IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 26/08 OF 2022

TANZANIA BREWERIES LIMITED..... APPLICANT

VERSUS

THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT..... FIRST RESPONDENT

THE ATTORNEY GENERAL ..... SECOND RESPONDENT

PENDO MASASI ..... THIRD RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania at Mwanza)

(Ndika, Kwariko, And Fikirini, JJ.A.)

Dated 28th day of July, 2021

in

Civil Appeal No. 34 of 2019

.....

RULING OF THE COURT

8th & 14th December, 2023

RUMANYIKA, JA:.

This is an application for review of the above-named judgment of this Court (Ndika, J.A., Kwariko, J.A. And Fikirini, J.A.) dated 28th July, 2021 in Civil Appeal No. 34 of 2019. It is brought by way of notice of motion, under Section 4(4) of the Appellate Jurisdiction Act, Cap. 141 ("the AJA") and Rule

66(1) (a), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

Briefly, the background to the matter is that: Pendo Masasi, the 3rd respondent was an employee of Tanzania Breweries Company Ltd, the applicant. He began his service as a Forklift Driver, with effect from 3rd January, 1995 up to 14th October, 1998, when he was promoted to the position of a Banking Driver. It was alleged that, on 13th June, 2000 he allowed one Mrisho Selemani, a mere Yard Crew to drive the applicant's loaded vehicle without permission of the authority and he caused accident. He endangered both the consignment and other road users. Not amused by the 3rd respondent's act, the applicant wrote a letter requiring him to explain on the said tragedy. Still showing its unhappiness, the applicant filed Form No. 1 to dismiss the 3rd respondent summarily. Finally, the 3rd respondent's employment was terminated by a letter dated 24/06/2000, upon conclusion of a disciplinary hearing by the respective Trade Union Field Branch Committee. Not satisfied with the dismissal, he referred the dispute to the Labour Conciliation Board (the Board), which confirmed his guilt, but ordered that he be reinstated and, instead, reprimanded for the offence.

Aggrieved by that decision, the applicant referred the matter to the Minister (the 1st respondent), to challenge the decision, that there was a total disregard of the fact that the third respondent had committed a serious breach of the Disciplinary Code. The 1st respondent set aside the Board's decision. Still aggrieved, the applicant successfully applied for prerogative orders of certiorari and mandamus in the High Court of Tanzania, at Mwanza, vide Miscellaneous Civil Application No. 28 of 2009, on the ground that, the 1st respondent's decision was unreasonable for non-compliance with the law. The High Court quashed the decision and sustained the summary dismissal.

Aggrieved by the High Court's decision, the 3rd respondent successfully appealed in this Court vide Civil Appeal No. 34 of 2019. By its judgment dated 28th July, 2021, the Court observed that, the 1st respondent's decision to uphold the Board's decision was neither unreasonable nor irrational, because summary dismissal was not a mandatory penalty in the circumstances.

As hinted before, being aggrieved, the applicant is now before us, seeking a review of the judgment, on one ground only. It reads: *The Judgment was based on a manifest error on the face of record resulting in the miscarriage of justice.*

At the hearing of the application, Ms. Marina Mashimba, learned counsel represented the applicant. The 1st and 2nd respondents had the services of Mr. Lameck Merumba, learned Senior State Attorney who was assisted by Ms. Sabina Yongo and Mr. Victor Mhana, both learned State Attorneys. The 3rd respondent appeared in person, unrepresented.

Ms. Mashimba began by adopting the supporting affidavit and written submission filed on 18/11/2021. She faulted the Court for having erroneously interpreted items (h) and (g) of the 2nd Schedule to the Security of Employment Act, 1964 (the SEA). She contended that, upon upholding the conviction of the 3rd respondent for such a breach of the Code, an offence specified under the said Item (h), the only disciplinary penalty mandatorily available was summary dismissal.

Further, she faulted the Court for not considering the proviso to section 21(2) (a) of the SEA. According to her, the proviso required that, summary dismissal as the mandatory penalty be imposed, regardless of the 3rd respondent being a first or habitual offender. In her view, Ms. Mashimba considered the Court's finding and decision an apparent error on the record, under rule 66(1) (a) of the Rules.

Replying, Mr. Merumba adopted an affidavit in reply sworn by Ms. Sabina Yongo, for the 1st and 2nd respondents filed on 04/12/2023. He contended that, what is averred and alleged by the applicant in paragraphs 20 and 21 of the affidavit does not depict an error apparent on the record. He asserted that, the Court's decision may or may not have been erroneous, but it made it after it had fully heard the parties. The decision made, he stated, might be aggrieving but the ground raised is not necessarily a ground of review. To support his point, he cited **Shadrack Balinago v. Fikiri Mohamed @ Hamza & 2 Others,** Civil Application No. 25/8 of 2019 (unreported). With regard to what amounts to an apparent error on the record, he cited **Attorney General v. Mwehezi Mohamed (as Administrator of the Estate of the Late Dolly Maria Eustace) And 3 Others,** Civil Application No. 314/12 of 2020 (unreported). He prayed for an order dismissing the application for being misconceived.

The 3rd respondent adopted his written submissions. He stoutly resisted the application for being misconceived. To start with, he quoted, for our consideration, a passage at page 16 of our judgment, shown at page 116 of the record of review, as follows:

"...it is patent that the learned Judge erred in assuming that summary dismissal was mandatory even "for a first breach without the need of issuing a warning or reprimand", as she put it, and, consequently her finding that both the Board and the Minister wrongly imposed a penalty other than summary dismissal was erroneous."

He went ahead contending that, the burning issue in this application is whether he deserved a summary dismissal or a mere warning in the circumstances of the case. Referring to grounds 3, 4 and 5 of the appeal as presented before the Court, he asserted that, the Court fully heard the parties and arrived at the decision and that, if it made it wrongly then it is not an error apparent on the record within the context.

Further, the 3rd respondent contended that, the applicant may have been dissatisfied with the decision, but this application appears to be an attempt of a second bite appeal which is not acceptable in law. To reinforce his point, he cited the Court's decision in **Damian Ruhele v. R,** Criminal Application No. 4 of 2013, **Tanganyika Land Agency Ltd and 7 Others v. Manohar Lal Aggrwal,** Civil Application No. 17 of 2008 and **Shabani Menge & Another v. R,** Criminal Appeal No. 3 of 2013 (all unreported).

Still stressing on what an apparent error on the record entails, the 3rd respondent asserted that, when it is so alleged, the error must be self-evident requiring no any arguments to establish it. It cannot even be determined on a ground that, another judge could have taken a different view. To support his point, he cited our decision in **Halmashauri ya Kijiji cha Vilima Vitatu And Another v. Udaghwenga Bayay & 16 Others,** Civil Application No. 16 of 2013 (unreported). We note that, in that case, we also took inspiration from a Kenyan case in **National Bank of Kenya Ltd v. Ndung'u Njau** (1997) eKLR.

Concluding, the 3rd respondent stated that, after losing an appeal, the applicant now simply tries his luck, which may invariably result into wastage of the Court's precious time. He further contended that, if the Court cannot take serious measures to discourage such unwarranted actions brought in the courts, it may lead to unnecessary floodgate of litigations. To bolster his point, he cited **Dr. Aman Walid Kabourou v. The Attorney General And Another,** Civil Application No. 70 of 1999 (unreported). Finally, he urged the Court to dismiss the application in its entirety.

Having heard the parties' submissions and considered the authorities cited, and after reviewing the record, the issue that we are called upon to

determine is whether, the applicant has made out a case sufficiently to warrant the Court review its own decision.

It is trite law that, in order for the Court to review its own judgment, a person seeking it has to satisfy any of the grounds set out under Rule 66(1) of the Rules. for the purpose of this application, it reads:

> *"**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) – (e) [not applicable]".*
>
> [Emphasis added]

The applicant has premised this application under Rule 66(1) (a) of the Rules. At Paragraph 21 of the supporting affidavit, the deponent has stated what he thought is an error on the record, sought to be rectified. It is about the Court's finding that, summarily dismissing the 3rd respondent was not the mandatory penalty in the circumstances of the case. In our view, the applicant's stance is erroneous because she views the "permissible penalty" under Item (h), which is summary dismissal, as the mandatory penalty

regardless of whether the offence committed is a first breach. The term "permissible penalty" sets the maximum permissible penalty allowing the employer the liberty to impose a lesser penalty. It would be absurd to construe that term as having the effect of setting forth a single mandatory penalty.

As we are pausing here to see whether, what is alleged by the applicant to be an apparent error on the record in terms of rule 66(1) (a) of the Rules, we are mindful of the Court's common stance that, for an application for review, on account of a manifest error on the record to be successful, one must not only allege it, but also, he must show that the alleged error has resulted into a miscarriage of justice. See the Court's decision in **Anania Clavery Betela v. R** [2020] 2 T.L.R 112. Upon a further scrutiny of the Court's judgment, we are satisfied that this application has not met the required threshold to grant it.

On a number of occasions we have reiterated what amounts to an error manifest on the record. For instance, in our unreported decision in **Tanganyika Land Agency Limited** (supra), we stated that:

> *"... it 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".

Looking at paragraph 21 of the supporting affidavit, the applicant, avers that, the Court's finding that summary dismissal of the 3rd respondent was not a mandatory option, was flawed and erroneous. In our view, that is where confusion comes in between a mere Court's error and an error apparent on its record, stipulated under rule 66(1) (a) of the Rules. The two might be separated by a narrow thread. However, the fact remains that, no meaningful distinction between them can be made without making long drawn arguments. See-**Chandrakant Joshubhai Patel v. R** [2002] T.L.R. 218.

Simply reviewed, therefore, the ground presented by the applicant clearly intends to impeach the Court' decision. It is calling for a rehearing of the appeal as opposed to seeking to review our decision. It is trite law that, a party, in this case the applicant, who embarks on a mission to re-open an appeal in the guise of a review, cannot have that room. We have held so in a number of cases, one of them being **Abel Mwamwezi v. R,** Criminal Appeal No. 1 of 2013 (unreported), that:

"A ground of review inviting the court to consider any evidence afresh, amounts to inviting the Court to

determine an appeal against its own judgment. This shall not be allowed".

Still stressing our zeal and vigor safeguarding the Court's powers of review, we have maintained the stance, as we did in **Tanganyika Land Agency Limited & Others** (supra), that:

> *"For matters which were fully dealt with and decided upon an appeal, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the court process, but would result to endless litigation. Like life, litigation must come to an end".*

See also **Damian Ruhele** (supra), **Karim Ramadhani v. R**, Criminal Application No. 25 of 2012 (unreported) and **Halmashauri ya Kijiji Cha Vilima Vitatu And Another** (supra).

Perhaps, before we take leave of the matter, we should excerpt what we observed in **Dr. Aman Walid Kabourou** (supra) that a review should not be undertaken for the purpose of trying one's luck:

> *"We shall therefore in future not look kindly to applications for review which in reality only amount to trying one's luck. This approach has a tendency of unnecessarily taking up the Court's valuable time and even raising false hopes in the minds of clients.*

Counsel have therefore a duty to refrain from doing the above two things. They should have the courage and honesty to tell their clients the true position. Unless of course the intention is merely to buy time which in our view is worse."

In conclusion, we hold that, the alleged error on the face of record is non-existent. Consequently, the application fails. It stands dismissed.

DATED at **MWANZA** this 14th Day of December, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

Ruling delivered this 14th day of December, 2023 in the presence of the Ms. Tumaini Sanga, the learned counsel for the Applicant, Mr. Felician Daniel, learned State Attorney for the 1st and 2nd Respondent and in the absence of the 3rd Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL