IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And MAIGE, J.A.)

CRIMINAL APPLICATION NO. 36/05 OF 2020

CHRISTIAN ORGENES NKYA.....APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review from the judgment of the Court of Appeal of Tanzania at Arusha)

(Msoffe, Kileo & Oriyo, JJ.A.)

dated the 6th day of September, 2010
in
Criminal Appeal No. 285 of 2007

.....

RULING OF THE COURT

27th September & 2nd October, 2023

MWANDAMBO, J.A.:

The District Court of Moshi at Moshi convicted the applicant Christian Orgenes Nkya of the offence of statutory rape involving a girl aged eight years in the year 2004. He was, in consequence, sentenced to 30 years' imprisonment. On appeal before the Resident Magistrate's Court at Moshi, Mgaya, PRM exercising extended jurisdiction dismissed the appeal sustaining the conviction and sentence. Still aggrieved, he appealed to the Court in Criminal Appeal No. 285 of 2007. Like the first appellate court, the Court dismissed his appeal in its decision delivered

on 6 September, 2010 but substituted the sentence from 30 years' imprisonment to life sentence as the appropriate sentence against a convict of rape involving a girl below 10 years.

Having exhausted his right of appeal, the appellant has moved the Court for review predicated upon rule 66 (1) (a), (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). This he did after obtaining an order extending the time for doing so made by a single justice of the Court (Sehel, JA.) made on 26 March 2020.

Initially, the applicant had predicated his quest for review upon five grounds as shown in the notice of motion lodged on 8 May 2020 supported by his own affidavit. However, on the day he appeared before us for the hearing of his application, the applicant abandoned all grounds except ground one which runs as follows with its inherent grammatical errors: -

> *"The decision of the Court was a nullity as it was based on a manifest error on the face of the record due to the fact that the enhanced sentence of the applicant by the courts was not in any way supported by the charge preferred against him, since the sub-sections categorizing the nature of the offence he is allegedly committed and the sentence facing him if found*

guilty were not featuring on the charge sheet. Furthermore, it is statutory law that's if the offence charge is one created the sections of the enactments creating the offence, hence deprive him an opportunity to fully defend himself and to know the nature and seriousness of the charge/sentence laid on his door, this resulted to a miscarriage of justice."

The respondent Republic opposed the application through an affidavit in reply deponed to by Ms. Revina Prosper Tibilengwa, learned Principal State Attorney.

At the hearing, the applicant appeared in person, unrepresented. He made two main arguments in support of his application. The first was that the Court altered the charge sheet by inserting sub-section (3) in section 131 of the Penal Code prescribing punishment for the offence of statutory rape that is, life imprisonment against a person convicted of statutory rape involving a girl under 10 years. It was the applicant's contention that since the charge before the trial court omitted to cite the sub-section, it was rendered defective and so his conviction was grounded upon a defective charge. According to him, the omission constituted a manifest error on the face of the record in terms of rule 66 (1) (a) of the Rules which should have been easily detected by the Court

on appeal. The second argument was that, in enhancing the sentence to life imprisonment, the applicant was wrongly deprived of his opportunity to be heard which was sufficient to grant his application under rule 66(1) (b) of the Rules.

Not surprisingly, Ms. Tibilengwa who addressed the Court appearing with Ms. Eliainenyi Njiro, learned Senior State Attorney was resolute that, the application is misconceived. According to her, the application neither satisfied the pre-condition under rule 66(1) (a) on the existence of a manifest error on the face of the record nor was the applicant wrongly deprived of the opportunity to be heard by the Court setting aside the illegal sentence of 30 years' imprisonment substituting it with the proper one of life imprisonment. In support of her submission, the learned Principal State Attorney referred to us the Court's decision in **Anania Clavery Betela v. Republic**, Criminal Application No. 46/01 of 2020 which cited several Court's decisions on the scope of review, notably, **Tanganyika Land Agency Limited & 7 Others v. Manohar Lal Agrwal**, Civil Application No. 17 of 2008 (both unreported). That decision was cited to argue that, an application for review must be based on obvious and patent mistake which should not involve a long-drawn process of arguments to be established.

Ms. Tibilengwa downplayed the applicant's contention on the omission to cite sub section (3) in section 131 of the Penal Code in the charge. She argued that the non- citation was a curable omission under section 388(1) of the Criminal Procedure Act (the CPA) in so far as the particulars of the offence indicated that the rape involved a girl below 10 years of age. With equal force, the learned Principal State Attorney argued that, imposing an appropriate sentence against the applicant after the Court had heard arguments during the hearing of the appeal did not amount to depriving the applicant opportunity to be heard. On those arguments, Ms. Tibilengwa invited the Court to dismiss the application.

When he was invited for his final word, the applicant reiterated that, section 131 (3) of the Penal Code on the basis of which the Court enhanced the sentence did not feature in the charge sheet he was called upon to plead before the trial court and ultimately convicted. Similarly, he contended that he was not called upon to say something on the penal provision leading to the enhancement of the sentence.

Having heard arguments from both sides, our starting point will be to revisit the scope of review particularly where an application is predicated upon rule 66 (1) (a) of the Rules which stipulates:

"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; ...".*

It is plain from the above that the Court's power to review its decisions is not open ended. It is exercisable upon a litigant satisfying the Court on any of the conditions prescribed under rule 66. One of such conditions set out in para (a) of rule 66(1) is existence of a manifest error on the face of the record such that had the Court detected such an error, it could not have made the decision. Parallel to that, it must be shown that such an error has resulted in miscarriage of justice. That means, a party seeking review of the Court's decision predicated upon para (a) of rule 66(1) of the Rules has to go further and satisfy the Court that the impugned decision has resulted in miscarriage of justice.

From the authorities placed before us and others we have landed our eyes on, it is settled law that an application for review is not meant to be used as an opportunity for an aggrieved litigant to re-argue his appeal through the back door. The Court has repetitively said so in many of its previous decisions such that it may not be necessary to cite them here. Needless to say, we shall cite a few of the decisions to stress

the point. In its recent decision in **Hajibhai Kara Ibrahim v. Mrs. Zubeda Ahmed Lakha & 2 Others**, Civil Application No. 573/11 of 2022 (unreported), the Court reiterated the scope of review with emphasis on para (a) in rule 66(1) of the Rules referring to its previous decisions in particular, **Patrick Sanga v. Republic**, Criminal Appeal No. 8 of 2011 (unreported). The Court stressed in that decision that there must be end to litigation which should not depend on the litigant's exhaustion of his ingenuity. In similar vein, in **Blue Line Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012 (unreported), it quoted with approval Lord Shaw's observations in an old decision in **Haystead v. Commissioner of Taxation** [1920] A.C 155 at page 166 thus:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present so as to what should be a proper apprehension, by the Court of the legal result... **If this were permitted litigation would have no end except when legal ingenuity is exhausted"** (Emphasis added).*

The applicant seeks review in this application claiming that the Court glossed over a manifest error on the face of record with regard to

the alleged defect in the charge which omitted to cite a sub-section prescribing penalty in section 131 of the Penal Code. However, it is glaring that, the Court made reference to section 131(3) of the Penal Code when addressing itself on the legality of the sentence of 30 years' imprisonment imposed on the applicant considering the age of the victim of rape. Be it as it may, to agree with the applicant entails examining the charge sheet from the record of appeal which is not before us. In our view, doing so will not be in harmony with the scope of review on a claim based on manifest error on the face of the record. At any rate, if we were to relax ourselves and travel that far, the omission to cite a penal section in the charge sheet, if any, would not have rendered such charge defective resulting into a wrongful conviction. This is because we are satisfied that such omission was inconsequential to the charge consistent with the Court's decision in particular; **Jamali Aly v. Republic**; Criminal Appeal No. 52 of 2017 (unreported). Consequently, we reject the applicant's complaint predicated upon rule 66 (1) (a) of the Rules as misconceived.

Next, we shall consider whether the applicant was wrongly deprived of opportunity to be heard on the sentence. This complaint is equally baseless. As far as we can discern from the copy of judgment annexed to the founding affidavit, the Court raised the issue regarding

the legality of sentence in the presence of the parties at the hearing of the appeal. It did so alive to its role as a superior Court to ensure the correct application of the law consistent with its decision in **Marwa Mahende v. Republic** [1998] T.L.R. 249.

There is no dispute that the victim of rape was a young girl below 10 years of age which attracted imposition of a mandatory life sentence to the applicant upon his conviction. Mindful that the two courts below glossed over and imposed an illegal sentence of 30 years' imprisonment, the Court intervened by quashing the illegal sentence and substituted it with the correct sentence. The applicant admits that he was present in Court and heard submissions from the respondent's attorneys at the Court's invitation. We are not prepared to accept the applicant's bare assertion that he was not called upon to say something in response when the Court drew the attention of the parties to the propriety of the sentence. Again, to go along with the applicant in his complaint, it will require going beyond the decision to find out if he was indeed denied his right to be heard with regard to life imprisonment sentence. It is significant that, in any event, the life imprisonment was a mandatory sentence rather than its inadequacy had the trial court assuming it had discretion on the sentence following conviction. The applicant has not explained to us that in what way the appropriate mandatory sentence

now complained of has resulted in miscarriage of justice. We similarly reject this complaint.

In fine, since the applicant has not satisfied the Court to review its decision in the ground canvassed at the hearing, we dismiss the application for lack of merit.

DATED at **MOSHI** this 30th day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 2nd day of October, 2023 in the presence of the Applicant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL