IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPLICATION NO. 91/07 OF 2019

1. GODFREY GABINUS @ NDIMBA
2. YUSTO ELIAS @ MNGEMA ..... **APPLICANTS**
3. EXAVERY ANTHONY@MGAMBO

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for Review from the decision of the Court of Appeal of Tanzania at Mtwara

(Mwarija, Mziray And Wambali, JJA)

dated the 1st day of March, 2019
in
Criminal Appeal No. 273 of 2017)

RULING OF THE COURT

12th & 19th February, 2020

MWANDAMBO, J.A.:

The applicants were convicted by the High Court sitting at Mtwara on the offence of murder followed by a death sentence by hanging. The Court dismissed their appeal and hence the present application for review on three grounds made under rule 66(1) (a), (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) supported by a joint affidavit annexed to the notice of motion. The respondent Republic opposes the application contending that it is misconceived.

The undisputed facts resulting in the instant application can be stated briefly as follows: Before the High Court, the applicants were prosecuted and convicted on the information of murder of Zainabu Nassoro @ Chikawe contrary to section 196 of the Penal Code, Cap 16 [R.E. 2002]. Their appeal to this Court hit a snag, for the Court sustained the conviction and sentence upon being satisfied that the appeal was devoid of merit. During the hearing of the appeal the applicants had the services of Mr. Hussein Mtembwa, learned Advocate. This advocate appears to have been assigned by the Court to represent the applicants under rule 31(1) of the Rules.

In terms of rule 73(2) of the Rules, the advocate lodged a supplementary memorandum of appeal to the memorandum of appeal the applicants had already lodged in Court. In its judgment reference was made to the memorandum of appeal and determined the appeal against the applicants on three main grounds that is to say; unsatisfactory evidence which did not prove the case beyond reasonable doubt, a standard of proof applicable in criminal cases, weak evidence of identification and improper summing up to the assessors. The Court found those grounds to be too weak to sustain the appeal and hence its dismissal.

Aggrieved, the applicants have preferred this application on three grounds set out in the notice of motion that is to say; **one**, manifest error on the face of the decision resulting in the miscarriage of justice, **two** , wrongful deprivation of the opportunity to be heard and **three,** that the decision is a nullity. The applicants' averments in the founding joint affidavit have focused on the wrongful deprivation of the opportunity to be heard and to a limited extent on a claim on the alleged manifest error on the record resulting in the miscarriage of justice. They contend that the Court made an error in not considering their grounds of appeal they had lodged earlier on which the advocate whom they were not aware of prior to hearing of the appeal abandoned and canvassed grounds he had himself prepared without their knowledge. In further amplification, they aver that the Court did not allow them to explain their grounds of appeal.

During the hearing, the applicants appeared in person, unrepresented. Each of them made oral submissions but their arguments focused on the complaint that the advocate who acted for them on appeal did not meet with them to discuss on the grounds of appeal ahead of the hearing neither did the Court give them an opportunity to explain the grounds they had filed earlier and discarded

by the advocate assigned to represent them. They thus invited the Court to find that those grounds are sufficient to invoke its jurisdiction to review the earlier decision which had dismissed their appeal.

For his part, Mr. Wilbroad Ndunguru, learned Senior State Attorney who appeared for the respondent Republic resisted the application on the basis of his own affidavit in reply contending that the application has not met the threshold for a review. He reiterated that stance in his oral submission relying on the Court's previous decisions in **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 and **Dadu Sumano @ Kilagesa v. Republic,** Criminal Application No. 13 of 2014 (unreported) and urged the Court to dismiss the application.

Arising from the notice of motion and the affidavit, the sole issue for the Court's determination is whether the applicants have made out a case for the Court's exercise of its jurisdiction for the review of its decision in pursuance of section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 as amended by Act No. 3 of 2016 (the Act). The burden lies in the applicants to prove that there exist grounds warranting the order they have sought in the notice of motion. The applicants have cited three grounds premised on rule 66(1) (a), (b) and (c) respectively of the Rules.

To succeed on the ground based on manifest error on the face of the record resulting in a miscarriage of justice, a party must establish that the error is so patent that no tribunal could have overlooked it on the one hand. On the other hand, such error must have resulted in the miscarriage of justice. Authorities on this abound including **Chandrakant** (supra) cited by Mr. Ndunguru. Other cases include; **Omary Makunja vs. Republic**, Criminal Appeal No. 22 of 2014 (unreported), **M/s. Thunga Bhandra Industries Ltd v. the Government of Andra Pradesh,** AIR 1964 SC 1372 cited with approval by the Court in **Tanganyika Land Agency Limited and 7 others Vs. Manohar Lal Aggrwal,** Civil application No. 17 of 2008 (unreported). The Court has emphatically stressed in the above mentioned decisions and many others that applications for review cannot be an attempt to appeal from the impugned decision through the back door. In **Chandrakant**, the Court made it explicit:

> *"That a decision is erroneous in law is no ground for ordering review. Thus the ingredients of an operative error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third, the error must have resulted in miscarriage of justice"* [at page 225].

In **Charles Barnaba v. Republic**, Criminal Appeal No. 13 of 2009(unreported) cited in **Dadu Sumano** (supra), the Court was emphatic that the remedy of review is limited to addressing irregularities on the impugned decision or proceedings causing injustice to a party and not to challenge the merits of the decision.

What is gleaned from the above is that not every error in a decision will fall into the category of an error manifest on the face of the record warranting a review. The operative averments on this ground are contained in paragraphs 3, 4 and 5 of the joint affidavit which run as follows:

> "3. *That there is manifest error on point of record on ground that the court combined the evidences on record without showing and considering participation of each applicant in committing the offence of murder since a mere presence of the applicants at the scene of the crime was not sufficient to invoke the doctrine of common intention and implicating the applicants to the murder as the records had been put clear on such ground the Court could not have reached the current decision and hence such manifested mistake on the records inadvertently occasioned by the Court in the course of composing its decision*

which resulted into injustice on part of the applicants.

4. *That the evidence from the record reveals that PW2 saw the applicants setting fire on the deceased but he did not explain how each applicant participated in the act. Furthermore the evidence from the record show also that the deceased was assaulted using fists but the witness did not point places of body attacked, again those who used burnt bricks to assault the deceased were evidenced not to be among the applicants but records of the Court indicates they were the applicants while not. All these mistakes need to be rectified so as to reach a just decision and the Court had mistaken in making its decision and thus the Court would have not acted as it had if all circumstances had been known.*
5. *That the evidence from the record depicts that there is an error as to the statement"hapa lazima afe mtu" on assuming that such words as were spoken by each applicant and the court mistakenly in its making the decision thereof while such words were alleged to have been said on series of events by unknown people who were under great heat of passion in lieu of the alleged witchcraft act on part of the deceased. Therefore, the Court had*

mistaken in making its decision and thus the Court would have not acted as it had if all circumstances had been known and this makes the whole proceeding and decision of the court thereof to be null as such words were not spoken before the alleged act enough to invoke malice aforethought on part of the applicants."

There is no doubt that those grounds seek to challenge the merits of the impugned decision by revisiting the evidence adduced at the trial. Such grounds are but grounds fit in an appeal rather than in an application for review. In **Patrick Sanga v. Republic,** Criminal Application No. 8 of 2011(unreported) the Court made the position more lucid. It stated:

"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and

a judgment of the final court in the land is final and its review should be an exception. That is what sound public policy demands." [at page 6].

In the same vein, those grounds cannot qualify to support the applicants' contention that the decision was a nullity simply because the Court did not specify who among the applicants uttered words that agitated the unlawful killing of the deceased. If we were to agree that that the decision was erroneous, we could not go ahead and review it because on the authority of **Chandrakant**'s case and others which we have referred to shortly, an erroneous decision can be corrected through an appeal which is not what we are called upon to do in the instant application. Our power is limited to determining if there is an error manifest on the face of the decision warranting a review. Apparently, the applicants did not seriously pursue this ground during the hearing. In the upshot, we find no merit in the applicants' complaint predicated on rule 66(1) (a) of the Rules and we reject it. We shall now turn our attention to the claim predicated on rule 66(1) (b) of the Rules that is; whether the applicants were wrongly deprived of the opportunity to be heard.

In para6 of the affidavit, the applicants have launched a two pronged attack against the decision on this ground. They contend in the first place that the Court wrongly deprived them an opportunity to be heard by failing to consider the grounds of appeal they had lodged in Court earlier on. They also contend that despite being represented by an advocate the Court should have allowed them to canvass the grounds of appeal parallel with their advocate. It is trite law that the right to be heard is so fundamental that its breach may result into the nullification of a decision regardless whether the same decision would have been reached had that right been exercised. See for example: **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251. The position in the instant application as highlighted earlier, presents a different scenario.

The impugned decision shows that the Court determined the appeal on the basis of the grounds in the memorandum of appeal. There is nothing to indicate that those grounds were from the original memorandum or the supplementary memorandum lodged by the applicants' advocate pursuant to rule 73(2) of the Rules. Be it as it may, we are settled in our mind that the advocate who acted for the applicants in the appeal was entitled to canvass the grounds in the

memorandum of appeal the applicants had lodged together with those he himself filed according to rule 73(2) of the Rules. The fact that the learned advocate chose to canvass the grounds he filed after the appeal had been assigned to him by the Court in accordance with rule 73(2) of the Rules could not have amounted to a wrongful deprivation of the opportunity to be heard as claimed by the applicants. In any event, since the applicants were present in Court during the hearing of the appeal, they had the right to bring to the Court's attention to their grounds of appeal had they wished to canvass them. In so far as they did not express their wish to do so, their complaint cannot qualify to be a ground for invoking the Court's jurisdiction to review its decision on the alleged wrongful deprivation of the opportunity to be heard.

On the other hand, the claim that the Court denied them opportunity to canvass their grounds alongside their advocate is equally baseless. It falls far below the claim that the Court wrongly deprived them of the opportunity to be heard. Generally, rule 30(1) of the Rules regulates appearance in the Court by a party in person or by an advocate. Since the appeal from which the present application has arisen was a criminal appeal, the Chief Justice or a Presiding Justice assigned an advocate to represent the applicants in accordance with rule

31(1) of the Rules. Apparently, the applicants do not challenge the assignment of the advocate who acted for them in the appeal. Their contention lies in the Court's alleged omission to allow each of them to canvass the grounds of appeal. In our view, the claim is legally and factually erroneous as shall become apparent shortly.

Recently the Court was confronted by an application for review in **Maulid Fakihi Mohamed @ Mashauri v. Republic**, Criminal Appeal No. 120/07 of 2018 (unreported) whereby the applicant complained, among others, that the Court denied him opportunity to be heard because he was not summoned to appear during the hearing. That was notwithstanding the fact that his advocate appeared and argued the appeal on his behalf. Rejecting that ground, the Court had regard to rule 80(2) of the Rules which dispenses with the personal appearance of a represented appellant who is in prison. The Court stated:

> *"It should similarly be pointed out that because the appeal before the court proceeded on the basis of the Record of Appeal, it cannot be for sure be said that since the applicant did not communicate with his advocate, then his advocate was in a disadvantaged position. It is presupposed that his advocate dutifully read the record,*

understood his client's case, and adequately represented him, surely nothing was amiss..." (at page 10).

It is worth noting that the applicants in this application complained also about lack of communication with the advocate. By parity of reasoning, if the personal presence of a legally represented appellant can be dispensed with, it cannot be expected that the presence of the applicants during the hearing of their appeal conferred them with right to be heard in person parallel with their advocate. In the circumstances, there is no merit in the complaint that they were wrongfully deprived of an opportunity to be heard simply because they did not canvass their grounds alongside with their advocate. Otherwise, had they have any misgivings with the assigned advocate, there is no reason why they failed to bring it to the Court's attention in the course of hearing. This ground also fails.

In conclusion, the application fails because the applicants have not satisfied the Court on the grounds predicated under rule 66(1) (a) (b) and (c) of the Rules respectively be it on account of the existence of any manifest error on the face of the record resulting in the miscarriage of justice or that the applicants were wrongfully deprived of an opportunity

to be heard or that the decision was a nullity. The application is accordingly dismissed.

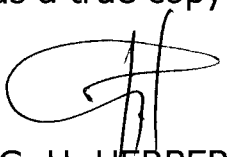
DATED at **MTWARA** this 18th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 19th day of February, 2020 in the presence of the 1st, 2nd and 3rd applicants in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL