IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUSSA, J.A., LILA, J.A. And MWAMBEGELE)

CRIMINAL APPLICATION NO. 3 OF 2013

1. SHABANI MENGE
2. THOBIAS CHARLES .....**APPLICANTS**

VERSUS

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

(Application for review of the Judgment of the Court of Appeal of Tanzania at Bukoba)

(Msoffe, J.A, Bwana, J.A, And Mjasiri, J.A.)

dated the 20th day of February, 2012

in

Criminal Appeals No. 182 and 183 of 2007

RULING OF THE COURT

29th November & 7th December, 2017

LILA, J.A.:

In this application, Shaban Menge and Thobias Charles, the applicants, seek the decision of the Court (Msoffe, Bwana, Mjasiri, JJ.A) in Criminal Appeal No. 182 and 183 of 2007 dated 20/2/2012 be reviewed. In that decision the Court varied the sentence of thirty five years imprisonment meted out to each applicant to the minimum mandatory

sentence of thirty years imprisonment and then dismissed the applicants' appeals.

The background of the matter as can be gleaned from the scanty materials available is this. The applicants were charged before the District court of Bukoba at Bukoba of the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 (R.E. 2002) and upon conviction they were each sentenced to serve thirty five (35) years jail term. Aggrieved, they unsuccessfully appealed to the High Court of Tanzania at Bukoba. Dissatisfied, they appealed to the Court in Criminal Appeals Numbers 182 and 183 of 2007 in which, except for the varied jail terms, their appeals failed. Still aggrieved, they preferred the present application for review.

In their joint notice of motion, the applicants raised two grounds, upon which their application is premised. These are:-

> "1. ***THAT***, *having thoroughly gone through the whole judgment date (sic) 20th February, 2012 as oppose(sic) to the record of trial, the learned justice(sic) of Appeal Seriously erred*

in Matters of law and in facts of the case in that:

A. *By failing to consider that Ownership of the property by the complainant was not positively by P.W.1 in his testimonies at the trial. Refer to the case of MORRIS FABUAN(sic) (1974) l.r.t. No. 5;*

B. *By exempting themselves from considering that in order for the Doctrine to apply as a basis for conviction it must be positively proved that the complainant possessed the property in question and not mere claims of ownership.*

C. *By failing consider (sic) such a fact which was not decided upon by the high court on the first appeal, which the court is in a form of re-hearing of the case, the Hon. Justice errored (sic) in not appraising the evidence(s) and come to just own conclusion, particularly where the high court had omitted to consider such important part of criminal jurisprudences, rather than just neglecting on this point of law the bench had to determine and come to just own conclusion.*

2. *On the basis of what has been stated here in above the Applicants (Appellants) were incurably prejudiced as the judgment on Appeal dismissing their appeal was based upon on (sic) (a) Manifest error(s) in the face of record resulting into miscarriage of justice and further that, wrongly deprived them of an opportunity to re-gain their freedom, regard being had to the ownership of the property in question for the Doctrine to fully apply."*

The application is supported by the applicants' joint affidavit which, in essence, contains averments similar to the grounds raised in the notice of motion.

At the hearing of the application the applicants appeared in person and unrepresented. They fended for themselves. Mr. Athumani Matuma, learned Senior State Attorney and Mr. Nestory Paschal Nchiman, learned State Attorney, appeared for the respondent Republic.

The applicants relied on their joint written submissions they presented to the Court which they urged the Court to adopt them and had nothing to add.

In their joint written submissions which, admittedly, contained mixed-up and unsystematically arranged arguments hence difficult to comprehend, at least, three grounds of review can be explored**. First**; that the Court's decision was based on a manifest error on the face of the record resulting in the miscarriage of justice. They specifically contended that the doctrine of recent possession was improperly invoked in that PW1, the owner by the stolen engine, was not recalled to testify on his ownership of the engine when the charge was altered, the alleged stolen boat engine was not tendered in Court and that all that was in evidence is that they were found in possession of the engine which evidence was insufficient to base their conviction. In support of their arguments, they cited the case of **Pili Bakari and Ally Bakari V. R**, [1992] T.L.R 10 in which conditions to be proved for the doctrine of recent possession to be invoked were stated to be that the property must be found with the suspect and the stolen goods must be positively identified as that of the complainant. It is their further contention that there was no evidence establishing that they were found in possession of the stolen engine. **Second;** that the prosecution evidence was not properly analyzed as a result of which they were wrongly convicted. They essentially complain that

the prosecution evidence was insufficient to sustain their conviction. And **third;** that after the prosecution had substituted a fresh charge they were not called to plead on the same which was a contravention of sections 234(1), (2) (a), (b), (c) and 228 (1) of the Criminal Procedure Act, Cap 20 R.E.2002 (the CPA). In support of their argument they referred the Court to its decisions in **Naoche Ole Rebile v. R,** [1993] T.L.R. 253, **Thuway Akonnay v. R,** [1987]T.L.R. 92, **Hsuchin Tai and Another v. R,** Criminal Appeal No. 250 of 2012 and **Shabani Issack @ Magambo Mafuru and Another V.R,** Criminal Appeal No. 192 and 218 of 2012 (both unreported). It is their contention that the Courts' decision subject of this application for review deviated from the long established precedents which is a procedural error amounting to a failure of justice. They accordingly urged the Court to, at this stage, reconsider those irregularities and come up with a just decision.

In response, Mr. Matuma attacked the applicants' application and was not hesitant to state that the same is an appeal in disguise hence without merit. He contended that the grounds of appeal that were raised by the applicants can be gleaned at page 4 of the Court's judgment to be that they were not identified at the scene of crime and the courts below

were wrong in relying on the doctrine of recent possession to convict them. He pointed out that those grounds were properly considered and determined by the Court from page 4 to 6 of the Court's judgment. He argued that the Court agreed with the appellants that they were not identified at the scene of crime on that material night. In respect of the invocation of the doctrine of recent possession, Mr. Matuma submitted that the Court elaborated the principles governing its application and cited several decisions on the point even that of **Ali Bakari V. R,** (supra) cited by the applicants and at the end the Court arrived at the conclusion that the boat engine belonged to PW1 who reported the matter to the police, gave evidence in court and produced receipts of the engine's purchase and the applicants never challenged PW1's claims over ownership of the engine before the court. He further said the Court also found that the applicants failed to establish how they legally came to possess it. He was of the firm view that as the grounds raised in the present application were raised when the applicants' appeals were heard by the Court and were determined, it is improper to ask the Court to consider them again.

Regarding the issue of the applicants not being called to plead to a substituted charge, Mr. Matuma contended that, that was a new issue

raised by the applicants in their written submission at this stage. He pointed out that such ground was not among the grounds for review raised in the notice of motion. He argued that it was improper to do so.

In all, Mr. Matuma contended that neither of the grounds raised by the applicants constituted any of the grounds outlined under Rule 66 (1) (a) to (e) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and no any error on the face of the record has been shown by the applicants. He, on those reasons, urged the Court to dismiss the application.

We have given a deserving weight to the arguments by both sides. We will consider them while guided by the scope of the Court's power of exercising the review jurisdiction.

The grounds for the Court to review its own decision are provided for under Rule 66 of the Rules. That Rule states:

> *"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;

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

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

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

The above restrictions are necessary as are intended to bar the Court from sitting on appeal against its own decisions on the same proceedings (See, **Patrick Sanga Vs The Republic**, Criminal Application No. 8 of 2011 and **Ghati Mwita Vs the Republic**, Criminal Application No. 3 of 2013 (both unreported). Giving allowance to the Court to sit on its own decision will result in endless litigation which is against a renowned public policy *interestei reipublicae ut finis litium* which means Litigation must come to an end. (See **Chandrakant Joshubai Patel V. R** [2004] T.L.R 218).

As eluded to above, in the present application, the applicants have raised as grounds of review three grounds. These are, **first,** that the doctrine of recent possession was improperly invoked to convict them because PW1 did not give evidence to establish ownership of the boat

engine and that they were not found in possession of the same. **Secondly**, that the prosecution evidence was not properly analyzed by the Court. As rightly submitted by Mr. Matuma, the Court's decision subject of the present application for review clearly shows that the applicants' convictions were not based on their being seen and identified at the scene of crime but in the application of the doctrine of recent possession. The Courts' judgment speaks it all at pages 4 to 8. Apart from elaborating the principles governing invocation of that doctrine the Court examined the evidence by PW1 and other evidence on record and arrived at the finding that PW1 established his ownership of the engine and the applicants were found in possession of the same which inference was drawn from the fact that the applicants were arrested while looking for a "purchaser" of the robbed engine. The applicants' complaints were therefore considered and determined by the Court. It seems the applicants are not satisfied with the Courts' finding and they want the Court to reconsider the evidence afresh. This is tantamount to asking the Court to sit on appeal on its own decision. The East African Court of Justice, Appellate Division at Arusha in the case of **Angela Amindo and the Secretary General of the East African Community** Application No. 4 of 2015 (unreported) categorically stated

that *an error on the face of the record justifies a review while an erroneous view justifies an appeal.* We fully subscribe ourselves to that position. Therefore, the power of review may not be exercised on the ground that the decision was erroneous on merit. This can only be done on an appeal. In the circumstances, the two grounds raised by the applicants stand out to be grounds of appeal and the legal position is clear that the Court cannot sit on appeal on its own decision (See, **Karim Ramadhani Vs The Republic**, (supra) and **Patrick Sanga V. The Republic** (supra). For clarity, we wish to reproduce the Court's view in **Karim Ramadhani Vs The Republic** (supra) where it was stated that:

> " *Our decision in* ***Mbijima Mpigaa and Another Vs The Republic*** *(supra) which Ms. Haule referred to us, has articulated the settled position of the law that* ***in a review, the Court does not sit to re-evaluate the evidence all over again.*** *Indeed, the review Court is restricted to determine if there are errors or otherwise apparent on the face of the decision subject of an application for review."* *(Emphasis added)*

The same legal position was reiterated in the case of **Abel Mwamezi Vs The Republic**, Criminal Application No. 1 of 2013 (unreported) where the Court categorically stated:-

> *"...inviting the Court to consider any evidence afresh amounts to inviting the Court to determine appeal against its own judgment. This shall not be allowed."*

In the circumstances we are in agreement with Mr. Matuma that the two grounds of review do not constitute grounds for review.

The applicants' **third** ground of review is that they were not called on to plead on the substituted charge. Indeed, we agree with the learned Senior State Attorney that such ground is new and has been introduced in the appellants' submissions for the first time. The Court's decision subject of the present application for review does not indicate anything concerning the charge sheet having been raised either before the High Court or before the Court. The legal position is clear that it is improper to raise a new ground at this stage. That position was well stated by the Court in the case of **Ghati Mwita Vs The Republic** (supra). In that case, the Court

set to hear a review and in the course a new issue of non-direction which was not raised on appeal was raised as a ground for review. In declining to entertain that ground, the Court remarked:-

> " *As regards the complaint of non-direction, we once again agree with Ms. Kileo that since it was not raised and it did not transpire in the Court of Appeal, to raise it now is tantamount to calling the Court to re-assess the evidence on record which is improper as it is not appeal."*

We, for the above reasons, agree with the learned Senior State Attorney that the applicants are barred from raising a new ground at this stage. We are not therefore ready to accept the applicants' invitation to consider that irregularity at this stage. We are not even sure if that irregularity existed. More so, we are alive of the fact that at this stage and generally in the exercise of review jurisdiction all that is considered is the decision of the Court on appeal, reference or revision. It is for that reason that we are not, at this stage, seized of the lower courts' records.

In the upshot, we are satisfied that the grounds of review raised have no substance warranting the Court to exercise its review jurisdiction. Neither have we been able to see any error manifest on the face of the Court's decision subject of this application.

For the foregoing reasons, we dismiss the application.

DATED at **BUKOBA** this 6th day of December, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL