IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And KHAMIS J.A.)

CIVIL APPLICATION NO. 349/01 OF 2022

RUBY ROADWAYS (T) LTD .....APPLICANT

VERSUS

PUMA ENERGY TANZANIA LIMITED .....RESPONDENT

(Application for review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Mwambegele, Kerefu & Maige JJ.A.)

dated the 21st day of April, 2022
in
Civil Appeal No. 287 of 2020
.....

RULING OF THE COURT

16th February & 1st March, 2024

KITUSI, J.A.:

This is an application for an order of review of our decision (Mwambegele, Kerefu and Maige, JJA) in Civil Appeal No. 287 of 2020 dated 21st April, 2022, under rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), on the ground of an error apparent on the face of the record. The notice of motion cites four instances of error that the applicant considers to be apparent and resulted in miscarriage of justice. However, subsequently, the applicant's counsel abandoned all four grounds and sought to argue an additional ground in terms of rule 106 (3) (b) (ii) of the Rules. Since we have been spared the task of

considering the four grounds appearing in the notice of motion, we shall confine ourselves to the additional ground which is that :-

> *"There is illegality apparent on the face of the record in that the Court did not give reasons in holding that the evidence fell short of substantiating how the applicant suffered loss of expected profits, which has resulted in miscarriage of justice".*

The application is supported by an affidavit of Anwar Sachu, the Principal Officer of the applicant.

Mr. Beatus Malima, learned advocate, addressed us in support of the application, with Ms. Miriam Bachuba, learned advocate on the adversary, firmly opposing.

As intimated earlier, the learned counsel had filed written submissions and during the hearing, they utilized their right to elaborate. What is central to the application is expressed in a rather philosophical style by Mr. Malima in the introductory statements of the written submissions. Given its unique style, we quote it verbatim: -

1. A Court can only hold that the evidence is not sufficient after *considering the evidence before it and by giving reasons why the evidence is not sufficient. If the Court has not considered the evidence before it but proceeds to hold that the evidence is*

not sufficient that is an error of law, which results into a miscarriage of justice.

2. *It is a defining characteristic of courts and of the exercise of judicial power that reasons for judicial decisions are always given. A failure to provide reasons for judicial decisions is not just an error of law but is a jurisdictional error, resulting into miscarriage of justice.*
3. *The error, which is the subject of this Application is that the Court proceeded to hold that evidence was insufficient without considering the evidence first and without giving reasons why the evidence was insufficient.*

In terms of background, we shall adopt the respondent's written submissions as it reflects the undisputed history. The appellant instituted Commercial Case No. 86 of 2015 at the Commercial Division of the High Court for a declaration that the respondent was in breach of contract, for which it claimed special damages in three categories, that is: TZS 4,713,658,570/=; USD 300,000.00 and TZS 535,000,000/=. It also claimed for general damages and interest. The respondent filed a statement of defence raising a counterclaim of TZS 94,457,982.85. allegedly being the value of fuel and lubricants supplied to the applicant. The contract between the parties was for transportation and supply of fuels by the respondent to the applicant.

The High Court entered judgment for the applicant, declaring the respondent to be in breach of the contract and awarded the applicant TZS 800,000,000 as compensation for loss of expected earnings for the remaining contractual term, and TZS 100,000,000 general damages. On the other hand, the respondent obtained judgment for the amount of TZS 94,457,982/= claimed in the counterclaim. After the set-off, the High Court awarded to the applicant the balance of TZS 805,542,982. This is the crux of the matter.

The respondent was aggrieved by the decision and appealed to the Court while the applicant, also aggrieved, lodged a cross-appeal. The appeal as well as the cross-appeal raised four grounds each. The Court allowed one ground of appeal dismissing the other 3 grounds, while it dismissed all 4 grounds of the cross-appeal. The essence of allowing that one ground of appeal was, according to the judgment of the Court now for our consideration, that there was no sufficient evidence to substantiate loss of expected profits claimed by the applicant. Here lies the bone of the contention as we earlier intimated.

In his written and oral submissions, Mr. Malima pointed out that the Court merely referred to decided cases on the principle of award of specific damages without anyhow linking that principle to the case before it. Citing our decision in **Francia Mtawa v. Christina Raja**

Lipanduka & 2 Others Civil Appeal No. 15 of 2020 (unreported) in which the Court emphasized the duty of an appellate court to consider grounds of appeal and assign reasons for its decision on each point, the learned counsel further submitted that, the applicant had placed a number of exhibits for consideration as proof of loss of expected profits, but the Court concluded that, there was no sufficient proof without giving reasons for not considering those exhibits.

Mr. Malima took us through those exhibits and the relevancy of each to the issue of proof of expected profits. For instance, he referred to exhibit P1 on the volumes of fuel to be transported, and exhibit P3 on the expected payment for those volumes. He further referred to the evidence of PW2 and exhibits P4 and P12. The learned counsel proceeded to suggest that the Court had at its disposal, an alternative method of establishing how much the applicant would have earned if the contract had run its full course. He submitted that, by not considering the six exhibits placed before it the High Court made an apparent error and cited the case of **Abubakari I. H. Kilongo and Another v. Republic,** Criminal Appeal No. 230 of 2021 (unreported) for the principle that, precedents should not be followed blindly. He took the view that if one claims specific damages of 4 billion shillings but

manages to prove 3 billion shillings, one should be granted that which he has managed to prove instead of being denied the whole.

On the other hand, Ms. Bachuba submitted that the applicant's counsel is asking the Court to re - appraise the evidence, which does not fit in review cases and accused the applicant for bringing an appeal in disguise. She further submitted on the law governing review, citing, in the process, the cases of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 and **Patrick Sanga v. Republic**, Criminal Application No. 8 of 2011 (unreported).

In addition, the learned counsel was opposed to the contention that the Court did not assign any reasons for rejecting the evidence in the exhibits. She further faulted Mr. Malima for taking the view that the Court should give all the details for its decision, which is against our decision in **Andrew Shayo @ Bangimoto v. Republic**, Criminal Application No.37/01 of 2019 (unreported). She submitted, in fact, that from page 14 of the impugned judgment, the Court made reference to the exhibits, at the end of which it concluded that there was no sufficient evidence.

In a short rejoinder, Mr. Malima submitted that the case of **Chandrakant** (supra) and the reference to the Court's judgment from page 14 are both in favour of the applicant's case in that had the Court

taken the exhibits into account, it would have arrived at a different decision.

In considering the arguments for and against the application, we are aware that the application's mainstay is that the Court did not give reasons for its decision. In principle we agree with Mr. Malima's formulation which we reproduced earlier, that it is inherent in courts to give reasons for their decisions. Rights and obligations of parties to judicial inquiry cannot, in the words of the Court in **Ikindila Wigae v. Republic**, [2005] TLR 365, be decided by *a toss of the coin.*

In view of the above, the issue for our consideration is, whether in fact, the Court did not refer to the exhibits as alleged, and ultimately rendered its decision without considering them. We must caution that, it is not for our consideration whether the decision of the Court was right or wrong, for, doing that would be sitting on appeal of our own decision, which as correctly argued by Ms. Bachuba, we are not permitted to do.

We note from page 13 of the judgment, the Court's reference to submissions of counsel for the parties. Specifically, it referred to submissions that had been made by Mr. Malima who was acting for the present applicant, then it observed:

> *"Out of the fifteen – page reply written submissions, eight of them are dedicated to this*

ground of appeal. However, the kernel of his argument is that the amount was proved through; ***one****, the agreement itself (exhibit P1) in which the volume and fee payable were provided thereby showing how the respondent would have earned if the contract had not been terminated;* ***two****, request for quotation (exhibit P3) which contains information on the expected volume which the respondent would have supplied in the duration of the contract;* ***three****, email correspondence of 23.04. 2013 (exhibit P4) which shows that the parties had agreed before signing the contract on the service fee or price per lltre to be transported.* ***Four****, the testimony of PW2 who testified that the respondent would have earned Tshs 4, 713, 570/= as 20 % profit if the contract had not been terminated;* ***five****, invoices and payment receipts (exhibit P12) which were issued pursuant to clause 1.66 of exhibit P1 and six...".*

The above exhibits and pieces of evidence are the same that Mr. Malima has referred to in submitting that they were not considered. We must point out that the Court was sitting on appeal from the decision of the High Court, so it was considering if that decision was correct or not. Having referred to arguments of the counsel for the parties, from page 18 of the judgment, the Court subjected the judgment of the High Court to scrutiny and observed that the record before it was silent on how the

figure of 800,000,000/= was arrived at. The Court reproduced the relevant part of the decision of the High Court awarding the amount of Shs 800,000,000/= and after observing that there was no evidence to prove it, it went ahead to observe that the trial judge might have treated general and specific damages as one and the same thing.

Ms. Bachuba cautioned against engaging in small details, and we tend to agree. But even then, what details did the Court omit? Mr. Malima should have been fair by referring to the decision of the High Court and pointing out how it arrived at the award of Shs 800,000,000/, before accusing the Court for not considering such evidence. With respect we take Mr. Malima as attempting a second bite of his appeal. We are certain that the learned counsel is aware of our decisions echoing the principles governing review. In the case of **Golden Globe International Services & Another v. Millicom (Tanzania) N.V & Another,** Civil Application No. 195/01 of 2017 (unreported), the Court reproduced 9 principles of review as set out in the case of **Angella Amundo v. The secretary General of the East African Community,** Civil Application No. 4 of 2015 (unreported). In our considered view, the risk of reproducing those principles is worth taking even as we are conscious that it will make this decision too long: -

"(a) The principle underlying a review is that the court would not have acted as it had, if ail the circumstances had been known.....

(b) There are definite limits to the exercise of the power of review. The review jurisdiction is not by way of an appeal. The purpose of review is not to provide a back door method to unsuccessful litigants to re-argue their case. Seeking the re-appraisal of the entire evidence on record for finding the error, would amount to the exercise of appellate jurisdiction which is not permissible....

(c) The power of review is limited in scope and is normally used for correction of a mistake but not to substitute a view in law. This is because no judgment however elaborate it may be can satisfy each of the parties involved to the full extent.....

(d) A judgment of the final court is final and review of such judgment is an exception.

(e) In review jurisdiction, mere disagreement with the view of the judgment cannot be ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction...

(f) There is a clear distinction regarding the effect of an error on the face of the record and an

erroneous view of the evidence or law. An erroneous view justifies an appeal. Therefore, the power of review may not be exercised on the ground that the decision was erroneous on merit...

(g) It will not be sufficient ground for review that another judge would have taken a different view. Nor can it be a ground for review that the court preceded on incorrect exposition of the law...

(h) A Court will not sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard...

(i) The term 'mistake or error on the face of the record' by its very connotation signifies an error which is evident ***per se*** *from the record of the case and does not require detailed examination, scrutiny and elaboration either of the facts or the legal position thereof requires a long debate and process of reasoning, it cannot be treated as an error on the face of the record. To put it differently, it must be such as can be seen by one who runs and reads..."*

With respect, Mr. Malima is inviting us to *look for a needle in a haystack*, which is against the above principles. It is our conclusion that the Court rendered a reasoned decision and the alleged error is nonexistent. For the reasons we have shown, we dismiss this application with costs.

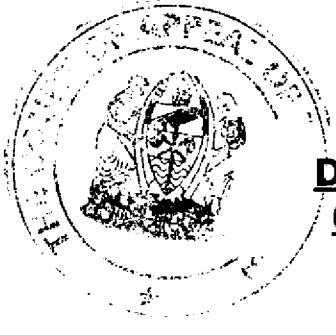
DATED at **DAR ES SALAAM** this 1st day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 1st day of March, 2024 in the presence of Ms. Natasha Mukangara, learned Counsel for the Respondent and also holding brief for Mr. Beatus Malima, learned Counsel for the Applicant is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL