

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPLICATION NO. 35/11 OF 2021

BORE S/O CLIFF APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for Review against the Judgment of the Court of Appeal of
Tanzania at Tabora)**

(Mwarija, Kwariko, Galeba, JJA.)

Dated the 6th day of May, 2021

in

Criminal Appeal No. 193 of 2017

RULING OF THE COURT

19th September, & 4th October, 2023

MGEYEKWA, J.A.:

The present application arises from an unsuccessful decision of this Court. It seeks to review the decision of this Court (Mwarija, Kwariko, Galeba, JJA.) dated 6th May, 2021 sitting at Tabora in Criminal Appeal No.193 of

2017. The application is supported by an affidavit sworn by Bore Cliff, the applicant who reiterates the grounds for review in paragraphs 5 and 6 of his accompanying affidavit, stipulating that there is an error apparent on the face of record which resulted in miscarriage of justice on his part. And the Court did not effectively deal with the issue of the age of the victim.

The respondent resisted the application and demonstrated his resistance by lodging an affidavit in reply sworn by Veronica Kwilini Moshi, learned State Attorney dated 26th September, 2023.

A brief background related to the application is that the applicant was arraigned before the District Court of Nzega at Nzega for rape contrary to sections 130 (2) (e) and 131 (3) (b) of the Penal Code. He was convicted and sentenced to serve a period of thirty (30) years imprisonment. The first appeal before the High Court was unsuccessful. His second appeal to this Court in Criminal Appeal No. 193 of 2017 was also dismissed. Still aggrieved, the applicant lodged the instant application on one (1) ground of review: -

- 1. That, the bench of the Justices of Appeal did not effectively deal with the issue of the age of the victim.*

At the hearing of the application, the applicant was present in person unrepresented whereas the respondent/Republic had the services of Ms. Alice Thomas assisted by Ms. Veronica Moshi, both learned State Attorneys.

Having adopted the supporting affidavit and written submissions, the applicant urged us to adopt and consider his grounds for review.

Ms. Moshi hastened to inform the Court that she was not in support of the application because it is misconceived. She forcefully argued that the applicant's claim on existence of manifest error in the impugned decision is misconceived since the Court determined the victim's age. Relying on the case of **Mirumbe Elias @ Mwita vs. The Republic**, Criminal Application No. 4 of 2015, [2016] TZCA 275 (25 October 2016) TanzLII, she submitted that the Court cannot re-assess evidence and sit as an appellate court on its own decision. She therefore argued that the issue cannot amount to an error apparent on the face of the record.

In his rejoinder, the applicant had no much to say, he urged us to consider the ground of review regarding the victim's age. He also urged us to consider his ill-health condition and set him free.

Having heard the arguments advanced by the parties for and against the application also having synchronized the ground of review, affidavit in reply, the issue for our determination is whether the grounds for review as echoed in the supporting affidavit, justify the review of the Court's decision under Rule 66 (1) of the Court of Appeal Rules, 2009 (the Rules).

The review jurisdiction of the Court is a creature of statute stipulated under the provisions of section 4 (4) of the Appellate Jurisdiction Act (AJA) and Rule 66 (1) of the Rules which provide that the Court shall have power to review its own decisions. The provisions of the law regulating review of decisions of the Court is stipulated under Rule 66 (1) of Rules which provides that:-

"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; or*
- (b) A party was wrongly deprived of an opportunity to be heard; or*

- (c) *The Court's decision is a nullity; or*
- (d) *The Court had no jurisdiction to entertain the case; or*
- (e) *The jurisdiction was procured illegally or by fraud or perjury".*

From the above wording of rule 66 (1) of Rules, it is clear that a judgment/ruling of the Court is final and review of such decision is an exception. Rule 66 limits the scope of review jurisdiction. In **Tanganyika Land Agency Limited and 7 Others v. Manohar Lai Aggrwal**, Civil Application No. 17 of 2008 (unreported), the Court defined the phrase "a manifest error on the face of record" as follows:-

"....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."

See - **Masudi Said Seiemman v. Republic**, Criminal Application No. 92/07 of 2019 [2020] TZCA 18 (25 February 2020) TanzLII and **Chandrakant Joshubhai Patel v. The Republic** [2004] TLR 218.

Guided by the above position on what kind of manifest error on the face of the record is referred to under rule 66(1) of the Rules, in the present application, we have scrutinized the applicant's affidavit to find out whether the applicant's grounds for review are worthy it. In paragraphs 5 and 6 of the supporting affidavit, the applicant has raised a ground on manifest error apparent on the face of the record which resulted in a miscarriage of justice. He complained that the Court did not effectively deal with the issue of the age of the victim. In essence, as rightly submitted by the learned State Attorney that the issue on the victim's age was conclusively dealt with by the Court and answered. The alleged error is not self-evident and, it cannot be treated as an error on the face of record. More so, the same does not qualify to be a ground of review because it invites the Court to re-assess evidence and sit as an appellate court on its own decision. In **EX F. 5842 D/C Maduhu vs. Director of Public Prosecutions**, Criminal Application No. 46/06 of 2019 [2020] TZCA 322 (17 June 2020) TanzLII, the Court held that:-

"As submitted by the learned State Attorney, the move by the applicant was aimed at inviting us to re-

evaluate the evidence which is not the essence of a review."

Similarly, in the case of **Executive Director Golden Sands Hotel Limited Zanzibar v. Attorney General & Another**, Civil Application No. 4/ 2016, [2019] TZCA 492 (12 December 2019) TanzLII, the Court held that:-

"In Review the Court should not sit on appeal against its own Judgment in the same proceedings. In a review, the Court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the Court had some matter not been inadvertently omitted." [Emphasis added].

Besides, the applicant urged us to consider his ill- health condition and set him free. However, our hands are tied by the law such that we cannot issue an order which would be in contravention of statutory provisions of the law.

In view of what we have endeavoured to discuss, we are satisfied that the applicant has not made out a case warranting a review of the Court's decision and the application is unmerited. We accordingly, dismiss it.

Order accordingly.

DATED at **TABORA** this 3rd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Ruling delivered this 4th day of October, 2023 in the presence of the Applicant in person and Mr. Steven Mnzava, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL