IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CRIMINAL APPLICATION NO. 29/06 OF 2023

ABEL MATHIAS @ GUNZA @ BAHATI MAYANI.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Lila, Kitusi & Mashaka, JJA.)

dated the 17th day of February, 2023

in

Criminal Appeal No. 267 of 2020

RULING OF THE COURT

11th & 14th December, 2023

MWANDAMBO, J.A.:

The applicant Abel Mathias @ Gunza @ Bahati Mayani is before the Court for the second time. Initially, he approached the Court by way of an appeal in Criminal Appeal No. 267 of 2020 from the decision of the High Court at Mbeya which convicted him of murder.

As the Court dismissed his appeal in a judgment delivered on 20 February 2023, he has now preferred an application for review predicated upon rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the

Rules) cognizant that, the Court has that jurisdiction under section 4 (4) of the Appellate Jurisdiction Act (the AJA).

According to the notice of motion, the applicant was aggrieved by the Court's decision as the justices of the Court of Appeal overlooked the law and unlawfully dismissed his appeal. He thus wants the Court to clarify the points of law regarding the entire evidence adduced before the trial court and the resultant judgment which convicted him of murder as charged. The ground upon which the applicant relies in the application is that, the Court's decision was based on a manifest error on the face of the record. The founding affidavit contains four paragraphs with averments on the unsuccessful appeal against conviction for murder and discovery of a manifest error resulting into miscarriage of justice warranting review to correct the alleged errors.

Ahead of the date of hearing, the respondent had lodged an affidavit in reply deponed to by Ms. Revina Prosper Tibilengwa, learned Principal State Attorney resisting the application. However, that affidavit was found to be defective and so we discarded it before the commencement of hearing.

The applicant appeared in person to prosecute his application when it was called on for hearing. His arguments were, essentially, a repeat of

his contentions in the notice of motion, that is to say; his conviction was erroneous because it was based on the doctrine of recent possession of a motorcycle allegedly robbed from the deceased whose chain of custody was not established. Similarly, the applicant faulted the Court's decision for sustaining conviction on appeal relying on the principle that, the last person to be seen with the deceased is taken to be the killer. The applicant repeated the same contention he made before the Court at the hearing of the appeal that, the deceased was a free person who could have moved anywhere and met his death in the hands of any other person than him and so the principle relied upon in convicting him was erroneous. When prompted by the Court, the applicant urged that, should it be possible, there should be a re-hearing of the appeal allegedly because the case against him was fabricated.

For her part, Ms. Tibilengwa who was assisted by Mr. Alex Mwita, learned Senior State Attorney and Salmin Zuberi, learned State Attorney, resisted the application. She predicated her arguments on case law on what it takes to succeed in an application for review based on manifest error of the record. She referred to the Court's decision in **Lilian Jesus Fortes v. Republic,** Criminal Application No. 77/01 of 2020 citing **Chandrakant Joshubai Patel v. Republic** [2004] T.L.R. 218 and

Patrick Sanga v. Republic, Criminal Application No. 8 of 2011 (unreported). Relying on the Court's pronouncements, Ms. Tibilengwa urged the Court to dismiss the application for being misconceived because the applicant has not met the threshold for the Court to review its decision in the absence of manifest error in the impugned decision. Unmoved, the applicant sought to distinguish **Lilian Jesus Fortes v. Republic** (supra) cited by the respondent Republic arguing that the case involved an offence different from murder and so it should not be applied in the instant application.

We shall begin our determination by the obvious; the law governing applications for review in all cases be it criminal irrespective of the offence involved or civil. The Court's power to review its decisions is derived from section 4 (4) of the AJA. That power is exercisable in accordance with rule 65 (1) of the Rules which prescribes parameters on which an aggrieved party can approach the Court to review its decision. One of such parameters is manifest error on the face of the record causing injustice in terms of rule 66 (1) (a) of the Rules on which the applicant relies in the notice of motion.

That rule has been subject of the Court's construction in many of its previous decisions. The interpretation of rule 66 (1) (a) of the Rules is so

legendary as reflected in the decisions cited to us by Ms. Tibilengwa. It would not have been necessary to delve into the nitty gritty of such decisions but for the applicant's adamancy when addressing the Court. In **Chandrakant,** for instance, the Court cited with approval an excerpt from the celebrated works of the learned authors of Mulla on the Code of Civil Procedure Act V of 1908, 14th edition thus:

> *"... An error apparent on the face of the record must be such as 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 opinions ... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review ..."*

Later, in **Patrick Sanga**, the Court frowned upon aggrieved litigants invoking review as a means to have their appeals reheard - . It stated:

> *"The review process should never be allowed to be used as an appeal in disguise. ... The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning*

justice system, like ours, litigation must have finality and a judgment of the final court of the land is final and its review should be an exception..."

It is common cause that, the applicant's conviction was predicated upon two pieces of evidence; **one,** applicant being found in possession of a motorcycle claimed to have been driven by the deceased and, **two,** evidence proving that he was the last person to be seen with the deceased. In its judgment, the Court found the first category of evidence grounding the doctrine of recent possession wanting by reason of the irregularity in the tendering and admission of the motorcycle. However, the Court found sufficient evidence to sustain conviction on the second aspect; strong circumstantial evidence which proved that the applicant was the last person to be seen with the deceased and so he was found to have been the actual killer.

We agree with Ms. Tibilengwa that, the applicant's complaint is, but misconceived. Firstly because, as we have alluded to shortly, since the evidence grounding conviction on the doctrine of recent possession was discarded, it cannot be a basis for any complaint in this application.

Be it as it may, it is glaring from the notice of motion that the applicant is dissatisfied with the Court's alleged erroneous decision rather

than an error manifest on the face of it in both aspects. This is so having regard to his invitation to us to re-hear the appeal. Quite unfortunate to him, that cannot be possible. As we have said in many cases including, **Tanganyika Land Agency Limited & 7 Others V. Manohar Aggrwal**, Civil Application No. 17 of 2008:

> *"For matters which were fully dealt with and decided upon on 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: **Charles Barnabas v. Republic,** Criminal Appeal No. 13 of 2009 (unreported) in which the Court was emphatic that, a review is not meant to challenge the merits of the decision as if it were an appeal but to address irregularities in the decision or proceedings which have caused injustice.

Contrary to the clear intent and purpose of review under section 4 (4) of the AJA and the rule 66 (1) of the Rules, the applicant is asking us to sit on our own decision in the hope that we will reverse the decision and allow his appeal. We must say, as we have repeatedly said in many of our previous decisions, we are not permitted to do that being satisfied

that the applicant has failed to single out the so -called manifest error on the face the impugned decision other than dissatisfaction with it. A dissatisfaction with a decision is amenable to an appeal to a higher court which is not available in our legal system.

In the event, the application fails and is dismissed.

DATED at **MBEYA** this 13th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 14th day of December, 2023 in the presence of applicant in person, unrepresented, and Mr. Augustine John Magesa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL