IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Coram: Lubuva, J. A., Lugakingira, J. A. and Munuo, J. A.)

CRIMINAL APPLICATION NO. 8 OF 2002
In the Matter of an Intended Appeal

BETWEEN

CHANDRAKANT JOSHUBHAI PATEL.....APPLICANT

AND

THE REPUBLIC.....RESPONDENT

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

(Makame, J. A., Lubuva, J. A. and Lugakingira, J. A.)

dated the 20th day of May, 2002

in

Criminal Appeal No. 13 of 1998

R U L I N G
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Lugakingira, J. A.:

In this application the court is being asked to review its decision in Criminal Appeal No. 13 of 1998 dated May 20,

2002. The applicant, Chandrakant Joshubhai Patel, was before the High Court sitting at Mwanza convicted for the murder of one Jagdish Sodha and sentenced to suffer death. The conviction and sentence were upheld by this court in the decision it is sought to review. Since the application turns on the cause of death and the murderer, it seems desirable to revisit the facts in some detail.

The deceased and his family occupied a flat in a storeyed building on Nyerere/Temple Roads in Mwanza. There was a single ingress into the flat through an enclosed verandah and one had to press a bell next to the door in order to be let in. The family had two housemaids, PW1 and PW2, who reported for duty each morning and knocked off in the evening. On the morning of February 24, 1995, the deceased's wife, PW4, left to attend to the family shop on Nkrumah Road, leaving the deceased already up but before the arrival of the housemaids. PW1 was first to arrive around 9.00 a.m. She pressed the bell and the deceased came over and opened for her. Upon entering she saw the applicant settled in the sitting room. The

deceased then took a telephone call from his wife which he passed on to PW1 and proceeded to the bathroom. PW2 arrived while the deceased was still in the bathroom. Thereafter the deceased joined the applicant and there was a chat before the two withdrew into the guest-cum-children's play room in which there was a bed.

The deceased had a history of shoulder pains and the applicant was a reputed massagist. He had massaged the deceased even the previous day. When later PW1 wanted to sweep the guest room she had a glimpse of the deceased flat on the bed, the applicant massaging him, and withdrew. On four occasions the applicant would pop out, look around and draw back. On the second such occasion he did so to forestall interruption when he overheard a conversation between PW2 and an electrician, PW3, who was fixing a bulb in the sitting room. The electrician asked for a key to the main switch which was encased but PW2 told him that the key was with the deceased. The applicant sprang out and told them not to disturb the deceased. He finally emerged around 11.30 a.m.

and warned the housemaids not to disturb the deceased, telling them that he had massaged him with a strong medicine which had rendered him limp and senseless. He assured them that the deceased would wake up on his own.

The deceased never woke up. Around 1.30 p.m. his wife returned home. She had already gathered on the phone that her husband was resting following treatment. She proceeded to the guest room and saw the deceased on the bed covered with a blanket from foot to neck. There was clotted blood about the neck. When she removed the blanket, the whole body and bed were bathed in blood. The deceased was taken to Bugando Medical Centre where he was pronounced dead. According to the post-mortem report death was due to acute haemorrhage from a cut wound 10cm long on the neck, involving the common carotid artery and external jugular vein, among other parts. The post-mortem report also indicated that sections of the deceased's internal organs, blood and stomach contents were taken for scientific analysis.

At the trial the prosecution led no evidence on the results of the scientific investigations. The prosecuting attorney was in fact unaware of any report on the matter and there was no mention of one at the committal stage. At some stage after the conclusion of the trial and while the applicant's appeal was pending hearing, it came to light that analyses had been carried out at the Government Chief Chemist's department and a report of the results had been forwarded to the Mwanza district crime office as early as May 3, 1995, that is three years before the trial got underway. The report was admitted as additional evidence at the hearing of the appeal upon application by Prof. Shivji and Prof. Shaidi, the applicant's counsel since the appeal stage. The court also called Mr. Andrew Magembe, the chemist who carried out the analyses, to clarify some areas. According to the report, no known poison was detected in any of the deceased's organs or stomach contents, but tests on the blood revealed the presence of 486.84mg of alcohol per 100mL of blood, the equivalent of 9.65 litres of beer of 3% alcohol or 0.32 litres of 70% proof spirits. The report states that an amount of 450-

550-mg of alcohol per 100mL of blood may be fatal to an average 70kg – person. Mr. Magembe explained that such person would in fact be in a coma. In view of this evidence it was submitted that the cause of death had not been conclusively established. The court considered the additional evidence and, having formed the view that alcohol was not a causative factor, it concurred with the High Court that the deceased died of acute haemorrhage as stated in the postmortem report. It is generally contended in this application that the court misdirected itself in its approach to the additional evidence and it is asked in the accompanying affidavit sworn by Prof. Shaidi to re-evaluate the evidence and give the applicant the benefit of the doubt.

The exercise of review powers by this court is fairly recent. As far as it could be ascertained, the court for the first time stumbled on review in the case of Felix Bwogi v. Registrar of Buildings, Civil Application No. 26 of 1989 ***(unreported),*** an application to rectify a judgment of the court which had been based on a wrong record. A document withdrawn at the trial

before the High Court had somehow found its way into the record of appeal and judgment had proceeded on the basis of that document. The court granted the application and reversed its earlier decision. In doing so, however, the court considered itself to be acting pursuant to Rule 40(1) of the Court of Appeal Rules which provides for the correction of clerical or arithmetical mistakes in judgments or errors arising therein from accidental slips or omissions. It was not realized that the exercise amounted to a review of the court's decision. The misconception was realized and the court's inherent powers of review were concretized in Transport Equipment Ltd v. Devram P. Valambhia, Civil Application No. 18 of 1993 ***(unreported),*** where a Full Bench consisting of seven justices ostensibly sat to consider whether the court had inherent power to review its decisions. It was observed that the court's powers derived from statute but inherent jurisdiction was by its nature not a creature of statute although it may sometimes be embodied in a statute. It is power which is necessary for the proper and complete administration of justice and one which is resident in all courts of superior jurisdiction and

essential to their existence. After making reference to various authorities in and outside East Africa, the Full Bench held that the court had the inherent jurisdiction to review its decisions and that it will do so in any of the following circumstances: where there is a manifest error on the face of the record which resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived of the opportunity to be heard." In subsequent decisions on the subject, e.g. Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd, Civil Application No. 62 of 1996 ***(unreported)***, the court has made it clear that this list is not exhaustive.

We asked Prof. Shivji to state specifically in which of the above criteria was this application grounded. He cited the first and contended that there were three manifest errors on the face of the record which he listed as: (i) failure to consider the additional evidence in accordance with established principles; (ii) failure to draw any conclusion on the non-disclosure of the chemist's report; (iii) failure to revert to the evidence relating to

the arrival at the deceased's home of one Abbakar between the applicant's departure and the arrival of the deceased's wife. Learned counsel argued that these errors cumulatively resulted in miscarriage of justice. Principal State Attorney Mr. Mkamanga who appeared for the respondent Republic, took the view that the application did not meet any of the conditions for review but was an appeal in disguise. He stated briefly that the court gave consideration to the additional evidence, that the chemist's report supplied no alternative cause for the deceased's death, and that no one else entered the guest room between the applicant's departure and the arrival of the deceased's wife.

It is, we think, apparent that there is a conflict of opinion as to what amounts to an error manifest on the face of the record and it is important to be clear of this lest disguised appeals pass off for applications for review. We say so for the well known reason that no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that

kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review. As held by the Supreme Court of India in Thungabhadra Industries Ltd v. State of Andhra Pradesh, (1964) SC 1372, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. The High Court of Uganda likewise held in Balinda v. Kangwamu [1963] EA 557, that a point which may be a good ground of appeal may not be a good ground for review although it may be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for an appeal. In Transport Equipment (above) the Full Bench was preoccupied with formulating broad principles without the necessity of going into theoretical definitions. We would say, in the light of the authorities at hand, that an error which will ground a review, whether it be one of fact or one of law, will be an error over which there should be no dispute and which results in a judgment which ought to be corrected as a matter of justice. As stated by the High Court in Attilio v. Mbowe [1970] HCD

n. 3,

> The principle underlying a review is that the court would not have acted as it had if all the circumstances had been known.

The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following.

> 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 [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... 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 [Basselios v. Athanasius (1955) 1 SCR 520]. But it is no ground for review that the judgment proceeds 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: Utsaba v. Kandhuni (1973) AIR Ori. 94. 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 [Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372].

In the same vein are the decisions in Kheshodass v. Murtaza Ali Khan (1952) AA 318 and Awate v. Fernandes (1959) Bom. 334. We think this sufficiently articulates what constitutes an error manifest on the face of the record and it seems the best example at hand is the case of Felix Bwogi (above) where judgment proceeded on the basis of a document which ought not to have been on record. The court would not have decided as it did were that document not on record. We will now test the errors listed for the applicant against these principles.

Prof. Shivji's argument on the first alleged error, that the evidence was approached contrary to established principles, was two-fold: that the court failed to consider the evidence as one whole but dealt with the additional evidence in isolation, secondly, that the court did not apply the proper (if any) test in its assessment of the additional evidence. We start with the first leg. Learned counsel contended in this respect that the court made up its mind on the guilt of the applicant before turning to the additional evidence. We were referred to, among others, Pandya v. R. [1957] EA 336 on the need to integrate evidence. We have no quarrel with that but our first observation is that the contention generally that the court considered the additional evidence in a manner contrary to established principles does not, even if correct, constitute an error which will ground an application for review; it may probably be a ground for appeal. If it were claimed, which it is not, that the additional evidence was not considered at all, rather than that it was improperly considered, that would be a different matter; errors in the approach to the evidence as

such and even erroneous conclusions therefrom cannot be grounds for review.

Secondly, it is arguable whether, in fact, the additional evidence was considered in isolation. It is for the avoidance of doubt only that we need go into this. The organization of a judgment is dictated by many factors, including the complexity of the issues involved. While an attempt is always made to consider and determine the essential issues, the exercise has to reflect also some rational arrangement. Consideration of any piece of evidence is certainly appropriate in the context of the issue to which it is relevant. When evidence is considered in its proper context along with other evidence in that context, it cannot be properly said to have been considered in isolation. In this case the additional evidence was relevant only to the issue of cause of death and it was in that context that it came up for consideration along with the other evidence on the issue, namely the post-mortem report. A careful examination of the judgment will also reveal that the position of that issue

was consciously decided upon but was not an oversight or disregard for established principles. The court said:

> We deliberately decided to deal last with the first ground in the appeal, that the cause of death had not been established.

Having said so the court set out in detail the chemist's report to which reference had previously been made on at least two occasions, next it referred to the post-mortem repot, and upon weighing the two pieces of evidence the court concurred with the trial judge that cause of death was acute haemorrhage from a cut wound. It is not necessary to make this ruling longer by demonstrating this with the relevant passage from the judgment. The additional evidence was thus considered where and when it was appropriate to do so and this was done in conjunction with the other evidence on the same issue. At that stage the court had not affirmed the applicant's guilt for the murder but had reviewed the circumstantial evidence which left him exposed to the affirmation. The case of

Msambya v. A. G., Civil Appeal No. 2 of 2002 ***(unreported)***, cited as an instance of evidence considered in isolation, has no parallel in the instant case. In that case, an election petition, there was no attempt by the trial judge to integrate the evidence from the opposing sides, but only after condemning the petitioner's witnesses as untruthful did he turn to consider the evidence for the defence. It is therefore debatable in the instant case whether there was failure to integrate the evidence, in which case it cannot be said that there was an error manifest on the face of the record.

Turning to the applicable test, Prof. Shivji submitted that the post-mortem report was merely prima facie evidence of the cause of death, that having admitted additional evidence the court should have considered whether it was safe to sustain the conviction, and that in resolving this question the court should have considered what impact the additional evidence would have had on the trial court had it been adduced before it. He cited for these propositions Mapunda v. R. [1992] TLR 200, R. v. Pendleton [2002] 1 All ER 524 and James Jordan

Clinton v. R. (1956) 40 Cr. App. R. 152 respectively. We think, with respect, these arguments would have been properly advanced at the hearing of the appeal; to advance them in this application is to misconceive seriously the purpose of review and to have a second bite at the appeal. As seen earlier in this ruling, it is no ground for review that judgment proceeds on an incorrect exposition of the law. And while the impugned judgment admits of no patent incorrectness in the exposition of the law, we wish to caution only that Pendleton and Clinton have to be approached with care since this court, when hearing appeals from the High Court in its original jurisdiction, proceeds by way of retrial.

The second listed error turned on non-disclosure – the failure by the prosecution to produce the chemist's report at the trial. This is undoubtedly disturbing for the omission seems to have been deliberate. The report was apparently received at Mwanza for it was subsequently obtained from the Regional Crime Officer when its existence became known. Although prosecuting counsel had no hand in this, the

malfeasance ought to be deplored as no explanation was forthcoming. It was now argued for the applicant that the court's failure to dwell on the non-disclosure and to draw any conclusions therefrom was an error manifest on the face of the record. The court was referred to R. v. Ward [1993]2 All ER 577, where conviction was quashed on account of non-disclosure of scientific tests that cast doubt on the prosecution case and non-disclosure of statements taken by the police of interviews with the defendant which had a bearing on the question of her proclivity to make untrue confessions. The court was also referred to ARCHBOLD (1993), section 4-274, which cites R. v. Maguire 94 Cr. App. R. 133 for the proposition that failure by a prosecution expert witness to disclose the results of tests carried out by him was capable of constituting a material irregularity in the trial, even though the prosecuting counsel was unaware of the existence of those tests. Reference was finally made to Meek v. Fleming [1961]3 All ER 148, where it was held that where a party deliberately misled the court on a material matter, e.g., by the concealment of a matter of vital significance, a judgment obtained or

probably obtained by the deception should not be allowed to stand. In the light of these decisions it was submitted that the court ought to have drawn an adverse inference from the prosecution's failure to disclose the chemist's report in as much as it suggested the presence of a potentially fatal dose of alcohol in the deceased's system.

We again wish to state generally that failure or omission by an appellate court to draw an adverse or any inference from non-disclosure of evidence at the trial is a non-direction which may be a good ground for appeal, where further appeal lies, but cannot be a ground for review. There is no guarantee that the court would necessarily have drawn an adverse inference had it addressed the non-disclosure because it is not the law that an adverse inference has to be drawn every time there is non-disclosure. We will again be indulgent and show that the non-disclosure in this case did not in fact qualify for an adverse inference. It is necessary for this purpose to revert to the ingredients of an operative error. First, there ought to be an error, next the error has to be manifest on the face of the

record, finally the error must have resulted in miscarriage of justice. The three ingredients have to co-exist in order for the error to be capable of grounding a review. In our view the court would be under no obligation to draw an adverse inference from non-disclosure of evidence unless its disclosure would probably have affected the outcome of the trial, for that is when non-disclosure can be said to have occasioned miscarriage of justice. The three English decisions cited to us were instances of that kind. In Ward's case, for instance, the undisclosed scientific test cast doubt on the prosecution case and rendered it insupportable. It was not suggested in the instant case that the chemist's report cast doubt on the post-mortem report. As the court said in its judgment, the former merely threw up a touch of mystery in the case. Moreover, unlike in the Mapunda case (above) where the post-mortem report merely suggested a "possible" cause of death, in the instant case the report was positive. Assuming for argument's sake that the deceased had consumed alcohol a few hours before he met his death as theorized by Prof. Shivji, it is apparent that he was not the type to be dispatched by 9.5

litres of beer or 0.32 litres of spirits. He was not, by his actions, in any coma as apprehended by Mr. Magembe but he was alert, active and rational at the arrival of the applicant. If ever he ingested any alcohol while closeted with the applicant, that would be within the applicant's special knowledge and for the applicant to have explained. By no stretch of imagination, however, could it be said that the deceased first expired from alcohol, then a butcher came around to slash his neck, and we do not understand learned counsel to suggest such an absurdity. The chemist's report was thus not a matter of vital significance and its non-disclosure was not a material irregularity against which an adverse inference ought to have been drawn. The second so-called error is therefore unsustainable.

In the third and last of the alleged errors it was claimed that the court gave no consideration to the evidence relating to Abbakar's calling at the deceased's home after the applicant's departure but before the return of the deceased's wife. It had been argued at the hearing of the appeal that Abbakar might

have been the murderer and it was now submitted that the omission to address this possibility was a fatal error. There is no substance in this. Admittedly, Abbakar was not expressly mentioned in the judgment of the court but an objective assessment of the judgment will reveal that his arrival at the scene was considered and dismissed by implication. Abbakar was the deceased's shop assistant. Around midday on the material day he was sent by the deceased's wife to the flat to fetch drinking water. He met PW2 who gave him the water and left. According to PW2 he was around for just about three minutes and never went past the door. She added that no one entered the guest room before the deceased's wife arrived. It may be noted that at the hearing of the appeal, Prof. Shivji cast suspicion not only on Abbakar but on everyone who was or came at the scene, including the deceased's wife and some imaginary intruder whom he figured climbing into the flat through the window. There was so much labouring over nothings that the court had occasion to remark:

> Some of the arguments by Prof. Shivji we can, with respect, say outright, that they were picking on small details, of no consequence in the context of the totality of the evidence, and nibbling at them.

The court specifically addressed the possibility of any other person being responsible for the killing and emphatically ruled it out. It observed that no one else could have gained ingress into the guest room without the knowledge of PW2 and that the established geography and details of the flat made it fanciful to assert that an intruder could have come in undetected. The court then held:

> It is not the law, and it would be unreasonable, and ridiculous, to hold that every time a person is at a scene of crime, or close to it, he becomes a suspect...

We think, with respect, the totality of this excluded Abbakar from suspicion even though he was not expressly mentioned. If this view is disputed, that would take us back to what constitutes a manifest error. It must be obvious, self-evident, etc., but not something that can be established by a long drawn process of learned argument.

Having thus considered the three errors as claimed, we do not find any which would warrant the exercise of review powers. The application therefore fails and is accordingly dismissed.

Dated at Dar es Salaam this 29th day of April, 2003.

D. Z. LUBUVA
JUSTICE OF APPEAL

K. S. K. LUGAKINGIRA
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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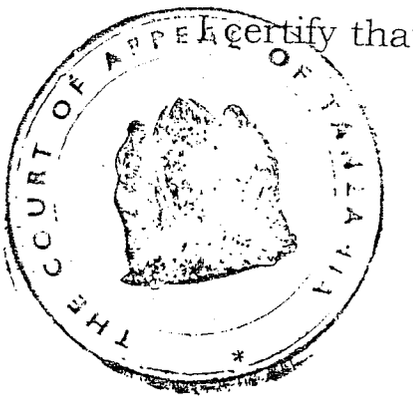

F. L. K. Wambali
DEPUTY REGISTRAR