**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MGONYA, J.A.)**

**CRIMINAL APPLICATION NO. 34/05 OF 2020**

**KENNEDY ELIAS SHAYO..... APPLICANT**

**VERSUS**

**THE REPUBLIC.... .....RESPONDENT**

**(Application for review from the Judgment and Order of the Court of Appeal of Tanzania at Arusha)**

**(Mussa, Korosso, Kitusi, JJ.A)**

**dated 12th day of December 2019**

**in**

**Criminal Appeal No. 84 of 2017**

**.....**

## RULING OF THE COURT

14th & 16th November, 2023

## MGONYA, J.A.:

Kennedy Elias Shayo the applicant herein, preferred this application for review of the decision of this Court in Criminal Appeal No. 84 of 2017. The application is by way of Notice of Motion made under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141, rule 48 (1) and 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In support of the application there is an affidavit affirmed by the applicant himself. On the other side, the respondent did oppose the application by

way of an affidavit in reply affirmed by Kassim Nassir Daud, learned State Attorney.

The facts giving rise to the application at hand started way back in 2015, in Criminal Session No. 13 of 2015 where the applicant Kennedy Elias Shayo and Athuman Musa who is not a party in this application were arraigned before the High Court of Tanzania at Moshi for the offence of trafficking in Narcotic Drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 [R. E. 2002] as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 6 of 2012 (The Drugs Act). At the end of the trial, the court was of the view that, the prosecution succeeded to prove the charge beyond reasonable doubt against the accused persons henceforth they were found guilty as charged, convicted and sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, the applicant and his co-accused lodged an appeal to this Court praying that the conviction be quashed, set aside the sentence and they be set at liberty. After determination of the grounds of appeal, this Court, on 12th December, 2019, delivered its judgment whereby, it found that the appeal by the 2nd accused had merit and accordingly quashed the conviction and set

him free while the 1st accused's appeal was found to be unmerited and hence the decision of the High Court was upheld.

The applicant herein was not pleased with the decision of this Court henceforth, he filed the instant application praying this Court to review its decision in Criminal Appeal No. 84 of 2017. The grounds for review canvassed in the Notice of Motion filed by the applicant are:

(a) That, the decision of the Court was a nullity as it was based on a judgment of the convicting court, yet the presiding judge in her judgment failed to assign the reasons for dissenting with the opinion of the two assessors who had returned a verdict of not guilty in favour of the appellant (applicant). Hence, the trial cannot be said to have been conducted with an aid of assessors and it became a nullity.

(b) That, the decision of the court was based on a manifest error on the face of record as the charge sheet preferred against the applicant was based on a dead provision of the law, hence the prosecution ought to have been substituted while filing information of trafficking in Narcotic Drugs on 22/2/2017. Failure to do so renders the court's decision a nullity as it is not clear which charge was read over to him on the said date.

When we sat for hearing, the applicant was represented by Mr. Jethro Turyamwesiga, learned counsel whereas Ms. Upendo Shemkole, Senior State Attorney accompanied by Ms. Neema Mbwana, State Attorney, appeared for the respondent.

Before embarking on the hearing of the application, we invited Mr. Turyamwesiga to address the Court on the validity of the Notice of Motion filed by him while there was already another Notice of Motion filed by the applicant. Upon a short dialogue with the Court, the learned counsel prayed the Court to abandon the Notice of Motion filed by him and chose to proceed with the one filed by the applicant, having discerned impropriety in filing the second one without leave of the Court.

When he was invited to argue on the application, Mr. Turyamwesiga informed the Court that, he will argue on the second ground only which is on the manifest error on the face of record. He went on to adopt the Notice of Motion and the supporting affidavit. In his effort to elaborate the alleged manifest error on the face of record, the learned counsel pointed out Page 19 paragraph 2 line 6 of the impugned judgment and went on to state that, it is on record that the first and the second appellants were arrested at Majengo, while it was the prosecution's case that they were driving from Himo to town. Mr.

Turyamwesiga also referred this Court on page 38 and 39 that, there is an error on record that the accused was arrested while driving; and that since his co-accused was a mechanic fixing the said vehicle, then his main concern is how the person can be arrested while driving a motor vehicle which was on motion and under repair. In his view, this is an error which can be seen even by a person who is reading while running.

It was Mr. Turyamwesiga's further submission that, since the second appellant was a mechanic of the said vehicle who was acquitted, then, it was his view that, even the applicant who was the driver to that vehicle should be acquitted as well. Failure to acquit the applicant is an error on the face of the record that does not require a long process to detect, he argued. Therefore, the applicant has to benefit from that apparent error. To bolster his argument, he cited the case of **Chandrakat Joshubhai Patel v. Republic** [2004] TLR 218 and the case of **Juma Mzee v. R.,** Civil Application No. 88/07 of 2019 (unreported) on how it defined a manifest error.

In response to the learned Counsel's submission, Ms. Mbwana learned State Attorney, at the outset objected the application. She contended that, there is no manifest error on the face of record as alleged. She submitted that, in review, one cannot challenge the merit

of the case. That the applicant's complaint did not even feature in the courts. Responding on the alleged error pointed from page 19 and 38 of the impugned judgment, Ms. Mbwana stated that, the counsel for the applicant moves the Court to reassess the evidence something which is contrary to rule 66 (1) of the Rules. To fortify her stance, she referred this Court to the case of **Armand Guehi v. The Republic**, Criminal Application No. 35/05 of 2020 (unreported) quoting the case of **Maulid Fakihi Mohamed @ Mashauri v. The Republic**, Criminal Application No. 120/07 of 2018 (unreported) and the case of **Alexandris Athanansios v. Republic**, Criminal Application No. 50//01/2020 (unreported).

Ms. Mbwana contended further that the matter before the Court is rather an appeal in disguise and not review. Further, the ground in issue is not an error on the face of record as it will entail the Court to refer to the courts' proceedings. Therefore, granting the applicant's application will be contrary to rule 66(1) of the Rules, she argued.

When it was his turn for making a rejoinder, Mr. Turyamwesiga objected that the indicated error emanated from the proceedings. Essentially, he insisted that the application fits for review and he is not praying for the hearing of the appeal.

Having considered the anxious submissions made by the counsel for the parties for and against the application, the main issue for consideration is whether the ground advanced for review is justifiable for grant of the prayer sought.

The exercise of review powers by this Court had its history from the case of **Transport Equipment Ltd v. Devram P. Valambhia**, Civil Application No. 18 of 1993, where a Full Bench consisting of seven Justices sat to consider whether the Court had inherent power to review its decisions. It was then observed by the Full Bench that review power is necessary for the proper and complete administration of Justice. Then the Full Bench held that, the Court had inherent jurisdiction to review its decisions on the following circumstances. **One**, where there is manifest error on the face of record which resulted in miscarriage of justice. **Two**, where the decision was obtained by fraud. **Three**, where a party was wrongly deprived of the opportunity to be heard. See; **Chandrakant Joshubhai Patel v. The Republic**, Criminal Application No. 8 of 2002.

It is the same circumstances mentioned in **Chandrakant Joshubhai Patel** (supra) which were listed under rule 66 (1) of the Rules, upon which the Court can be moved to review its own decision.

As alluded to above, in the instant application, the applicant complaint is on a manifest error on the face of the record as provided under rule 66 (1) (a) of the Rules. What constitutes manifest error on the face of record, the phrase has been discussed at length by this Court in the case of **Chandrakat Jitubhai Patel v. Republic** (supra) that:

> *"An error apparent on the face of the record must be such that can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two options...Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record ..But it is no ground for review that the judgment proceeds on an incorrect exposition of the law...A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not ground of ordering review. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is*

*obvious and self-evident and does not require an elaborate argument to be established."*

The above position has been reiterated in numerous decisions including: **Abbas Kondo Gede v. The Republlc**, Criminal Application No. 75/01/2020; **Tanganyika Land Agency Limited and 7 Others v. Manohar Lal Aggrawal,** Civil Application No. 17 of 2008; **Isaya Linus Chengula v. Frank Nyika**, Civil Application No. 487 of 2020; and **Ansaar Muslim Youth Centre v. Ilela Village Council, & Another**, Civil Application No. 310/01/2021 (all unreported) to mention a few.

So far it has to be kept in view that, an error apparent on the face of record must be such an error which must be on a mere preview on the record and would not require any long-drawn process of reasoning. It is very limited only to correct self-evident errors. Therefore, the question of misappreciation of facts and evidence involved may not be a sufficient ground for review.

In this application, as indicated earlier by Mr. Turyamwesiga, a manifest error in the impugned judgment was pointed on Page 19 paragraph 2 line 6. Going by the referred part, it is revealed that, the Court was analysing the testimony of PW9 and PW10 on the incident which occurred on 3rd April, 2013 around 13:00 hrs. The said witnesses

testified on how they got information from their informer about the appellants' conduct, the information which led to their arrest and how the search was conducted in Exhibit P9 (the motor vehicle), which led to retrieval of six parcels therein.

Likewise, we have gone through pages 38 and 39 of the impugned judgment where the Court was also referring to the evidence tendered, where it was testified that the 1st appellant was arrested while he was driving Exhibit P9 within Moshi District and that Exhibit P3 was seized in that process. At page 39 it is also on record that, the Court was analysing the evidence which revealed how the 2nd appellant was found in exhibit P9 and then how the Court found his assertion that he was just a mechanic was not challenged.

We have thoroughly gone through the impugned judgment especially the pointed pages, unfortunately, we failed to observe any error apparent on the face of it. The purported error raised by Mr. Turyamwesigwa that, the records on the paragraphs he referred to, creates unattended questions as to how a person can be arrested while driving and how a motor vehicle can be repaired while moving. From those questions, we are of the firm view that, those questions do not fall within the meaning of an apparent error on the face of record resulting

in miscarriage of justice. The reason for the finding is very simple thus, the raised question needs a long-drawn process of reasoning therefore, it did not fall within the context of apparent error on the face of record as dictated by the Court in the case of **Anania Clavery Betela v. The Republic**, Criminal Application No. 46/01 of 2020 (unreported) quoting the case of **Tanganyika Land Agency Limited and Others** (supra) that:

> *".....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 opinion."*

Further in the case of **Juma Luluba v. The Republic**, Criminal Application No. 66/01 of 2017 (unreported), this Court had this to say:

> *"Review is by no means an appeal, but is basically intended to correct an inadvertent error committed by the Court and one which, if left unattended will result into a miscarriage of justice. We must emphasize that, for a decision to be based on manifest error on the face of record, the error must be clear to the reader not requiring long-drawn arguments or reasoning."*

All that needs to be said is that, from what has been submitted by Mr. Turyamwesiga, it is revealed that his complaint is on how the second appellant was acquitted while the first appellant was not while their case was made on the same evidence. In his view, that is an apparent error of the face on record which resulted into miscarriage of justice to the applicant. Therefore, the applicant has to benefit from it. With due respect, we are not ready to buy his version for two reasons. **One**, the counsel has failed to establish on how the miscarriage of justice had occurred when the Court was evaluating the evidence of PW9 and PW10 (page 38 and 39). **Two**, in his argument as on how the second appellant was acquitted while the first appellant's appeal failed, his arguments demand this Court to reassess and re-evaluate the evidence on record, a task which was supposed to be done on appeal and not in review. It is trite law that, mere disagreement with the view of the judgment cannot be a ground for review. See; Dr. **Muzzammil Mussa Kalokola v. The Minister of Justice and Constitutional Affairs & Another**, Civil Application No. 256 /01 of 2019 (unreported) and **Blueline Enterprises Ltd v. The East African Development Bank (EADB)** Civil Application No. 21 of 2012.

All said, we find that what is stated to be apparent error on the face of record fails to meet the tests laid down in **Chandrakat Joshubhai Patel v. Republic** (supra) and the provisions of rule 66 (1) (a) of the Rules. Therefore, the issue raised above is responded in the negative.

In a final analysis and on the above reasons, we find this application without merit and we accordingly dismiss it.

**DATED** at **ARUSHA** this 15th day of November, 2023.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

L. E. MGONYA
**JUSTICE OF APPEAL**

The Ruling delivered this 16th day of November, 2023 in the presence of the applicant in person, Ms. Neema Mbwana, learned State Attorney for the respondent and in the absence of Mr. Jethro Turyamwesiga, learned counsel for the applicant though duly notified, is hereby certified as a true copy of the original.

A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**