

TANZANIA / JUDGMENT

20161022 TZCA Mwanza

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IN THE COURT OF APPEAL OF TANZANIA - ATMWANZA (CORAM: RUTAKANGWA, J.A.,
MASSATI, J.A., And MUGASHA, J.A.) CRIMINAL APPLICATION NO. 12 OF 2014

1. JOHN SAMWEL@ KABAKA}
2. CHARLES BA KARI APPLICANTS VERSUS THE
REPUBLIC RESPONDENT {Application for Review from
the decision of the Court of Appeal of Tanzania at Mwanza) (Lubuwa, Mroso, Rutakangwa,
JJJ.A.) dated the 16th day of March, 2007 in Criminal Appeal No. 58 of 2005 RULING OF THE
COURT 21 st & 25th October, 2016 MASSATI, J.A.: This is an application for review of the
judgment of this Court (LUBUVA, JA, MROSO, JA and RUTAKANGWA, JA) in Criminal Appeal
No. 58 of 2005 delivered at Mwanza on the 16th March 2007. The notice of motion is taken
out under Rule 66(1)(a) of the Tanzania Court 1 . of Appeal -Rules, 2009 (the Rules) and is
supported by separate - - affidavits of the applicants. According to the Notice of Motion the
major grounds in support of the application are two: First, that there are manifest errors
apparent on the face of the record resulting into a miscarriage of justice. Second, that the
Court failed to notice and consider serious irregularities in sentencing the applicants with
terms of imprisonment which were ordered to run consecutively. Those grounds are set out
more elaborately in the affidavits of the applicants, whose contents are almost a replica of
each other. In their paragraphs 2 of their separate affidavits they both aver that when they
were convicted with the offences in Criminal Case No. 245 of 1993 on 15th July 1993 before
K.H.J. Utamwa, RM, they had already been convicted previously of the same offences of
armed robbery in Criminal Cases Nos. 242, 243 and 244 of 1993, before the same district
court of Mwanza. That Criminal Appeal No. 58 of 2005 (the subject of this application)
originated from criminal case No. 245 of 1993. In their separate paragraphs 3, they both
complain that in Criminal Appeal No. 2 58 of 2005, this Court did not consider the
irregularities in sentencing the applicants to consecutive terms; and this occasioned a
miscarriage of justice. If anything can be made out in paragraphs 4 of their separate
affidavits the applicants claim that it was the duty of this Court to have seen those
irregularities, and give appropriate directions to the lower courts, for the interests of justice.
The applicants also filed a joint written submission purportedly under Rule 75(1)(4) of the
Rules, which in our view, applies to appellants in prison in support of their memorandam of
appeal. _Be that as it may, the written submissions challenges the pleas of guilty entered by

them at the trial court, describing the plea taking process as perfunctory. They even go further to question the admissibility of a gun and bullet as well as the extra judicial statements that were admitted as exhibits. Referring to the decision of this Court in CHANDRAKANT JOSHUBHAI PATEL v R (2004) TLR. 218, the applicants argued that the manner in which their pleas of guilty were recorded by the trial court, constituted errors apparent on the face of the record that resulted into a miscarriage of justice to them, hence the need for review. 3 The respondent/Republic filed an affidavit in reply to oppose the application. Ms Bibiana Kileo, filed it on its behalf. Controverting the three twin paragraphs of the applicants' affidavits, the respondent disputed the contents of paragraphs 2, 3 and 4 by pointing out that the contents of paragraphs 2 were relevant to the appeal at hand and that there were no errors apparent or irregularities on the face of the record, contrary to the averments in paragraphs 3 and 4 of the affidavits. The respondent however, did not file any submission in reply. At the hearing of the application the applicants appeared in person, and agitated us on their grounds of review and asked us to consider the arguments they had raised in their joint written submission. Ms. Bibiana Kileo, learned Senior State Attorney also appeared at the hearing. As expected, she opposed the application. Relying on the decision of this Court in GHATI MWITA v R, Criminal Application No. 3 of 2013, Ms. Kileo countered both grounds as follows. Against the first ground, she submitted that the references to the procedure 4 adopted by the trial court in entering pleas of guilty on the applicants shown by the applicants went beyond an error apparent on the face of the record, and therefore outside the scope of Rule 66(1) (a) of the Rules. But even if it were within the scope of the Rule, the Court adequately dealt with it in its finding that the plea was unequivocal. On the second ground, the learned counsel submitted that the original criminal cases No. 242, 243 and 244 of 1993 at Mwanza district Court regarding sentences were not relevant for the purposes of the application at hand, which originated from Criminal Case No. 245 of

1993. But in any case, she went on, this Court considered the propriety of the sentence of 30 years imprisonment imposed on the applicants in respect of that criminal case No. 245 of 1993, and found it lawful. For the above reasons, Ms. Kileo urged us to dismiss the application. In rejoinder, the applicants reiterated their earlier prayers to the Court to consider their plight in the light of their written submission and allow the application. The law governing review of decisions of the Court is now sanctioned by a recent amendment to section 4 of the Appellate 5 Jurisdiction Act Cap. 141 R.E. 2002 by Act No. 3 of 2016 by the new section 4(4) with effect 7th July 2016. But prior to that the Court used to review its decisions under Rule 66 of the Court Rules which is what is applicable in the present application. On the applications that were lodged immediately after the coming into force of Rules and in particular Rule 66(1) the Court had right from the start, made its stand abundantly clear. First, that the Court could entertain applications for review only on account of the five grounds set out in Rule 66(a) to (e). (See KOMBO OMARY v R, Criminal Appeal No. 4 of 2009, FADHILI MSEMO v R, Criminal Appeal No. 9 of 2009 (both unreported). It also made it clear that a review was not a second appeal through the back

door in which a decision of the Court could be challenged again on merit. (See *MIRAJI SEIF v R*, Criminal Appeal No. 2 of 2009 (unreported)). The most common and preferred ground of review is that contained in paragraph (a) of Rule 66(1) of the Rules which reads: "(a). the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice"~ 6 This is not only the most commonly raised ground, but also consequently the most frequently considered by this Court. Therefore, there are numerous decisions of this Court on what constitutes "a manifest error apparent on the face of the record", but the leading authority on that is *CHANDRAKAT JOSHUBHAI PATEL v R* (supra) cited by the applicants and Ms. Kileo. At page 225 the Court adopted the following passage from *MULLA* 14th ed. Pp. 2335-36: '~n error apparent on the face of the record must be such as can be seen by one man who runs and reads/ 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. " On page 229, the Court went on to set out the ingredients of an operative error:

- (i) These must be an error. (ii) The error has to be manifest on the face of the record; and (iii) The error must have resulted in miscarriage of justice. 7 Although *PATEL'S* case was decided prior to the 2009 Rules, it still operates as the manifesto of Rule 66 in its day to day application to date. In this case, the applicants have complained that there is an error manifest on the face of the record. In the vein of their argument they point out that at the trial court they were tried and convicted with four different offences of armed robbery to which they were sentenced to imprisonment terms on which the trial court was silent on how they were to run. But as Ms. Kileo has submitted, and we agree, with her, what came for appeal in Criminal Appeal No. 58 of 2005 was the one originating from Criminal Appeal No. 245. The details of the other criminal cases were not before the Court of Appeal. The applicants have no complaint against the decision in Criminal Appeal No. 58 of 2005, let alone an error manifest on the face of it. The applicants have also complained about the purported irregularity in sentencing them. Once again since these complaints were not raised nor were they part of the Criminal Appeal No. 58 of 8 2005, we cannot detect any error, let alone manifest on the face of the record. We are therefore forced to conclude that we have found no errors apparent or otherwise in the record of appeal to warrant our intervention by way of review. For the above reasons the application has no merit. We hereby dismiss it. DATED at MWANZA this 22 nd day of October, 2016. E.M.K.
RUTAKANGWA JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL S.E.A. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. P.~ SENIOR DEPUTY REGISTRAR COURT OF APPEAL 9

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