IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., MZIRAY, J.A., AND MWANGESI, J.A.)

MISC. CRIMINAL APPLICATION NO. 04 OF 2013

FRANK LUCAS.....1st APPLICANT

ACKLEY AUGUST.....2nd APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review from the judgment of the Court of Appeal of Tanzania at Arusha)

(Mbarouk, Mjasiri and Massati, JJJ.A.)

dated the 14th October, 2011

in

Criminal Appeal No. 349 of 2008

RULING OF THE COURT

09th & 11th August, 2017

MWANGESI, J.A.:

In their amended notice of motion made under the provisions of Rule 66 (1) of the Court of Appeal Rules, 2009 (the Rules), which was lodged in Court on the 11th day of May 2017, the applicants herein are moving the

Court to review its judgment that was handed down on the 14th October 2011 for the reasons that:

> ***"First,*** *the decision was based on manifest errors on the face of the record to the extent that, the charge sheet which founded the applicants' conviction was invalid/defective since the prosecution substituted the charge and added accused number 3 and 4 of the 04/08/2006. Hence the record does not indicate that the charge was substituted again to withdraw the latter (sic).*
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> ***Second,*** *the Honorable Justices of Appeal erred in law in finding that, the applicants were caught red-handed at the scene of the crime, while the evidence on record shows that, the applicants were allegedly chased and arrested elsewhere not at the scene of crime."*

The notice of motion has been supported by a joint affidavit sworn by both applicants. Additionally, the applicants have filed a written submission wherein they have amplified their reasons for moving the Court to review its previous judgment.

During the hearing of the application which did come on the 09th August 2017, the applicants appeared in person fending for themselves, whereas, the respondent/Republic had the services of learned State Attorney Ms Alice Mtenga. Both applicants opted to let the learned State Attorney to respond to their grounds of application first, before they could rejoin if need could arise.

In resisting the application by the applicants, the learned State Attorney did argue that, it was without basis as the grounds advanced were inept. Starting with the first ground to the effect that, the charge against them was defective, she did argue that, the question on the defect on the charge sheet was never raised during the hearing of the appeal before this Court, and that, it was from such reality that, such an issue does not feature anywhere in the judgment that was delivered by this Court, which is being sought to be reviewed. In the circumstances, it was the view of the learned State Attorney that, this ground of application by the applicants did not fall within the realm of the stipulation under the provision of Rule 66 (1) of the Rules, which has categorized the grounds under which judgments and orders that can be reviewed.

Regarding the contention by the applicants in the second ground that, there was improper evaluation of the evidence that was relied upon by the trial Court, to hold them culpable to the charged offence, the learned State Attorney was of the view that, the same was as well unfounded. We were referred to the first paragraph of page seven of the typed judgment of this Court, where after having considered the grounds of appeal on the question of evaluation of evidence, the Court did conclude by stating that, it was fully satisfied that, there was enough evidence from the prosecution that did sufficiently establish the commission of the offence by the applicants. In raising such complaint in the current application, the implication was that, the applicants were inviting the Court to re-evaluate the evidence, which is against the spirit envisaged under the provisions of Rule 66 (1) of the Rules. In support of her contention, she did refer us to the decision in the case of **Karim Kiara Vs Republic,** Criminal Application No. 04 of 2013 (unreported). In that regard, we have been urged by the learned State Attorney, to find no merit in this application and as a result, we be pleased to dismiss it in its entirety.

When the applicants were required to rejoin to what was submitted by the learned State Attorney, they had nothing substantial to argue to what is contained in their notice of motion and the written submission. After reiterating what is contained in their already filed documents, they did refer us to a decision of this Court in the case of **Muhidin Ally @ Muddy and Two Others Vs Republic,** Criminal Application No. 02 of 2006 (unreported), wherein, the applicants managed to move the Court to review its judgment. They have thus humbly implored us to follow suit.

Since the citation of the above authority by the applicants, was made in rejoinder after the learned State Attorney had responded to the applicants' grounds of application, we were constrained to recall her, to respond to the newly brought in authority. The view of the learned State Attorney after going through the newly cited judgment, was to the effect that, the circumstances in the authority relied upon by the applicants was distinguishable from the one pertaining to the application under discussion. She has therefore reiterated her prayer that, the application be dismissed for want of merit.

In determining as to whether the application by the applicants is founded, which is the gist of the issue, which stands for our deliberation and determination, our take off is the stipulation under the provision of Rule 66 (1) of the Rules, under which the application has been made, which mandates this Court to review its judgments and orders. In its own words, the Rule reads:

> *"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 nullity: or*
> *The Court had no jurisdiction to entertain the case: or*
>
> (d) *The judgment was procured illegally, or by fraud or perjury."*
>
> [Emphasis supplied]

Back to the application under discussion, we are called upon to gauge, if it conforms to the requirements that have been stipulated in the fore quoted provision of law. As regards the first ground of the application, we have been told by the learned State Attorney that, the same did not form part of the grounds of appeal by the applicants to this Court. Indeed, our perusal on the six grounds of appeal, that were preferred to this Court by the applicants in the decision sought to be reviewed, there was no mention of a complaint in respect of the charge sheet. As such, the said complaint which is a new one was not traversed by the Court and therefore, has no room for review. Review is normally made to a thing which had previously been considered.

In the second ground, the complaint by the applicants is on the evaluation of the evidence which was done by the Court. As correctly submitted by the learned State Attorney, the task of this Court is not to re-hear the evidence and re-evaluate it. This is what was said by this Court in the case of **Patrick Sanga Vs Republic,** Criminal Application No. 08 of 2011 (unreported) that:

"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation be it in civil or criminal proceedings. A call to reassess 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 exception. That is what sound public policy demands. This is the cherished stance of not only this Court but also Courts of other foreign jurisdictions."

In yet another decision in the case of **Abel Mwamwezi Vs Republic,** Criminal Appeal No. 01 of 2013 (unreported), the Court had an occasion of reiterating its previous stance when it stated that:

"A ground of review inviting the Court to reconsider any evidence afresh, amounts to inviting the Court

to determine an appeal against its own judgment. This shall not be allowed."

Other instances where the Court did maintain the stance taken in the above cited cases include **Karim Kiara Vs Republic** (supra), **Abdul Adam Chakuu Vs Republic**, Criminal Application No. 02 of 2012 (unreported). It is evident therefore in the light of the foregoing decisions that, an application for review not falling within the confines of Rule 66 (1) of the Rules as it has been the case in the instant one, is un-maintainable.

With regard to the decision that has been cited by the applicants in reliance that is, of **Muhidin Ally @ Muddy and Others Vs Republic** (supra), we are in agreement with what has been submitted by the learned State Attorney that, the circumstances in that case were distinguishable from the one at hand. It worthy being noted that, to every general rule, there are exceptions pertaining to the particulars of each individual case. That was the situation in the case of **Muhidin Ally @ Muddy** (supra) and his colleagues. Under the circumstances, the peculiar situation of that case cannot be invoked to the application involving the applicants herein.

That said and done, we are of the firm view that, the application by the applicants has failed to meet the mandatory threshold set by the provisions of Rule 66 (1) of the Rules, and as a result, it has to fail. We hereby dismiss it in its entirety.

Order accordingly.

DATED at **ARUSHA** this 10th day of August, 2017

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL