IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SEHEL, J.A, KENTE, J.A, And MDEMU, J. A.)

CRIMINAL APPLICATION NO. 48/01 OF 2022

OMARY JUMA LWAMBO.....APPLICANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Ndika, Mwandambo And Kente, JJ.A.)

dated the 14th day of July, 2022
in
Criminal Appeal No. 176 of 2020

.....

RULING OF THE COURT

10th & 13th June, 2024

SEHEL, J.A.:

In this application, the Court is asked to review its decision in Criminal Appeal No. 176 of 2020 dated 14th July, 2022. The application is brought by notice of motion and it is supported by an affidavit of the applicant, himself. The application is made under the provision of section 4 (4) of the Appellate Jurisdiction Act (the AJA) and rule 66 (1) (a) of the Tanzania Court of Appeal Rules (the Rules).

Briefly, the applicant was convicted by the District Court of Temeke at Temeke (the trial court) of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code and sentenced to serve a term of thirty (30) years imprisonment. He was not satisfied with both the conviction and sentence. He appealed to the High Court of Tanzania at Dar es Salaam (the first appellate court). However, his appeal was dismissed for want of merit. Following the dismissal of his appeal, the applicant filed his second appeal to the Court which was also dismissed. He has now preferred the present application for review on grounds that the decision of the Court was based on a manifest error on the face of record resulting in miscarriage of justice. The alleged errors are:

i) *The Court denied him his constitutional right of fair hearing guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania (the Constitution) as he was not accorded with an opportunity to rejoin on matters contested by the respondent.*

ii) *the prosecution failed to prove its case beyond reasonable doubt as the judgment failed to effectively deal or determine an important issue of the contradictions of the victim's (PW1's) age which was not supported by birth certificate.*

iii) *the decision of the Court failed to consider the applicant's mitigation that he was the first offender. Thus, the life sentence*

was manifestly excessive and contravened Article 13 (6) (b) of the Constitution.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas, Mses. Neema Moshi and Kijja Elias Luzungana, learned State Attorneys appeared of the respondent/Republic.

The applicant first adopted his notice of motion and affidavit in support of the application. He then argued that the case against him was framed after he was trying to help the victim. Further, he contended that, during hearing of the appeal before this Court, the learned State Attorney mentioned the substituted charge which he was not given. He said that he heard the State Attorney mentioning different names and age of the victim appeared in the substituted charge. He further said that the age of the victim which according to the learned State Attorney was below eighteen years while the one he was charged and tried with was ten years old. With that brief submission, the applicant urged us to consider the grounds and allow the application.

On her part, Ms. Moshi opposed the application and sought leave of the Court to adopt the contents of the affidavit in reply filed on 4th June, 2024. On the issue of a charge sheet, the learned State Attorney argued that it was not part of the applicant's grounds for review. That apart, she

contended that the issue was well canvassed by the Court. She referred us to page 4 of the judgment where the Court was dealing with the applicant's complaint that the victim named in the charge was not called to testify to support the prosecution case. In that appeal, we observed that the charge was substituted on 27th September, 2016 and replaced by a new charge that corrected the name of the victim who appeared before the trial court and gave his evidence. The learned State Attorney therefore did not see any substance on his complaint.

Responding to the application for review, she generally contended that the grounds raised by the applicant do not qualify to be errors manifest on the face of record because they are not self-evident but rather, they require a long-drawn process of reasoning. A manifest error on the face of record, she explained, must be easily seen when someone runs and reads it. It does not require a long-drawn process of reasoning. To fortify her submission, she referred us to the case of **George Mwanyingili v. The Republic**, (Criminal Application No. 27/6 of 2019) [2024] TZCA 31 (6 March, 2024; TANZLII) where the Court cited the case of **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R. 218 that an error on the face of the record 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 opinions.

For instance, she argued, the argument that the applicant was denied a right to rejoin, and that, the age of the victim was not proved by way of birth certificate are matters befitted to be grounds of appeal rather than review. To support her argument that an application for review is not for the purpose of rehearing and correcting an erroneous decision, Ms. Moshi referred us again to the case of **George Mwanyingili v. The Republic** (supra).

Responding to the issue of sentence, the learned State Attorney argued that the sentence imposed by the Court to the applicant was in accordance with the law as section 154 (2) of the Penal Code prescribes a mandatory sentence of life imprisonment as such it did not give the Court the discretion to reduce it to thirty years. She added that the compliant is not a manifest error and that the applicant is trying to bring an appeal through a back door. At the end, the learned State Attorney beseeched the Court to dismiss the application for lacking merit.

In rejoinder, the applicant insisted that he did not commit the crime but rather his being compassionate made him face the charges.

As rightly submitted by Ms. Moshi, a manifest error on the face of the record must be apparent and obvious such that it strikes in the eyes immediately after looking at the records and does not require a long-drawn process of reasoning on points where there may be possibly two opinions. It is an error which is self-evident such that it does not require any extraneous matter to show its existence and it must have resulted into miscarriage of justice. We are guided in this position by our decision in the case of **Chandrakant Joshubhai Patel v. The Republic** (supra) where we stated the following:

> *"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 for 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."

Relating the above to the application at hand, we failed to go along with applicant that there was a manifest error on the face of the record in our decision. We wish to start with his complaint that he was denied a right to rejoin which amounts to a denial of a right to be heard guaranteed under Article 13 (6) (a) of the Constitution.

Luckily, we happened to deliberate on the same complaint in the case of **Ramadhani Said Omary v. The Republic**, Criminal Application No. 87/ 01 of 2019 [2022] TZCA 459 (21 July, 2022; TANZLII) and the Court categorically stated that a judgment is not a transcription of the proceedings that:

"...we do not think it would be proper to equate the judgment to a transcription of the proceedings that unfolded before the Court at the hearing of the appeal. What is most important, and is actually discernible from the judgment, is that the Court provided a balanced account of the arguments for

and against the applicant's appeal before it interrogated them and dismissed the appeal."

Flowing from the above position and having taken time to revisit the entire impugned judgment, we noted that, his complaints concerning charge sheet and the age of the victim were well canvassed by the Court during the hearing of the applicant's appeal. For instance, at page 4 of our judgment we observed the following:

"That, while it is on record that the boy named as the victim in the original charge sheet dated 19th August, 2016 was not produced as a prosecution witness, the said charge sheet was substituted on 27th September, 2016 and replaced by a new one intended to correct the name of the victim. The said victim as stated in the new charge sheet appeared at the trial and testifies as the first prosecution witness (PW1) on 9th March, 2017, as shown at pages 12 and 13 of the record of appeal."

From pages 5 - 7 of our decision, we extensively discussed the issue of the age of the victim, and ultimately, at page 7 of the judgment, we held that:

"We are mindful, as hinted earlier, that the victim's age had to be proved, in terms of section 154 (2) of the Penal Code, for the purpose of levying the

mandatory life imprisonment. Despite the apparent contradictions in the evidence on the age of the victim, we agree with Mr. Tesha that what was common in the testimonial and documentary evidence on record is that the victim was a boy aged below eighteen years. In the premises, the disparities in question had no deleterious effect to the sentence of life imprisonment that ought to have been imposed in the circumstances of this case because ***by all accounts the victim's age was below eighteen at the time of commission of the offence."***

[Emphasis added]

Therefore, whether the victim was aged ten or below eighteen years was not material and, in any way, it did not prejudice the applicant since an offence against a child of either age attracts the same sentence of life imprisonment. All these complaints are grounds of appeal which the applicant properly raised in Criminal Appeal No. 176 of 2020 and adequately argued them during the hearing of appeal and, at the end, the Court made a finding on them. To advance them again in the application for review is a serious misconception of the underlying principles for review.

The applicant has no right to raise the same grounds in the review as if a review is a second bite. It is the position of the law that a review is not

an appeal or '*a second bite*' by a party in the aftermath of the dismissal of his/her appeal -see, for instance, **Miraji Seif v. The Republic**, Criminal Application No. 2 of 2009 and **Robert Moringe @ Kadogoo v. The Republic**, Criminal Application No. 9 of 2005 (both unreported).

The applicant has also complained under paragraph 1 (iii) on the enhancement of sentence. For a start, we wish to state that it is on record that the propriety or otherwise of the sentence imposed by the trial court and later on upheld by the first appellate court was considered by the Court while dealing with the applicant's appeal. This is found at page 9 of the judgment the Court when the Court said:

> *"... the punishment that ought to have been imposed on the appellant, given the tender age of the victim, was life imprisonment in terms of section 154 (2) of the Penal Code. The sentence imposed by the trial court was manifestly illegal but it escaped the attention of the first appellate court. As urged by the learned Senior State Attorney, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act and proceed to set aside the thirty's years' imprisonment in lieu of which we impose the mandatory life imprisonment."*

From the above, it is patently clear that the Court took cognizance of the fact that section 154 (2) of the Penal Code provides for a mandatory sentence of life imprisonment. The question that follows is whether dealing with illegal sentence at the appellate stage where there was no cross appeal is akin to an error manifest on record that would have entitled the applicant to seek an application for review. In our considered view, it is not. We say so because a legal issue can be raised at any time even at the appellate stage. In addition, we are increasingly of the view that there was no miscarriage of justice because the applicant was also given a chance to submit on the issue but he was "*resigned to the fate that the original punishment on him would be enhanced once his appeal failed.*" Besides, we gathered from our decision that the Court proceeded to quash the illegal sentence and substitute thereof with an appropriate sentence, prescribed by the law, that is, life imprisonment, after hearing the submissions from both parties. Therefore, we find this complaint baseless.

In the end, we wish to echo that a review of the judgment of the highest Court of the land is only exercised in the rarest of cases which meet the specific benchmarks stipulated in Rule 66 (1) of the Rules. In the present application, it is obvious that what is being sought is a re-hearing of the already determined appeal which we cannot do. In that respect, we

are constrained to find that there is nothing in the present application which would warrant the exercise of our review powers under Rule 66 (1) of the Rules.

In the upshot, we find the application has no merit. We therefore dismiss it.

DATED at **DAR ES SALAAM** this 13th day of June, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 13th day of June, 2024 in the presence of the applicant appeared in person vide video link from Ukonga Prison and Mr. Titus Aron, learned State Attorney for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL