

TANZANIA / JUDGMENT

20130323 TZHC Dodoma

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IN THE COURT OF APPEAL OF TANZANIA AT DODOMA {CORAM: RU.TAKANGWA. J.A .• LUANDA. J.A .• And ORIYO. J.A.} CRIMINAL APPLICATION NO. 4 OF 2011 RIZALI RAJ ABU. ■■■■■ ■ .. ■■■■■ ■ . ■ . ■■ . ■ . ■■■■■■■■ . ■ I I • APPLICANT VERSUS THE REPUBLIC RESPONDENT (Application for Review from the judgment of the Court of Appeal of Tanzania at Dodoma) (Munuo J.A. • Kaji J.A .. Kimaro.J.A ..) dated 22nd day of June, 2007 in Criminal Appeal No. 81 of 2004 RULING OF THE COURT 20th & 25th March, 2013 LUANDA, J.A: This is an application for a review lodged by RIZAL! s/o RAJABU (the Applicant). The application was filed on 20/8/2002 under Rule 3(2)(a) of the old Court of Appeal Rules, 1979 and Article 13(3)(6)(a) of the Constitution of the United Republic of Tanzania. In the case of Samson Matiga V R Criminal Application No. 6 of 2011, we stated that that Article of the Constitution has no relevance to the application of this nature. Whatever the position, the applicant is inviting the Court to review its decision of 22/6/2007 where the Court dismissed his appeal. The applicant has advanced three grounds.

- (i) The key witnesses namely PW1 and PW2 contradicted each other as to the source of light which is alleged to have enabled them identify the applicant. (ii) The evidence of PW3 that he identified the applicant was doubtful. (iii) The evidence of PW3 as to the date of discharge differ with PF 3 (Exhb PI). When the application came for hearing, the applicant not only did :he pray the Court to go through the judgment and see the contradictions he pointed out and the question of identification, he also informed the Court that if his colleagues accused persons who were separately charged and convicted by the trial District Court were released by the High Court on first appeal, on the strength of the same evidence, then he is wondering why he is still languishing in jail. 2 At first Ms Maria Mdulugu, learned State Attorney, opposed the application stating that -the application did not meet any of the four grounds stated in case law namely:-
- (i) There is a manifest error on the face of the record which resulted a miscarriage of justice, or (ii) The decision was obtained by fraud, or (iii) The applicant was deprived the opportunity to be heard, or (iv) The Court acted without jurisdiction. She accordingly prayed that the application should be dismissed. In his reply, the applicant insisted and prayed the Court to go through the record of the case of his colleagues namely Criminal Case No. 258 of 2001 and see for itself. We reserved our Ruling and undertook to go through the record and see whether what the applicant had said is borne out by the record. We also directed Ms

Mdulugu to do the same. Having gone through both the trial court and High Court records, we find under Rule 4(2)(b) of the Court of Appeal Rules, 2009 proper to revisit the application for better meeting of the ends of justice. Ms Mdulugu changed position and she supported the application. Ms Mdulugu informed the Court, inter alia, that she discovered two criminal cases namely 3 Criminal Case No. 258/2001 the accused persons were Sadick s/o Athumani Igwana, Omari s/o Bakari and Athumani Ally Chironchi and in Criminal Case No. 278 of 2002 involving the applicant alone. In those two cases the charge is the same-armed robbery alleged to have been committed on 27/2/2001 on Omari Ally Chironchi, the complainant. The key witnesses in Criminal Case No. 258/2001 who are PW1 Sofia Husseni, PW2 Adam Ally and PW4 Omari Ally did not mention the applicant in their evidence to be amongst the assailants. He is only mentioned in the subsequent Criminal Case No. 278 of 2002 by the same key witnesses. She was wondering if they saw him why they failed to mention him as one of the assailants in Criminal Case 258 of 2001? She is of the view that Criminal Case No. 278 of 2002 is a cooked or frame up case. The application, she submitted, deserves to be considered as the judgment was procured by perjury. First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if it is not reconsidered will result into a miscarriage of justice. 4 We are alive to a well known principle that a review is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim - *Interest rei publicae ut finis litium*. (See Chandrakant Joshubai Patel VR [2004] TLR. 218; Karim Karia VR, Criminal Appeal No. 4 of 2007 CAT (unreported). We have also gone through the records. The observations made by Ms Mdulugu are correct. The evidence which implicate the applicant was that of identification of the applicant by three key witnesses mentioned supra by Ms Mdulugu. In Criminal Case No. 258 of 2001 all the three said they saw three assailants only. They did not mention the applicant to be amongst the group of the assailants. It is only in another subsequent Criminal Case No. 278 of 2002 where they said they saw four assailants. We ask ourselves if they saw four assailants why all witnesses failed to say so in the first case? Is it a human lapse? We don't think so. We say so because under normal circumstances a witness who saw his assailant would not withhold such a vital information when testifying. And if he did for whose benefit? It should be borne in mind that the ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. (See Marwa Wangiti Mwita and Another V R [2002] TLR 39). Unfortunately that omission was not put before the Court for consideration. Had the Court been informed about that failure, it could not have upheld the findings of the lower Courts. We are of the considered view that the conviction of the applicant was procured by perjury, as correctly submitted by Ms Mdulugu. And perjury now is one of the grounds for an application for review. This is provided under Rule 66(1)(e) of the Court Rules, 2009. Once that perjured evidence is discounted as we hereby do, our judgment and those of the lower courts cannot stand. We allow the application. In the final

result we vacate our decision, quash and set aside the conviction of the applicant and the sentences imposed on him and order the applicant to be released from prison forthwith unless he is held in connection with another matter. It is so ordered. 6 I •• DATED at DODOMA this 23 rd day of March, 2013. E.M.K. RUTAKANGWA JUSTICE OF APPEAL B.M. LUANDA JUSTICE OF APPEAL K. K. ORIYO JUSTICE OF APPEAL Ma DEPU COURTO 7

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