**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)**

**CRIMINAL APPLICATION NO. 45/06 OF 2021**

**MBARUKU HAMISI ..... 1ST APPLICANT**

**ELINAZI ELIABU @ MSHANA ..... 2ND APPLICANT**

**AMRI KIHENYE @ AMRI ..... 3RD APPLICANT**

**EX. F. 8302 PC. JAMES ..... 4TH APPLICANT**

**B. 500 SGT JUMA MUSSA ..... 5TH APPLICANT**

**VERSUS**

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

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

**(Mugasha, Ndika and Sehel, JJA.)**

**dated the 30th day of August, 2019**

**in**

**Consolidated Criminal Appeal Nos. 141, 143 and 145 of 2016 and 391 of 2018**

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## RULING OF THE COURT

13th & 21st February, 2024

**RUMANYIKA, J.A.:**

This application is by way of a Notice of Motion predicated on Section 4(4) of the Appellate Jurisdiction Act, Cap.141 ("the AJA") and rule 66(1) (a) of the Tanzania Court of Appeal Rules, 2009, ("the Rules") for review.

The Court is asked to review its judgment (Mugasha, J.A., Ndika, J.A., And Sehel, J.A) which was handed down on 30/08/2019.

Briefly, the Court, in its decision dismissed the applicants' Consolidated Criminal Appeal Numbers 141, 143 and 145 of 2016 and 391 of 2018. Commonly, in those appeals the applicants challenged a conviction for the offence of armed robbery contrary to section 287A of the Penal Code and the related custodial sentence of thirty years passed by the court of Resident Magistrate of Mbeya at Mbeya on 22/04/2014 in Criminal Case No. 03 of 2014. Their appeals to the High Court (Ngwala, J.) and later to this Court did not succeed. Still they are dissatisfied, hence the present application for review.

The application is supported by separate affidavits sworn or affirmed by Mbaruku Hamisi, Elinazi Eliabu @ Mshana, Amri Kihenye @ Amri, EX F.8302 Police Constable James and B.500 Sargent Juma Mussa, (the 1st, 2nd, 3rd, 4th, and 5th applicants), respectively. Mr. Lordgud Eliamini, State Attorney resisted it by filing an affidavit in reply, on behalf of the respondent. The applicants have fronted the following three grounds:

That, the decision of the Court is based on manifest error on the face of arrangement the record resulting in the miscarriage of justice to the

applicants, on three limbs: (i) that the Court, wrongly found that the applicants were apprehended while in their car during a continuous hot pursuit from the crime scene without proof (ii) that their defence evidence was ignored and (iii) that the decision of the Court was based on un incurably defective charge sheet laid under section 287A of the Penal Code which was non-existent, following its amendment by Act No.3 of 2011.

The applicants appeared in person unrepresented whereas Mr. Lordgud Eliamini, learned State Attorney represented the respondent Republic at the hearing of the application on 14/02/2024.

On the 1st ground, the 1st applicant on behalf of his fellows and himself contended that, by upholding the concurrent findings of the two courts below, on the offence allegedly committed in 2014 was an apparent error. For the provisions of section 287A were amended in 2011 by deleting the words "or in a company of one or more persons". Further he asserted that the prosecution failed to produce a machete used in the alleged armed robbery as an exhibit. And that the said omission amounted to failure to prove the offence charged which also constituted an error apparent on the face of the record occasioning injustice to the applicants. He stated his belief that they might not have been convicted as charged and sentenced

as aforesaid, but for wrong citation of the charging section. The decision of the Court thus, was a nullity.

Emphasizing on the 1st applicant's submission, the 5th applicant, also submitted on behalf of his fellow applicants. He cited **Shabani Said Ally v. R**, Criminal Appeal No. 270 of 2018 (unreported) to show the requisite ingredients of armed robbery, which he argued were not proved against them. He faulted the Court for holding to the contrary.

In reply, Mr. Eliamini contended that, in terms of rule 66(1) of the Rules, the grounds upon which the Court is asked to review its decision are not ambiguous. Much as no second bite appeal can be accepted, be it expressly or in disguise. Further, he contended that in all grounds presented for review, the applicants simply invite the Court to revisit the record of appeal and not its judgment. For clarity, Mr. Eliamini asserted that for the purposes of review, the word "record" does not mean a record of appeal but a judgment or an order of the Court subject of review. To reinforce his point, he cited our decision in **Issaya Linus Chengula** (as Administrator of the Estate of the Late Linus Chengula) **v. Frank Nyika** (as Administrator of the Estate of the Late Ashery Nyika), Civil Appeal No.

176 of 2017 (unreported). He implored the Court to find the three limbs of the 1st ground not apparent errors within the context.

On the 2nd ground about the alleged nullity of the Court's decision, Mr. Eliamini contended that, whether or not section 287A of the Penal Code was cited out of context, on account of the said amendments, the defect was curable. Moreover, he argued that, the applicants' contention on the issue needed long drawn arguments which may lead to more than one conclusion. He however asserted that, it is not wrong or non-citation of the charging section that counted but how the applicants were affected by it, which they did not establish.

Still showing that the grounds presented for review are not worthy it, Mr. Eliamini cited the Court's decision in **Equador Limited v. National Development Corporation** (Civil Application No. 338/01 of 2019) [2022] TZCA 484 (28 July 2022: TanzLII) citing the requisite guidelines: **One**; review is not a back door method of appeal and **two**, an error on the face of the record must be such as one can run and see, without establishing it by a long drawn argument. Therefore, he implored us to find that the application did not meet the threshold above, and that it is unmerited and liable to be dismissed.

Rejoining, the applicants reiterated their earlier submissions and asked the Court to grant the application for being meritorious.

Upon considering the parties' rival submissions, the issue is whether this application is tenable for grant of review sought.

With regard to the alleged manifest error on the face of the record, as a ground for review, we wish to stress that, the scope of the Court's powers not open ended. In the present application therefore, the scope goes as far as the limits set forth under rule 66(1)(a) and (c) of the Rules, as follows:

> *"66(1) The Court may view 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)...(not applicable).*
> *(c) the Court's decision is a nullity; or*
> *(d)...not applicable*
> *(e)...(not applicable* ).

What constitutes a manifest error on the face of the record was stated by the Court in the landmark case of **Chandrakant Joshubhai Patel v. Republic** (Criminal Application No. 8 of 2002) [2003] TZCA 37

(29 April 2003: TanzLII) and in a plethora of our decisions including in **African Marble Company (AMC) v. Tanzania Saruji Corporation,** Civil Application No. 132 of 2005 (unreported). In the latter case, while quoting the Indian Prominent Writer in Mulla, Indian Civil Procedure Code, 14th Edition, we observed as follows:

> *"an error on the face of 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 options".*

From the above extract of the Court's decision therefore, for an application for review to succeed, on account of apparent error on the face of the record and nullity of the Court's decision for that matter, one has to meet the following six guidelines: One, the Court would not look at the fact that it would not have acted as it had, if all the circumstances were known as, it was observed by the High Court in **Atilio v. Mbowe** (1970) HCD No.3 and approved by the Court, two; our reiterated proposition in **Blue Line Enterprises Ltd v. The East Africa Development Bank** (EADB) Civil Application No. 21 of 2012 (unreported) that a review of judgment being final could be exceptional, three, a mere disagreement with a

judgment cannot be a ground for review. See- **Kamlesh Varma v. Mayawati and Others**, Civil Application No. 453 of 2012. Four, a review is not a backdoor method for unsuccessful litigants to re-argue their lost cases or rather seeking re-appraisal of the entire evidence on records. See- **Mirumbe Elias @ Mwita v. R**, Criminal Application No. 4 of 2015 (unreported), five, power of review is used for correction of a mistake but not to substitute a view in law. The Court proposed so in **Peter Ngomango v. Gerson A.K. Mwanga and Another**, Civil Application No. 33 of 2002. And six, the fact that one of the parties is aggrieved with the outcome is not a ground for review as doing so would be an abuse of the court process, and more importantly resulting in endless litigation. We had that view in **Tanganyika Land Agency Ltd And Others v. Monohar Ll Aggrwal**, Civil Application No. 17 of 2008 (unreported).

As hinted earlier on, the 1st ground concerns the alleged apparent errors on the face of the record; on an improper visual identification of the applicants at the crime scene. It also addressed the issue of non-recovery of the alleged material machete as an arm to prove the offence charged. We wish to state very clearly at this juncture that whether or not the applicants were properly identified was discussed and concurrently

resolved by the two courts bellow and upheld by the Court. See- page 13 of the judgment where we stated that:

> *...We will start with the issue as to whether the appellants were properly identified. We think this issue should not detain us much because from the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 the appellants were arrested in the course of a hot pursuit...*

The 1st limb of ground one for review and the excerpt above put together, it appears to us that the applicants are still aggrieved thus, their quest for a re-appraisal of the evidence on visual identification. That ground, in our considered view suggested a second bite appeal rather than a review. The complaint contravenes the rule in **Mirumbe Elias @ Mwita** (supra). The first limb of this ground also fails. In other words, the issue of improper identification of the applicants should have not been raised at this stage.

Lastly is the applicants' additional complaint that, the charge of armed robbery was rooted from the dead law, following the amendments of section 287A of the Penal Code in 2011. Their complaint is two-fold; one, that the prosecution case could not be proved beyond reasonable

doubt based on a defective charge. Since that wrong citation of the changing section rendered the judgment nullity. Without much ado, we dismiss this complaint straight away. In fact the applicants are simply inviting the Court to re-consider its decision by looking at the evidence on record all over again. For more clarity, our findings which appear at page 17 of the judgment read:

> *"Guided by the principle of section 287A of the Penal Code, we have scrutinized the charge and reviewed the existence,* ***we are satisfied that all ingredients of the offence of armed robbery were disclosed in the charge sheet and proved by the prosecution****. As it will be recalled,* ***PW1 said he was threatened by machete thus the appellants used force against PW1 before stealing the properties*** *from PW1 and PW3. In that aspect,* ***we find this complaint together with the complaint that the charge sheet was defective to have no merit".***
>
> (Emphasis added)

It follows, therefore, that the complaint above is nothing but yet another attempt by the applicants to request the Court to re-consider its findings, and may be hold that the applicants should have not been charged, convicted and sentenced as such. Moreover, they may wish to

know that the issues of production or non-production of the alleged machete now being re-agitated needed evidence and long drawn arguments. It is not an error that one who runs can see and appreciate it. See- **Equador Limited** (supra).

We wish to also stress that however thin the thread that separates a review and an appeal may be, review should be preferred sparingly so not to mistake one for the other, bearing in mind that each of them has its scope and limits. We endorse Mr. Eliamani's analogy about the gist of rule 66(1) (a)-(e) of the Rules that like in football, players have to strictly perform within the confines of the pitch. Equally, whoever applies for review has no option but to observe its scope. It is very unfortunate that basically, the grounds presented by the applicants for review clearly abrogated the rules of the game. It cannot be accepted.

In conclusion, we find it apt to reiterate what we stated in **Tanganyika Land Agency Ltd And Others** (supra). In that case, we pronounced that the fact that one of the parties is aggrieved with the outcome is not a ground for review. It has to be dismissed. Since, without using the safety valves prescribed under rule 66(1) of the Rules, doing

otherwise could result in abuse of the Court process resulting to endless litigation, much as like life, litigation must come to an end.

In conclusion we are settled in our mind that the applicants have failed to make their case to warrant the grant of review. The application is unmerited and stands dismissed.

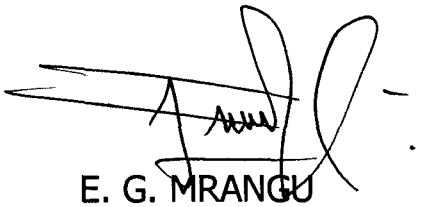
**DATED** at **MBEYA** this 20th day of February, 2024.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

S. M. RUMANYIKA
**JUSTICE OF APPEAL**

Z. G. MURUKE.
**JUSTICE OF APPEAL**

The Judgment delivered this 21st day of February, 2024 in the presence of the Applicants in person and Ms. Anastazia Sayi Elias, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**