**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: KWARIKO, J.A., LEVIRA, J.A., And KENTE, J.A.)**

**CRIMINAL APPLICATION NO. 48/03 OF 2020**

**JUMA MATHEW MALYANGO ..... APPLICANT**

**VERSUS**

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

**(Application for Review of the decision of the Court of Appeal of Tanzania at Dodoma)**

**(Mugasha, Ndika, Levira, JJA)**

**dated the 16th day of June, 2020**

**in**

**Criminal Appeal No. 348 of 2018**

.....

## RULING OF THE COURT

2nd & 8th May, 2023.

**KENTE, J.A.:**

This application for review arises from the decision of this Court in Criminal Appeal No. 348 of 2018 dismissing the appeal by the applicant Juma Mathew Malyango who was challenging the decision of the High Court (sitting at Dodoma) in Criminal Appeal No. 122 of 2017. In the said appeal before the High Court, the applicant together with three other persons not parties to this application, were challenging the decision of the

Resident Magistrate's Court of Dodoma which had convicted them of three offences namely leading organized crime, unlawful dealing in Government trophies and unlawful possession of Government trophies and subsequently sentenced each of them to imprisonment for the periods running from two years to twenty years.

Having partly succeeded in the appeal to the High Court which among others, had quashed and set aside their convictions and sentences for leading organized crime and unlawful dealing in Government trophies, the applicant and his colleagues were still aggrieved by the decision of the High Court sustaining their convictions and sentences in respect of the offence of unlawful possession of Government trophies, hence their abortive appeal to this Court.

In the present application which is brought by way of a notice of motion taken under Rule 66 (1) (a) and (e) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules), the applicant has moved the Court to review its judgment in the earlier mentioned appeal citing two grounds; thus:

1. *There is a manifest error on the face of the record resulting into a miscarriage of Justice.*

2. *That the judgment of the Court which is sought to be reviewed was procured illegally as it was based on invalid judgment of the trial court.*

Elaborating in his notice of motion, the applicant claimed in respect of the first ground, that the Court had failed to critically analyse the evidence with regard to recent possession which was a sole basis of his conviction and that there was a traverse and miscarriage of justice in the way the Court dealt with evidence on recent possession.

Regarding the second ground advanced in support of the application for review which alleges that the judgment of the Court was procured illegally, the applicant went on contending in the motion that: **one,** there was a misdirection on the part of the Court to expunge the certificate of seizure from the evidence and yet to proceed to dismiss the appeal on merit; **two**, that the caution statements ought not to have been admitted in evidence as one police officer had recorded the statements of more than one suspect contrary to what was stated in the cases of **Njuguna Kimani v Republic** [1954] EACA at pg. 316 and **Njiru and Others v Republic** [2002] IEA at pg 218; **three**, that the memorandum of the matters not in dispute was not read out to the accused persons at the time of the

preliminary hearing; **four**, that all documentary exhibits tendered by the prosecution side were not read out after being admitted in evidence and ought to have been expunged from the record; and **finally** that, the Court ought to have drawn an adverse inference against the prosecution side for their failure to call as witness one Chigumbi an independent witness to the certificate of seizure.

At the hearing of the application, whereas the applicant appeared in person standing for himself, the respondent Republic enjoyed the legal representation of Ms. Bertha Benedictor Kulwa and Mr. Geofrey Aron Mlagala, learned State Attorneys.

Submitting in support of the application and expounding on his grounds, the applicant raised some new complaints contending that during the trial, he was not furnished with the statements of the prosecution witnesses in terms of section 9(3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (hereinafter the CPA) and that, the provisions of section 10(3) of the same Act requiring a police officer who, in the course of investigation of a crime, examines orally any person acquinted with the facts of the case to reduce into writing the statement of the person so examined, were not observed.

Moreover, the applicant complained that, the police officer who recorded his statement did not put it in the questions – and – answers form as required under section 57(2) (a) of the CPA and he did not set out the particulars of any statement which he made orally during the interview other than in answer to the questions put to him in terms of section 57(2) (b) of the same Act.

With regard to the preliminary hearing, the applicant complained that he was not made to sign the memorandum of the matters agreed upon by the parties as required under section 192(3) of the CPA and that all in all, he did not know if at all the preliminary hearing was conducted by the trial court or not.

All the above omissions, according to the applicant, had the cumulative effect of occasioning injustice to him for which he prayed the application to be granted, and the judgment of the Court to be reviewed as to pave the way for him to be found not guilty and acquitted.

Submitting in reply, and having adopted the material contents of the respondent's affidavit in reply, Mr. Mlagala submitted and without getting halfcocked, we think correctly so in our respectful view that, the applicant had not met even the minimum requirements of Rule 66(1) (a) and (e) of

the Rules upon which the application for review is predicated. Presenting his argument in further details, the learned State Attorney contended that, the applicant had unconventionally revived the appeal by essentially presenting the grounds of appeal disguised as an application for review. In support of his position, Mr. Mlagala relied on and cited at great lengthy our decision in the unreported case of **Karim Kiara v. Republic**, Criminal Application No. 2 of 2012 in which we underscored the well established principle that, a review is not an appeal and therefore in a review, the Court should not sit on appeal against its own judgment in the same proceedings.

It was further contended that, it was clear from the notice of motion and the oral submissions made by the applicant that, the grounds raised by him would require the Court to revisit the evidence and come to other conclusions and findings as if it was reconsidering the appeal.

The upshot of the arguments by Mr. Mlagala on behalf of the respondent was that, the application was violative of the entire Rule 66(1) of the Rules and it was his stand and prayer that, it should be dismissed for lack of merit.

Submitting in brief rejoinder, the applicant remained single minded and determined that in any way, he had not disguised his grievances with the decision of the Court. He contended that, what he had done was to point out the shortcomings that are apparent on the decision of the Court such as the failure by the prosecution to show that section 38(3) of the CPA was duly complied with. He thus reiterated his prayer that the application be granted and the judgment of the Court be reviewed as to result into his immediate acquittal and release from jail.

Having heard the arguments from both sides, it is an opportune time to examine and analyse them in the light of the applicable law. However, before embarking on this task, it is imperative to revisit the relevant law and the principles developed through case law which will lead us in this endeavor.

In so far as the present application is concerned, Rule 66(1) (a) and (e) of the Rules 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 manifest error on the face of the record resulting in the miscarriage of justice;*

*(b) .....NA*

*(c) .....NA*

*(d) .....NA*

*(e) the judgment was procured illegally, or by fraud or perjury.*

With regard to the fundamental question as to what constitutes an error apparent on the face of the record, it is a settled principle that, it is an error which must strike one on a mere looking at the record and would not require a long drawn process of reasoning on points where there may conceivably be two opinions (vide **Sudy s/o Mashana @ Kasala v. The DPP**, Criminal Application NO. 2/09 of 2018 and **Emmanuel Kondrad Yasipati v. Republic**, Criminal Application No. 90/07 of (both unreported). It follows therefore that, the powers of the Court to review its own decision as provided for under Rule 66(1) of the Rules, may be exercised in the rarest of cases where some mistake or error apparent on the face of the record is established. It may not be exercised on the ground that the decision sought to be reviewed was erroneous on merit. For that would be the province of the Court in the exercise of its appellate

jurisdiction. In that connection, we wish to observe that, the review jurisdiction of this Court as evolved through case law and subsequently entrenched in the Court Rules, aims at avoiding miscarriage of justice or correcting grave and visible errors committed by the Court and therefore the power of review under Rule 66(1) of the Rules is not to be confused with appellate powers which enable the Court to correct all manner of errors committed by the lower courts.

We must hasten to add that, an application for review like the one now under scrutiny, is by no means an appeal in disguise whereby an erroneous decision can be reheard and corrected and it is the stance of the law that, mere discontent with the court's judgment cannot form the basis for seeking its review. See **Karim Kiara** (supra).

In view of the above stated principles, and upon a thorough and careful examination of the application before us, we find the argument by Mr. Mlagala not only lucid but also very compelling. The applicant's citation of several grounds of complaint such as the allegation that the Court had failed to deal with the evidence of possession, the Court's decision to expunge a caution statement from the record and yet to dismiss the appeal and that one police officer had recorded the statements of more than one

suspects, all of which were essentially intended to challenge the decision of the Court but disguised as grounds for review, is patently erroneous inasmuch as the whole exercise requires the Court to sort of reconstitute itself and revisit the evidence with a view to determining the applicant's appeal which has already been determined.

Other complaints which fall in the same category are the allegation that, the certificate of seizure was defective for non-compliance with section 38(3) of the CPA together with the complaint that the applicant was not furnished with the statements of witnesses as required under section 9(3) of the same Act. Similarly is the complaint by the applicant that, his statement was not recorded in the form of questions and answers. We need to emphasize here that, all the above-mentioned complaints were either canvassed by the Court in its judgment or were being raised by the applicant for the first time.

Again the contention by the applicant that the judgment of the Court was procured illegally merely because of the alleged shortcomings in the lower courts' judgments is entirely misplaced. As was quite correctly submitted by Mr. Mlagala, after hearing the parties in the appeal, the Court was satisfied that the evidence on the record was sufficient enough to

support the applicant's conviction by the lower courts and for that reason, he cannot be heard today to say that, that judgment was procured illegally.

All said and done, we find no merit in the application which we hereby dismiss in its entirety.

**DATED** at **DODOMA** this 5th day of May, 2023.

M. A. KWARIKO
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Ruling delivered this 8th day of May, 2023 in the presence of the Appellant in person and Ms. Bertha Kulwa, 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**