IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPLICATION NO. 46/01 OF 2021

ERNEST JACKSON @MWANDIKAUPESI ..... 1ST APPLICANT

HAMZA SAID RAMADHANI ..... 2ND APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ndika, Galeba, and Mwampashi, JJ.A.)

dated the 12th day of October, 2021

in

Criminal Appeal No. 408 of 2019

RULING OF THE COURT

18th July & 7th August, 2023

MWAMPASHI, J.A.:

In this application, the applicants, Ernest Jackson @ Mwandikaupesi and Hamza Said Ramadhani (the 1st and 2nd applicant respectively), move the Court to review its own decision in Criminal Appeal No. 408 of 2019 (Ndika, Galeba and Mwampashi, JJA.) dated 12.10.2021. Initially, the applicants stood charged, before the Resident Magistrate's Court of Morogoro at Morogoro (Hon. Kabwe, SRM – Ext. Juris) (the trial Court), with the offence of trafficking in narcotic drugs contrary to section 16 (b) (i) of the Drugs and

Prevention of Illicit Traffic in Drugs Act [Cap. 95 R.E. 2002] (the DPITDA). After a full trial, they were both convicted and sentenced to life imprisonment. Their appeal to this Court was unsuccessful hence the instant application for review.

The application is brought by way of a notice of motion and is predicated on section 4 (4) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by two affidavits, one sworn by the 1st applicant and the other affirmed by the 2nd applicants.

According to the notice of motion, the instant application is predicated upon the following grounds:

(a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice as:-

(i) the Court misdirected itself by quoting section 15 (1) (a) of the Drugs Control and Enforcement Act (Act No. 5 of 2015) which was operationalized by Government Notice No. 407 of 2015 which was irrelevant to the case at hand and prejudiced the applicants when the Court upheld the sentence of life imprisonment which was excessive to the applicants who were the first offenders.

(b) A party was wrongly deprived an opportunity to be heard, as:-

(i) The applicants were denied the right to be represented by an advocate during the hearing of the appeal on the Government expenses as they were provided during the trial in the Resident Magistrates' Court with Ext. Juris.

(ii) The applicants were not accorded an opportunity to make their rejoinder in respect to the issues resisted by the learned State Attorney, the omission which was a bare prejudicial on the part of the applicants.

When the application was placed before us for hearing, the applicants appeared in person and fended for themselves, whereas, the respondent Republic was represented by Ms. Agatha Lumato, learned State Attorney.

When invited to argue their application, the applicants had nothing much to say. They just adopted the notice of motion, the supporting affidavits and the written submissions they had earlier filed in support of their application. On that basis, they urged us to allow the application.

Regarding the first ground on the complaint that the decision of the Court was based on a manifest error on the face of the record, it was argued, in the written submissions that, the applicants were

charged on a repealed law and further that the Court misdirected itself in relying on section 15 (1) (a) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] (the DCEA) instead of section 15 (b) of the same Act which was amended by Act No. 15 of 2017. It was also argued that the Court did not consider that the sentence imposed was manifestly excessive hence occasioning a miscarriage of justice.

As on the first limb of the second ground of complaint that, the applicants were wrongly deprived of an opportunity to be heard for not being provided with legal aid at the government expenses, it was submitted by the applicants in their written submissions that the denial of legal aid services to them amounted to an unfair hearing. They argued that for the reason that they are laymen, the seriousness of the offence and the fact that during the trial, they had legal aid services at the government expenses, then such services could not have been withdrawn on appeal without any plausible reasons. To cement their argument that they were entitled to legal aid services, the applicants referred us to the decision of the Court in **Vicent Damian v. Republic,** Criminal Application No. 1 of 2014 (unreported).

With regard to the second limb of the second ground of complaint which is to the effect that, the applicants were wrongly deprived of an opportunity to be heard, it was submitted, in their written submissions, that the applicants were not afforded an opportunity to respond in rejoinder to the submissions made by the learned State Attorney against their appeal. It was insisted that the omission to let them make their rejoinder amounted to the denial of their constitutional right to be heard and further that it was in violation of the basic principle of natural justice.

On the above arguments, the applicants prayed for the application to be granted as sought in the notice of motion.

Responding to the submissions made by the applicants in support of their application, Ms. Lumato, sternly opposed the application arguing that the same is baseless. As on the first ground of complaint, it was submitted by Ms. Lumato, that the ground does not qualify or constitute a manifest error on the face of the record within the realm of rule 66 (1) (a) of the Rules. She contended that the issue being complained of by the applicants was fully dealt with and decided by the Court.

In relation to the first limb of the second ground of complaint, it was submitted by Ms. Lumato that the complaint regarding the right to be provided with legal aid services at the government expenses is misconceived. She explained that, given the kind and nature of the offence the applicants were charged with, the right to legal aid was not automatic. For that reason, she urged us to dismiss the ground.

On the second limb of the second ground of complaint which is to the effect that the applicants were denied their right to be heard because they did not make their rejoinder in response to the submissions made by the learned State Attorney, though it was readily conceded by Ms. Lumato that, indeed, it is not indicated in the impugned decision of the Court that the applicants made their rejoinder, it was insisted by her that, in fact, the applicants made their rejoinder. She further contended that reading the impugned decision as a whole, it cannot be said or complained that the applicants were not afforded a fair hearing. Ms. Lumato ended her submissions by insisting that even if the Court finds that the applicants did not make the rejoinder, the applicants have not established that the omission occasioned any injustice. She therefore prayed for the dismissal of the application.

Rejoining, the applicants reiterated their prayer for the application to be granted. They questioned why they could not be provided with legal aid services at the government expenses on appeal while during the trial they enjoyed such services.

Having examined the grounds of review as listed in the notice of motion, the supporting affidavit and also having heard the arguments advanced by the applicants in their written submissions in support of the application and the arguments from Ms. Lumato against the application, the issue for our determination is simply whether the grounds raised warrant a review of the impugned decision of the Court under rule 66(1) of the Rules.

First of all, it should be restated at this very early stage that whereas section 4(4) of the AJA clothes the Court with power to review its decisions by simply providing that the Court shall have power to review its own decisions, rule 66(1) of the Rules, goes further by not only giving such powers to the Court, but by also setting the benchmark by listing the grounds and limiting the scope on which the Court can exercise such powers, thus:

"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 a manifest error on the face of the record resulting in the miscarriage of justice; or

(b) a party was wrongly deprived of an opportunity to be heard; or

(c) the court's decision is a nullity; or

(d) the court had no jurisdiction to entertain the case; or

(e) the jurisdiction was procured illegally, or by fraud or perjury".

Not once but in several decisions, the Court has emphasized that the Court's power in review is confined within the scope of rule 66(1) of the Rules. One of such decisions is **Twaha Michael Gujwile v. Kagera Farmers' Cooperative Bank Ltd**, Civil Application No. 156/04 of 2020 (unreported) where the Court stated that: -

"... for an application for review to succeed, the applicant must satisfy one of the conditions stipulated under Rule 66 (1) of the Rules. ***It is only within the scope of the***

Rule that the applicant can seek the judgment of this Court to be reviewed."

[Emphasis added]

See also **Patrick Sanga v. Republic**, Criminal Application No. 08 of 2011 and **Martine Christian @ Msuguri v. Republic**, Criminal Application No. 07 of 2013 (both unreported).

Because, as we have earlier stated, the first ground of complaint on which the instant application is predicated is to the effect that our decision sought to be reviewed was based on "a *manifest or apparent error on the face of the record*" as stipulated under rule 66(1)(a) of the Rules, we find it imperative to refresh our mind by looking at what does the phrase "a *manifest or apparent error on the face of the record"* mean. Undeniably, the definition of the said phrase has been subjected to intense discussion. In the case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, the Court, having considered several authorities on the matter, adopted the definition of the phrase given by **Mulla on the Code of Civil Procedure**, 14th Ed, at pages 2335 to 2336, 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.....But it is no ground for review that the judgment proceeded on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. 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 .... 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...."

Guided by the above stated position of the law, we are of the settled view that the first ground of complaint raised by the applicants in support of the instant application that, the impugned decision of the court was based on a manifest error on the face of the record resulting in miscarriage of justice, fall short of the threshold set under rule 66 (1) (a) of the Rules. As rightly argued by Ms. Lumato, the issue or the complaint that the applicants were charged under a repealed law was raised on appeal as one of the grounds of appeal and it was fully dealt with and decided by the Court. At page 10 of the impugned judgment, the Court observed that:

"We agree with Mr. Nasua that the DPITDA was repealed by section 69 (1) of the DCEA, which was operationalized by the Government Notice No. 407 of 2015 on 15th September, 2015, four days before the charged offence was committed as alleged. It is to be noted that section 15 (1) (a) of the DCEA re-enacted the offence of trafficking in narcotic drugs under section 16 (b) of the DPITDA..."

Then, based on the position taken in **Matu s/o Gichumu v R** (1951) 18 EACA 311 and **Zakaria Martin v. Republic**, Criminal Appeal No. 178 of 2008 (unreported), the Court, decidedly concluded at pages 12 and 13 of the impugned judgment, that:

"In the instant case, the charging section 16 (b) of the DPITDA was re-enacted and is substantially similar to section 15 (1) (a) of the DCEA, the current statute, both provisions attracting the same penalty, that is life imprisonment. ***In the premises, it is our firm view that the appellants were not prejudiced by the defect in the charge, which we find curable under section 388 of the CPA. The second ground likewise fails."***

[Emphasis added]

Since the issue on the charge against the applicants being laid under a repealed law was raised as one of the grounds of appeal by the applicants and as it was determined and finally decided by the Court, as above demonstrated, the same issue cannot be raised as a ground for review. In the case of **Tanganyika Land Agency Limited and 7 Others vs Manohar Lal Aggrwal**, Civil Application No. 17 of 2008 (unreported), the Court emphatically stated that:

> *"**For matters which were fully dealt with and decided upon in 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 litigations. Like life, litigations must come to an end."*
>
> [Emphasis added]

On the above observations and reasons, the first ground of complaint raised by the applicants in support of their application fails.

The first limb of the second ground of complaint that, the applicants were not provided with legal aid services in defending their appeal at the government expenses hence depriving them of an opportunity to be heard is, under the circumstances of this case, not

a fit ground for review. First of all, as also rightly argued by Ms. Lumato, based on the offence the applicants were charged with, that is, trafficking in narcotic drugs, legal aid was neither automatic nor as of right to the applicants. Enjoyment of legal aid, was subject to the applicants having applied for such aid in terms of section 33(1) of the Legal Aid Act [Cap. 21 R.E. 2019] (the LAA). See- **Samwel Kitau v. Republic,** Criminal Appeal No. 390 of 2015 (unreported).

Under section 33 (1) of the LAA, the mandate for an indigent person to be assigned an advocate to represent him on legal aid, which is discretional, is vested upon a presiding Magistrate or Judge. It is only after such an eligible indigent person has been certified by a presiding Magistrate or Judge, as the case may be, that legal aid may be provided to him. Section 33 (1) sets two conditions for an accused person or appellant, as the case may be, to be eligible to such legal aid. Firstly, it should be in the interests of justice for such an accused person or appellant to have legal assistance in the preparation and conduct of his defence or appeal, as the case may be. Secondly, it must be satisfied that his means is insufficient to enable him to obtain such services on his own. In the instant case, the applicants did not raise such a request before the Court and it did

not appear to the Court that the applicants needed and were entitled to such services. For that reason and as the issue in question did not feature in the appeal, it cannot therefore be raised as a ground for review.

We also note that the applicants' complaint that they were not provided with legal aid is based on their claim that at the trial, they were provided with such services. To concretize the point, the applicants relied on the decision of the Court in the case of **Vicent Damian v. Republic** (supra). All that we can say in regard with the cited case is that, while we recognise the said decision of ours, we do not think that under the circumstances of the instant case, the decision is of any help to the applicants. We have observed, among other things, that unlike in the present case where the applicants seek review of the impugned decision of the Court and while, as we have extensively alluded to earlier, that in review the scope of rule 66 (1) of the Rules, has to be strictly observed, in the case relied upon by the applicants, what was sought by the applicant was not review. In that application, the applicant applied for the decision of the Court which had dismissed his appeal, to be referred to the Full Bench of the Court. The two applications are distinguishable.

It is for the above reasons and observations that we hereby dismiss the first limb of the second ground of complaint.

Regarding the last limb of the second ground of complaint that the applicants were not given an opportunity to respond, in rejoinder, to the submissions made against the appeal by the learned State Attorney, we again agree with Ms. Lumato that the ground is also baseless. Admittedly, there is no indication in the impugned judgment that the applicants made any rejoinder to the submissions in reply made by the learned State Attorney. That notwithstanding, we however, hasten to point out that, under the circumstances of this case and considering the manner the proceedings of this Court are transcribed, the fact that there is no such indication does not necessarily mean that the applicants did not make their respective rejoinder. As the Court stated in **Ramadhani Said Omary v. Republic**, Criminal Application No. 87/01 of 2019 (unreported), it is not proper to equate the judgment of the Court to a transcription of the proceedings that unfolded before the Court at the hearing of appeal. It is on that basis that we strongly believe and take it that the applicants made their rejoinder to the submissions in reply made by the learned State Attorney.

In addition to the above, the Court also observed that when there is a complaint that a party was not given an opportunity to make a rejoinder in an appeal, what is most important is to see whether it is discernible from the impugned judgment that the Court provided a balanced account of the arguments for and against the appeal. Taking guidance from the above, we have keenly scanned the impugned judgment and observed that in determining the grounds raised in support of the appeal, the Court properly considered the applicants' written submissions as well as the arguments made by the learned State Attorney. Our reading and examination of the impugned judgment as a whole, make us firmly find that it cannot be said that the applicants were wrongly denied an opportunity to be heard befitting a review of the impugned judgment of the Court. In fact, we have detected no sign in the impugned judgment, that indicate that the omission to make rejoinder occasioned any failure of justice. We therefore find the ground unmerited and in so concluding we find support in the decisions of the Court in **Ramadhani Said Omary** (supra), **Golden Globe International Services Ltd and Another v. Millicom Tanzania N.V and 4 Others**, Civil Application No.

441/01 of 2018 and **Jumanne Kilongola @ Askofu v. Republic,** Criminal Application No. 64/01 of 2020 (both unreported).

In the event and for the reasons we have given above, we find that the application was filed without sufficient cause and we accordingly dismiss it in its entirety.

It is accordingly ordered.

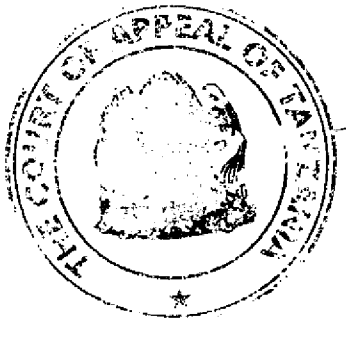
DATED at **DAR ES SALAAM** this 3rd day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered on this 7th day of August, 2023 in the presence of both applicants, and Ms. Salome Matunga, the learned counsel for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL