litigation must have finality, this being a matter of public policy. It is not irrelevant to clearly state that if this were not so, then as was stated by this Court in **Marcky Mhango and 684 Others** (supra), the Court's order would have the effect which would be:

> *"Is to reopen a matter otherwise lawfully determined. There should be certainty of judgments ....a system of law which cannot guarantee the certainty of its judgments and their enforceability is a system fundamentally flawed. There can be no certainty where decisions can be varied at any time at the pressure of the losing party and the machinery of*

justice as an institution would be brought into question..."

Therefore, a review should be carried out when and where certain conditions are met: **one,** that there is a manifest or apparent error on the face of the record, which resulted in a miscarriage of justice. Under the circumstances and as pointed out in **Tanganyika Land Agency Limited & 7 Others** (supra), the applicant would be under the obligation to show that the error is obvious or apparent when it stated:

> *"[An] error on the face of record.........must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinions".*

Two, the applicant was wrongly deprived of the opportunity to be heard. See, **Saitoti** and **Mapeyo** (supra). **Three,** the Court could review its decision once it has been shown that it was obtained by fraud. **Four,** the issue of jurisdiction can also constrain the Court to review its decision. See, **C. J. Patel v. R,** Criminal Application No. 80 of 2002 (unreported).

Turning to the present application, we believe the applicant has not met any of the four grounds above. His six (6) grounds, which essentially covered three areas as indicated beforehand in the application, are nothing

but grounds for what would appear to be another appeal. We say so for the following reasons: **first and foremost,** the averments in the applicant's affidavit and supplementary affidavits are not within the ambit of issues that could have beckoned the Court to review its decision. Specifically on the pointed-out areas, we find no apparent error on the face of the record that obliges us to review our decision.

Secondly, the applicant claimed to have been denied a right to be heard. We have thoroughly gone through the Court decision and that of the trial court. It is correct that the trial court did not rely on email evidence to convict the applicant. However, the 1st appellate court was required to reevaluate and re-assess the evidence, even though it highlighted the email evidence but did not solely rely on it to convict the applicant. There was other evidence more compelling relied on by the Court. In our view, the issue was neither an error apparent on the face of the record nor an erroneous decision. In **Mapeyo's** case, where the Court faced with almost an akin situation, had this to say:

> "*We are fortified in this view by the fact that this issue neither is an error apparent on the face of the record resulting from impugned decision nor is erroneous.* ***This is simply because the complaint is baseless owing to the fact that this issue was dealt well by the Court when it evaluated***

> ***and analyzed the evidence of the trial court and came to the conclusion that despite admitting that the autopsy report (exhibit P2) was not helpful because examination was performed on a body which had no head and that the DNA evidence if present would have been helpful to establish whose body was, nonetheless, the Court found that there was other cogent evidence to show that the said body was that of the deceased".***
>
> [Emphasis added]

The situation is, however, different in **Makongojo's** case (supra). In that case, it was evident the applicant was declined bail, but the record is silent if he was heard on the subject, which was not the case presently. There was, thus, an issue of a right to be heard. In the case before us, we believe that the applicant is challenging the merits of the decision and not precisely seeking the right to be heard, as he was afforded that right before. Moreover, we disagree that this is the justification for a review process. The purpose of having a review process has been articulated in the case of **Maulidi Fakihi Mohamed @ Mashauri** (supra). In that case, we had this to say:

> ***"Review is not to challenge the merits of the decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party".***

[Emphasis added]

From the decision, it is evident that a review is intended to address irregularities of a decision or proceedings that caused injustice and not to challenge the merits of the decision, which we think is what the applicant is doing.

Thirdly, the applicant alleged fraud in paragraph 11 of his supplementary affidavit but could not illustrate what evidence was withheld or suppressed; therefore, we could not comprehend his complaint. Ordinarily, in a review, the Court does not go back to the proceedings and start reevaluating and re-assessing the evidence but rely on the Court decision called upon to be reviewed. In this case, it would be the decision delivered on 28th February, 2014 and not any other decision. This Court will be sitting against its own decision arising from the same proceedings by permitting a review the applicant proposes.

We say loudly that this should not be allowed since it amounts to an appeal in disguise.

Fourthly, the applicant wants the decision to be considered a nullity because the conclusion arrived at convicting the applicant and the sentence meted by the Court, was illegal. We agree with Mr. Utafu that the Court thoroughly reevaluated and re-assessed the evidence and concluded that he

was guilty of murder as charged and accordingly sentenced him, based on the provisions in the Penal Code, thus properly and lawfully handled. There was nothing to the contrary warranting the grant of his prayers on the pretext that the decision was a nullity.

Having thus considered what the applicant presented before us, we see no merit to warrant this Court to review its judgment in Criminal Appeal No. 242 of 2010, dated 28th February, 2014. The application fails and is accordingly dismissed.

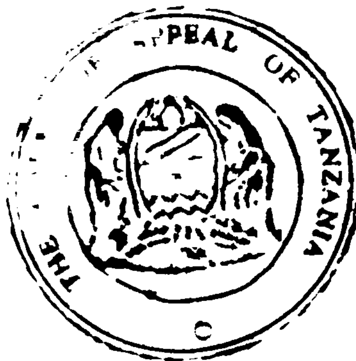
DATED at **MOSHI** this 31st day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2023 in the presence of the applicant in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL