IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPLICATION NO. 01/02 OF 2023

BASILID JOHN MLAY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania at Arusha)

(LILA, J.A., MWANDAMBO, J.A. And FIKIRINI, J.A.)

dated the 21st day of October, 2022

in

Criminal Appeal No. 306 of 2018

.....

RULING OF THE COURT

9th & 23rd February 2024

GALEBA, J.A.:

In the Resident Magistrates' Court of Manyara at Babati, the applicant was charged under section 15 (1) (a) and (b) of the Prevention and Combating of Corruption Act. The case facing him was Criminal Case No. 118 of 2013, in which 3 counts relating to corrupt transactions out of the 6 which had been levelled against him, were proved and he was accordingly convicted. He was subsequently sentenced to pay a fine of Tshs 500,000.00

on each of the 3 counts for which he was convicted, or serve a term of 2 years in respect of each of them.

The applicant was aggrieved by the above decision of the trial court, so, he lodged Criminal Appeal No. 68 of 2015 in the High Court of Tanzania at Arusha. However, that appeal did not succeed; it was dismissed on 2nd September, 2016. Once again, the applicant was not satisfied with the decision of the High Court. He thus lodged Criminal Appeal No. 306 of 2018 to this Court, challenging the decision of the first appellate court, for dismissing his first appeal. Nonetheless, like the first appellate court, in a 32-page judgment dated 21st October, 2022, this Court dismissed the applicant's second appeal.

This application is for review of the above decision of this Court. It has been preferred under section 4 (4) of the Appellate Jurisdiction Act, (the AJA) and rule 66 (1) (a) and (d) of the Tanzania Court of Appeal Rules 2009, (the Rules). The orders sought in this matter as per the notice of motion which is supported by the affidavit of Mr. John Faustine Materu, learned advocate, are:-

"1. That, the Honourable Court be pleased to review its judgment delivered on 21st October, 2022 in Criminal Appeal No. 306 of 2018, with a view to reverse the decision, quash the conviction, set aside the sentence imposed on the applicant and let the applicant at liberty.

2. Any other order as the Honourable Court may deem just to grant."

The grounds upon which the application is based are contained in the notice of motion as well as at paragraph 5 of the supporting affidavit of Mr. Materu. The grounds are as follows:-

"(i) That, the decision was based on manifest error under rule 66 (1) (a) and (d) of the Tanzania Court of Appeal Rules 2009, as the Court of Appeal wrongly held that PW2, PW3 and PW4 were neither witnesses with personal interests to serve nor were accomplices.

(ii) That, the decision was based on manifest error under rule 66 (1) (d) of the Tanzania Court of Appeal Rules 2009 as the Court did not find that the first appellate court lacked jurisdiction to hear the first appeal for want of a notice of appeal in

terms of section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2019.

(iii) That, the Court erred in law in holding that PW3's evidence did not require corroboration and that the evidence on record proved consistence and not corroboration.

(iv) That the decision of the Court is based on manifest error as the court wrongly believed the evidence of PW2, PW3 and PW4 to be credible and was enough to ground the applicant's conviction."

The application is resisted by way of an affidavit in reply of Ms. Eunice Makala, a learned State Attorney from the National Prosecution Services, swearing that the decision to be reviewed does not have any manifest errors on the face of the record resulting in the miscarriage of justice.

At the hearing of the application, the applicant had the services of Mr. John Faustine Materu learned advocate and the respondent Republic was represented by Ms. Riziki Mahanyu learned Senior State Attorney, assisted by Ms. Neema Mbwana, Ms. Eunice Makala and Ms. Tusaje Samwel, all learned State Attorneys.

At the outset, Mr. Materu raised under rule 49 (2) of the Rules and presented a supplementary affidavit, attaching with it a few documents. In the course of this ruling, we will make a deserving remark on such documents in an application for review before the Court.

After adopting the notice of motion and his affidavits both substantive and supplementary, Mr. Materu argued grounds (i), (iii) and (iv) together as the complaints in those grounds were interrelated. He tackled the remaining ground (ii) separately, and it is the latter ground that he started off with.

In respect of ground (ii), it was Mr. Materu's contention that after the conclusion of Criminal Case No. 118 of 2013 in the trial court, the applicant lodged Criminal Appeal No. 68 of 2015 in the High Court, without filing a notice of intention to appeal as required by section 361 (1) (a) of the Criminal Procedure Act, (the CPA). According to him, without such notice of intention to appeal, the High Court heard the applicant's appeal without jurisdiction, which means that all that the High Court did was a nullity because it had no jurisdiction to hear the appeal in the first place. He submitted that, because of lack of the notice of intention to appeal before the first appellate court, there was no copy of the said notice in the record of appeal in respect of

Criminal Appeal No. 306 of 2018 before this Court. According to him, this Court, like the first appellate court, had no jurisdiction to preside over the appeal emanating from proceedings in the High Court which had been initiated without any notice of appeal in place. To substantiate that there was no notice of intention to appeal before the High Court, he referred us to a document attached to the notice of motion titled "TANZANIA" marked "A Collectively". As evidence that a copy of the said notice was not included in the record of appeal, to this Court he attached to the supplementary affidavit, a copy of the index showing what was contained in the record of appeal before this Court on appeal. According to learned counsel, had the notice of appeal been part of the record of appeal, it could have been one of the items in the said index. To support his argument, Mr. Materu referred us to this Court's decisions in **Michael Kyando v. R**, Criminal Appeal No. 544 of 2020; **Joseph Lugala v. R**, Criminal Appeal No. 512 of 2020, and; **P. 9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011 (all unreported).

In respect of grounds (i), (iii) and (iv), the learned advocate was equally decisive and emphatic, that there are glaring and manifest errors on the judgment of this Court. On these points he was brief and he approached

the points on three fronts; **one,** that after all documentary exhibits were expunged from the record by this Court, oral testimony that remained was insufficient to found a credible conviction; **two,** although the undisputed matters were three as can be gathered from page 3 of the judgment of this Court, at page 26 to 27 of the same judgment, the Court added the fourth undisputed matter upon which it based its decision to uphold the conviction of the applicant. **Three**, that this Court erred to hold that PW1, PW2 and PW3 were credible witnesses.

In reaction to her counterpart's submissions, Ms. Mbwana emphatically opposed the view taken by Mr. Materu. According to her, the application has no merit because both ground (ii) and the second set consisting of grounds (i), (iii) and (iv) of this application do not demonstrate any apparent or manifest error on the judgment of this Court, to be reviewed. She argued that in order to resolve the complaints raised in this application the court has to engage itself in a long process of reasoning which is not permissible in determining applications of this nature. She warned that entertaining this application will be tantamount to reopening a fresh appeal and rehear it, which is not expected of this Court, sitting in review. To support her stance, she relied on the case of **Nguza Vikings @ Babu Seya and Another v.**

R, Criminal Appeal No. 5 of 2010 and; **Karim Kiara v. R**, Criminal Appeal No. 4 of 2007 (both unreported). She finally prayed that we dismiss this application for want of merit.

In this application although the grounds are two, that is ground (ii) on one hand, and grounds (i), (iii) and (iv) on the other, the issue emerging from the submissions of counsel for resolution is just one. The issue is whether in determining an application for review, this Court is mandated to inspect the records of the trial court and of the first appellate court in order to discover which documents were missing and consider credibility or sufficiency of any evidence that was tendered before the trial court.

As for ground (ii), Mr. Materu relied on this Court's decisions in **Michael Kyando** (supra) and **Joseph Lugala** (supra) to support his position that, where the High Court presides over an appeal without a notice of intention to appeal having been lodged in terms of section 361 (1) (a) of the CPA, the appeal before the Court is a nullity. Nonetheless, an appeal and a review are completely two different proceedings. Whereas there are no statutory points upon which an appeal may be preferred, an application for review, has strict grounds upon which the same can be made. The grounds

must be within the scheme of rule 66 (1) of the Rules. Further in applications for review, the Court does not have mandate to go through the documents of the lower courts to discover errors committed there. Indeed, errors of any lower court does not concern this Court on review. In addition, this Court has no jurisdiction in review to peruse any evidence and see whether the necessary standard of proof was attained or not. The court on review has nothing to do with evidence. Not even the weight of the remaining evidence after all exhibits might have been expunged. The duty of assessing whether the remaining exhibits discharges the standard of proof required in a particular case, is the domain of the Court on appeal. This Court on review, has no jurisdiction to interrogate its own findings on appeal, for that would be to seek to exercise appellate jurisdiction which, this Court in review proceedings, lacks. We will refer to a few decided cases to substantiate the position we have taken.

In **Chandrakant Joshubhai Patel v. R** [2004] T.L.R. 221, this Court referring to what an error of law means, stated thus:-

> *"Such an error must be an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points*

which there may conceivably be two opinions. 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."

In ground (ii) Mr. Materu wanted this Court to engage into a long-drawn process of searching and discovery in a multitude of documents, in order to get to unearth the truth on whether there was a notice of intention to appeal or it was not there. We refuse to fall into a temptation to call for records of the courts below in order to see whether such records contained all necessary documents, including the notice of intention to appeal to the High Court. In review proceedings what this Court is supposed to look at in order to discover the error referred to in rule 66 (1) of the Rules, is the impugned judgment of the Court. It is not the first time we are standing by that position. We held so in the case of **The Hon. Attorney General v. Mwahezi Mohamed (as administrator of the estate of the later Dolly Maria Eustace) and Three Others,** Civil Application No. 314/12 of 2020 (unreported), where we resolutely observed:-

> *"We think, we should pause here and refresh our mind on what record is referred in an application for review. Rule 66 (1) of the Rules is very clear that, the Court may review its* ***"judgment"*** *or* ***"order",*** *which means,* ***for the Court to determine an application for review ail it needs to have before it is the impugned decision and not the evidence adduced during trial or decisions of subordinate court(s) as submitted by Mr. Malata.*** *We need to emphasize here that, the record referred in review is either the* ***"judgment"*** *or* ***"order"*** *subject of review."*
>
> [Emphasis added]

As the issue of the missing notice of intention to appeal does not feature anywhere in the impugned judgment of the Court, the complaint in that respect, does not qualify to be an error on the face of the record. That is to say, all the documents that were attached to the affidavit and the supplementary affidavit to support the notice of motion are redundant, we cannot read them. In the circumstances, the complaint in ground (ii) has no merit and we reject it.

As for an invitation to deal with grounds (i), (iii) and (iv), with due respect to counsel for the applicant, like we have just observed in respect of ground (ii), these complaints call for this Court to carry out a full re-evaluation, re-consideration and re-assessment of the evidence on record after expunging certain exhibits. Re-evaluating any evidence or reassessing credibility of witnesses has never been one of this Court's function in review proceedings. We maintain that view with a backing of this Court's observation from the case of **Patrick Sanga v. R,** Criminal Application No. 8 of 2011 (unreported), where we stated that:

> *"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 exceptional. That is what sound public policy demands."*

Further in **The Hon. Attorney General** case (supra), on the same point of handling evidence, this Court stated:-

> *"In this regard, we decline the invitation by Mr. Malata who persuaded us to re-evaluate the evidence adduced during trial and the judgment of the High Court to search for an error. We do not agree with his argument that, since the decision of the trial court was based on the evidence fronted during trial and the same was referred by the Court on appeal, we are bound to assess and reevaluate the entire evidence on the record of appeal, which we say, was unnecessarily attached in this review application."*

The import from the above two decisions of the Court, and many other decisions including **Karim Ramadhani v. R**, Criminal Application No. 25 of 2012 (unreported), is precisely the message we wish to convey to parties in this application. This Court on review, never rediscusses evidence or deals with any issues of corroboration or witnesses with interest to serve or not. This Court in review, deals exclusively with the points legislated at rule 66 (1) of the Rules; full stop. Thus, like in ground (ii), grounds (i), (iii) and (iv) are not grounds upon which this Court can exercise its review jurisdiction.

For the above reasons, this application lacks competence before the Court, we thus strike it out.

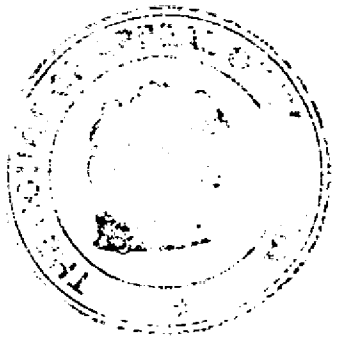
DATED at **ARUSHA**, this 22nd day of February, 2024

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Mitego Methusela holding brief for Mr. John Materu, learned counsel for the Applicant and Ms. Neema Mbwana, learned State Attorney for the Republic/Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL