IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And KEREFU, J.A.)

CRIMINAL APPLICATION NO. 63/01 OF 2016

SP CHRISTOPHER BAGENI .....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Luanda, Mjasiri and Kaijage JJJA.)

Dated the 16th day of September, 2016

in

Criminal Appeal No. 358 of 2013

RULING OF THE COURT

14th June & 14th August, 2019

WAMBALI, J.A.:

The applicant, SP Christopher Bageni, has preferred this application for review under section 4(4) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA) and Rule 66 (1) (a) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant requests the Court to review the judgment that was delivered on 16th September, 2016 in respect of Criminal Appeal No. 358 of 2013.The application hinges on the following grounds of review:

(a) That the applicant was denied equal and fair opportunity of hearing as when re-evaluating and re-appraising the evidence on record, the court selectively inclined only to the prosecution's evidence: -

(i) In analysing evidence upon which the decision of the court is based, the court only dealt with examination –in –chief evidence of the prosecution and simply gave cursory looking at the evidence of the defence particularly that of the Applicant or none at all.

(ii) There has been traverse of justice in that the Applicant herein has been denied equal opportunity and fair right of hearing by the court being selectively inclined to prosecution side and by totally failing to consider defence evidence.

(b) That decision of the court is based on manifest error on the face of the record resulting to miscarriage of justice for:

(iii) For failure to consider the guiding principles on the nature, value and application of corroborative evidence. Having failed to critically analyse and

evaluate the evidence on record the court failed to make a finding that the 4th Respondent's evidence circumstantial as it is, is patently lacking and valueless for it to require corroborative evidence, and thus unsafe to base conviction.

(iv) For failure to see and consider that the purported corroborative evidence is not independent, immaterial to the issue to be proved (PW27) and non-existing (PW36).

(v) For failure to critically make wholesome analysis of evidence on record otherwise the Court ought to have seen that the burden of proof in criminal cases was not attained. The Court in deciding as it did, in so far as the participation of the Applicant to the crime is concerned, failed to find that in totality the prosecution evidence as a whole does not prove its case beyond any reasonable doubt.

(vi) For failure as the first appellate Court, to rehear and re adjudicate the appeal as its obligation in

law. The Court did not treat evidence on record as a whole to that fresh and exhaustive scrutiny which the Applicant was entitled to expect.

(vii) *That by overruling and/or interfering with the findings of the trial judge who had advantage of visiting scene of crime, seeing and hearing witnesses testifying in court, in absence of supportive evidence so to do/or and without assigning good reasons.*

(viii) *For setting aside the Applicant's acquittal and substituting it with conviction basing on non-existing evidence (of 4th Respondent in the judgment, PW27 and PW36) and on hearsay and highly doubtful evidence.*

(ix) *For total failure to comply with mandatory provisions of section 312 of the Criminal Procedure Act, Cap 20 R.E. 2002. That in light of plainest evidence on record showing that the alleged CPL SAAD did not shoot the deceased, from the*

decision of the court it is not certain from whose evidence the Applicant is proved of having enabled or aided and whom in killing the deceased.

The application is supported by the applicant's affidavit sworn on 3rd November, 2016. The respondent Director of Public Prosecutions (the DPP) also lodged an affidavit in reply opposing the application.

At the hearing of the application for review the applicant was ably represented by Mr. Gaudiosus Ishengoma, learned advocate who strongly urged us to grant the prayer of the applicant and reverse his conviction and set aside the sentence of death.

On the other hand, the respondent the DPP was similarly ably represented by Mr. Ladislaus Komanya learned Senior State Attorney who strongly countered the submission of the learned advocate for the applicant.

In view of the history of the trial that led to an appeal whose judgement is a subject of the application for review before us, we deem appropriate to revisit a brief background of the case.

The applicant SP Christopher Bageni together with twelve (12) others, namely ACP Abdallah Zombe, ASP Ahmed Makele, PC Noel Leornard, WP

4593 Jane Andrew, CPL Nyangerela Moris, CPL Emmanuel Mabula, CPL Felix Sandys Cedrick, PC Michael Shonza, CPL Abeneth Saro, DC Rashid Mahamoud Lema, CPL Rajab Hamis Bakari and CPL Festus Philipo Gwabisabi were jointly charged with four counts of murder. The allegation put at their door was that on 14th January, 2006 at Pande Forest, Kinondoni District within Dar es Salaam Region the above named persons unlawfully killed Ephraim Sabinus Chigumbi, Sabinus Chigumbi, Juma Ndungu and Mathias Lunkombe. All of them pleaded not guilty to the allegation hence a full trial was conducted wherein the prosecution paraded 37 witnesses. It is noteworthy that after the prosecution closed its case, three accused persons, namely PC Noel Leonard, CPL Nyangelera Moris and CPL Felix Sandys Cedrick were found to have no case to answer and were accordingly acquitted by the High Court (Massati, J.K. as he then was).

Other ten accused persons including the applicant defended themselves against the allegation save for DC Rashid Mahamoud Lema who passed away before he defended himself. The case against him abated as required by law.

Nevertheless, at the conclusion of the trial, the High Court found the nine (9) accused persons including the applicant not guilty of the four counts of murder and acquitted them. As the DPP was aggrieved by that decision, an appeal was preferred to this Court. We however, think that it is not out of place to point out that at the hearing of the appeal, the DPP withdrew the appeal against WP 4593 PC Jane Andrew; D1406 CPL Emmanuel Mabula; D 8289 PC Michael Shonza; D2300 D/CPL Abeneth Saro and D1367 D/CPL Festus Philipo Gwabisabi who were the 4th, 5th, 6th, 7th and 9th respondents respectively. The appeal before the Court whose judgment is a subject of this application for review proceeded in respect of ACP Abdallah Zombe, SP Christopher Bageni (the applicant), ASP Ahmed Makele and D4656 D/CPL Rajab Hamis Bakari who were referred for the purpose of the appeal as 1st, 2nd, 3rd and 4th respondents respectively. In short, while the 1st, 2nd and 3rd respondents retained their designation in the appeal, the 8th respondent was designated as fourth respondent after the appeal against the 4th, 5th ,6th ,7th and 9th respondents were withdrawn as alluded above.

As it were, after hearing counsel for the parties, the Court gave its judgment in which the appeal against the applicant was allowed, an acquittal set aside and substituted thereof with a conviction in respect of all the four

counts of murder. He was however accordingly sentenced to suffer death by hanging in respect of the 1st count.

On the other hand, the Court dismissed the appeal of the DPP in respect of ACP Abdallah Zombe, ASP Ahmed Makele and D4656 D/CPL Rajab Hamis Bakari, who were the 1st, 3rd and 4th respondents respectively. Their acquittal by the High Court was accordingly confirmed.

It is against that background that the applicant seeks review of the Court's judgment based on the grounds outlined above.

Submitting in support of the application for review, Mr. Ishengoma urged us to treat the applicant's application as unique by considering the raised grounds of review widely and not narrowly. However, we must state at the outset that in his submission before us Mr. Ishengoma discussed the points raised in the two grounds of review generally without following the sequence outlined above.

With regard to ground one, Mr. Ishengoma stated that since the Court dealt with ground one which was purely based on a point of law, specifically on the proper application of section 22 of the Penal Code Cap 16 R.E 2002 (the Penal Code) and came to a conclusion that is was misinterpreted by the

learned trial judge, it would have ended there instead of embarking on evaluation of the matters of facts. He contended that the Court erred when it embarked on the evaluation of evidence and introduced some facts which were not borne out of the record and touched on some facts which were not disputed. He further argued that the Court went beyond the parameters of ground one of the appeal which required it to deliberate only on the proper application of the law on the status of aiders and abettors in commission of a crime.

It was the argument of Mr. Ishengoma that even during the re-evaluation of evidence the Court only dealt with the prosecution's evidence that was adduced during examination- in- chief with very little regard to that of the defence. In essence, he argued that the defence of the applicant was ignored in preference to that of the prosecution. In that regard, he submitted that failure of the Court to consider the defence of the applicant and to approach the evidence on record as a whole amounted to the denial of the right to be heard on the part of the applicant.

Moreover, Mr. Ishengoma argued that the fact that the applicant was not granted the opportunity to lodge the written submission in opposition of

the appeal like the respondent, denied him the opportunity to be heard. He further submitted that the respondent's written submission was heavily relied by the Court in its judgment which resulted in his conviction and sentence. He therefore concluded with regard to the first ground that, the applicant was not granted a fair opportunity to be heard as the preference was granted to the respondent, while his defence was also not considered thus resulting in a miscarriage of justice. To support his contention in respect to this ground he referred us to the decisions in **Jayantkumar Chandubhai Patel@Jeetu Patel and Three Others v. The Attorney General and Two Others,** Civil Application No.160 of 2016; **Shija Massawe v. The Republic,** Criminal Appeal No.158 of 2007; **Muhidin Ally @ Muddy and 2 Others v. Republic**, Criminal Application No. 2 of 2006; **Blue Line Enterprises Limited v. East African Development Bank,** Civil Application No. 21 of 2012 and **AMI Tanzania Limited v. OTTU on behalf of P. L. Assenga & 106 Others & 3 Others,** Civil Application No. 151 of 2013 (all unreported); **Williamson Diamonds Limited and Another v. Brown** [1970] 1 EA 1(CAD); **Begumisa and Others v. Tibebaga** [2004] 2 EA 17 and (SCU) **Chadrankant Joshibhai Patel v. Republic** (2004) TLR 218.

With regard to the second ground of review, Mr. Ishengoma strongly criticized the Court for heavily relying on the evidence of the 4th respondent (CPL Rajab Hamis Bakari) which he said required corroboration. He emphasized that it was wrong for the Court to have relied on the evidence of the 4th respondent which introduced matters of facts not stated by any of the 37 prosecution witnesses during the trial. He further submitted that it was also wrong for the Court to find that the conduct of the applicant on the fateful day and the alleged act of lying to his superior officers afforded corroboration to the evidence of the 4th respondent.

On the other hand, the learned counsel for the applicant submitted that during the evaluation of evidence, the Court introduced some new facts which were not in the record but very prejudicial to the applicant without affording him the opportunity to be heard. The learned advocate further characterized the reasoning of the Court found from pages 50-51 in which among others, it was found that the applicant lied to his superiors on the incident as a serious glaring error as most of the matters stated therein are not borne out of the record of the trial court. In the circumstances, Mr. Ishengoma urged us to review the judgment and remove the errors contained therein and come to a finding that the appellant is not guilty of

murder and acquit him accordingly. He also urged us to consider the other points raised in support of ground two as reproduced above. To support his submission in respect of the second ground Mr. Ishengoma implored us to consider the decisions in **Williamson Diamonds Limited and Begumisa and Others** (supra).

In response to the submission of Mr. Ishengoma, Mr. Komanya submitted that the application is not merited as the applicant has not demonstrated that there is any error which was committed by the Court to be termed as manifest error on the face of the record or that he was denied fair hearing. He out rightly supported the decision of the Court.

With regard to the first ground of review, the learned Senior State Attorney argued that the applicant cannot claim that he was denied an opportunity to be heard simply because he did not lodge the written submission like the respondent while he was ably represented by an advocate who strongly resisted the respondent's submission in opposition of the appeal. He further stated that the complaint that the applicant defence was not considered is unfounded. In his view, the judgment of the Court leaves no doubt that the applicant's defence was sufficiently considered since

the Court came to a right conclusion after it evaluated the whole evidence in the record. He therefore requested us to reject this ground of review.

Responding on the submission in respect of ground two, Mr. Komanya defended the re-evaluation of evidence done by the Court after it found that the trial court misinterpreted the provisions of section 22 of the Penal Code. He argued that the Court rightly relied on the evidence of the 4th respondent as the same was found to be truthful as it exposed the real account of what transpired on the date the deceased were killed in the presence of the applicant and the witness himself. He strongly opposed the submission on behalf of the applicant that his conduct could not be relied to corroborate the evidence of the 4th respondent to ground his conviction. Moreover, he submitted that the Court did not introduce any new fact or matter when it reevaluated the evidence and that what is stated in pages 50-51 of the judgment is based on the record of the trial court. He also submitted that in view of the evidence in the record the Court rightly concluded that the applicant lied to his superiors as he gave a different story on what happened on the fateful date which is contrary to what was stated by the 4th respondent who accompanied him throughout the day.

Mr. Komanya concluded his submission by arguing that the applicant has totally failed to meet the criteria set by the law and the Court's decisions to entitle the Court to review its judgment. In his view, the applicant apart from not having shown any error manifest in the record which has occasioned injustice has also not substantiated the claim of not being accorded a fair hearing by the Court when the appeal was heard. To support his submission he referred us to the decision of this Court in **Thobias Mang'era Mango and Another v. The Republic**, Criminal Application No. 8 of 2010 (unreported) in which the conditions for a successful review of the judgment of the Court were enumerated. Lastly, he stated that in view of the circumstances of this application the decisions relied upon by the counsel for the applicant to support the application are distinguishable and inapplicable. He therefore, prayed for the dismissal of the application.

Before going into the discussion of the submissions of counsel for the parties on the two grounds of review, we wish to emphasize that in the decision of the Court, a subject of review, the Court agreed with the finding of the learned trial judge that the second respondent (the applicant) was at the scene of the crime at Pande Forest although he disassociated himself

from criminal responsibility. For the purpose of emphasis, we once again reproduce what the learned trial judge stated in this respect: -

> *"In this case, I have found that the 2nd accused (the 2nd respondent) was in fact present at the scene of crime, and could but did not prevent the commission of the crime, but there is no evidence that he procured, commanded, aided or abetted, any of the other accused persons into committing the murders. According to the 12th accused (4th respondent) the killings were carried out by Cpl. Saad at the instance of the 2nd accused (2nd respondent). This is certainly hearsay and has no value. The fact remain that Cpl. Saad is not among the accused persons. The question of aiding, abetting, procuring or counseling cannot be considered in the absence of the alleged killers."*

Having reached that stage the Court set upon to deliberate on the important question, which was, **"On whose order the four deceased were sent to Pande Forest? And what was the purpose of sending them there, a place where there were no houses around?**

As what followed thereafter during the deliberation of the Court is the substance of the decision of the Court, and indeed a targeted area for review,

for the sake of our deliberations, we feel compelled to reproduce the relevant passages in extensor hereunder;

> *It is the evidence of the 4th respondent that at Sam Nujoma it was the 2nd respondent who ordered the four deceased to be taken in another motor vehicle make defender. It was that motor vehicle which carried the four deceased to Pande Forest. According to the 4th respondent at Pande Forest the 2nd respondent, Cpl. Saad and D/C Rashid disembarked from the motor vehicle make Pajero in which they were travelling and which parked about 15-20 meters behind the defender whereas the 4th respondent, the driver one Frank remained in the motor vehicle. The 2nd respondent gave the 4th respondent a radio call. So, he was listening to it. While listening he heard gun shots. He did not know from which guns they were fired. He decided to come down and went closer. He saw Cpl. Saad shooting one of the last four deceased persons while the other had already been shot dead. The dead bodies were then loaded in a motor vehicle.*
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> *The 2nd respondent ordered Sgt. James that the dead bodies be sent to Muhimbili Hospital. The 2nd respondent is a Senior Police Officer in the Police force. He was a superintendent of Police and Officer*

commanding of Criminal Investigation in Kinondoni District. He was the most senior police officer who went to Pande Forest. In actual fact going by the totality of evidence on record he was the one who issued orders to the junior police officers. We are satisfied therefore that he was the one who ordered the four deceased persons to be taken to Pande Forest. And indeed the four deceased persons were sent to Pande Forest, a place where there were no houses around. The sending of the deceased there is not without significance; it was to execute the ill planned mission without any hindrance. We are satisfied that the four deceased persons were killed in the presence and sanction of the 2nd respondent at Pande Forest. But that evidence came from the 4th respondent. If the evidence of the 4th respondent requires corroboration, then the conduct of the 2nd respondent in concealing the truth of the incident affords such corroboration. Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused person (See ***Paschal Kitigwa v. R.,*** *(1994) TLR 65). First, the 2nd respondent lied to his Senior Police officers including SACP Mkumbi (PW 36) and ACP Ubisimbali (PW27) inter alia; that the four deceased were killed*

in the exchange of gunshot sat[sic] the Post Corporation wall Sinza. Indeed, those who were close to the said wall, inter alia, Kisa Mohamed (PW20) a watchman of a garage and Rashid Ally (PW9) denied to have ever heard the exchange of gun shots nor heard any unusual incident to have occurred. He did not end there, he showed the place where the alleged exchange of gun fire took place. Basing on that information, a sketch plan was drawn by S/Sgt. Mwakajinga (PW33). Last but not least the 2nd respondent purported to show the nine spent cartridges were fired at Post Corporation wall Sinza while according to the 4th respondent they were fired at Bunju by Cpl. Saad and D/C Rashid and handed over to the 2nd respondent at his direction.

In view of the above, it is clear that the 2nd respondent was the architect so to speak of the whole incident by sending the four deceased persons to Pande Forest with a view to killing them and in actual fact they were eliminated. In term of S. 22 (1) (b) of the Code a person who enabled another person to kill another person and that other person is actually killed the person who facilitated the killing is guilty of unlawfully causing death of that person notwithstanding the absence of the actual

perpetrator. We do not buy the story of denial of the 2nd respondent which is intended to save his skin.

We are content of the fact that Mr. Ishengoma was very critical of the above reasoning and finding by the Court on the fate of the applicant. However, on our part, we are settled that after the Court came to a conclusion that the learned trial judge misinterpreted the proper application of section 22 of the Penal Code, it was perfectly justified to embark on the reevaluation of the evidence in the record and apply the same in the circumstances of the case before it drew its own conclusion as it did. We do not, therefore, with respect, agree with the contention of Mr. Ishengoma that the Court could have ended by pronouncing that the trial court misinterpreted the provision of section 22 of the Penal Code.

Moreover, our careful perusal of the evidence which was placed before the Court during the hearing of the appeal and the judgment, a subject of review, dispels any flicker of doubt that whatever the Court stated with regard to the facts of the case was not borne out of the record as submitted for the applicant. No any new facts were introduced as Mr. Ishengoma seemed to strongly suggest. We must emphasize that since the trial court had made a firm finding that the applicant was at the scene of the crime at

Pande Forest when the deceased were shot to death, being the first appellate Court it was justified to find the extent of the participation of the applicant as per section 22 (1)(b) of the Penal Code. The Court was persuaded, and indeed, still is that, the 4th respondent's (CPL Rajab Hamis Bakari) evidence which was not challenged is truthful and reliable as found by the trial judge. Furthermore, considering the defence of the applicant and his conduct as revealed by the Court in its reasoning reproduced above; no other conclusion could be drawn than that the applicant is guilty of murder as charged in view of his role and participation during the incident on the fateful day.

On the other hand, we do not go along with Mr. Ishengoma's contention that during the evaluation of the evidence in the record, the Court would have called upon the applicant to defend himself on the evidence which implicated him. It must be made plain that the Court did not deal with any new set of evidence which would have necessitated taking of additional evidence and involving parties in the said process. The Court simply evaluated the evidence on record which left no doubt that the applicant was at the scene of the crime and came to its conclusion based on the extent of his participation. It is instructive, we think, to state that in **Damiano Petro**

and Jackson Abraham v. Republic [1980] TLR 260, the Court, among others, emphasized that: -

> *"...mere presence at the scene of the crime is not enough to constitute a person aider and abettor; the person must also participate in the crime to some extent."*

In the present case, nobody can doubt, based on the reasoning of the Court reproduced above that, the extent of the applicant's involvement in the commission of the crime before the deceased were sent to Pande Forest and during their execution, patently categorized him as an aider and abettor falling under the provision of section 22(1) (b) of the Penal Code as found by the Court.

Furthermore, the argument by Mr. Ishengoma that the appellant's defence was not considered during the reevaluation of the evidence by the Court is not backed by the record. Nobody needs a bird's eye to see that from pages 9-11 of the judgment, the Court summarized the defence of the applicant before it came to a thorough deliberation (reproduced above). To be precise, his evidence was reevaluated, analyzed and considered visa-vis the other evidence of the prosecution and the defence in the record.

In addition, the complaint that the applicant was denied right to be heard as the appellant (now respondent) lodged written submission in support of the appeal while the applicant (then 2nd respondent) was not given that opportunity is equally baseless. This is so because, the applicant was ably represented by Mr. Majura Magafu, learned advocate who addressed the Court and defended the trial court's decision which acquitted the applicant. The judgment of the Court is very clear on how the applicant's counsel participated in opposing the appeal of the respondent. We find that, the contention that the respondent was given a fair opportunity to be heard than the applicant is unfounded.

In the event, we find that the decisions of this Court and from other jurisdictions relied on by the learned counsel of the applicant to support the principles of the right to be heard are patently distinguishable and thus inapplicable in the circumstances of the present application.

It follows that, we agree with Mr. Komanya that the first ground of review is not merited.

We now turn to consider the submissions in respect of the second ground.

Admittedly, apart from the argument of Mr. Ishengoma that the evidence of the 4th respondent could not be corroborated as it also needed to be corroborated, no any other patent error was vividly identified by the applicant based on the outlined points in ground two of review.

On our part, we have no doubt that the evidence of the 4th respondent which was not based on hearsay as alleged by the applicant, was fully corroborated by the other evidence and the conduct of the applicant as decided earlier by this Court.

As we have stated above, the 4th respondent was present throughout the incident and under the direction of the applicant. As it was the case for the trial judge the Court found him truthful and reliable and indeed, his evidence was not seriously challenged by the applicant. For purpose of clarity we deem appropriate to reproduce what the Court stated in this regard: -

> *"The learned trial judge was satisfied that the 4th respondent was telling nothing but the truth and that his evidence is that of an accomplice. We too having carefully read the record, are at one with the finding of the trial judge that the 4th respondent on the whole was telling the truth."*

Therefore, the reasoning of the Court on the issue of how corroboration was found in the present case is based on the finding of the learned trial judge that the 4th respondent gave a true account as to what took place at Pande Forest which resulted to the death of the four deceased persons. The Court cannot therefore be accused to have committed an error on how it handled the issue of corroboration of the 4th respondent's evidence while everything it stated is borne out of the record. Thus the complaint of the applicant on the issue of how the Court found corroboration to the evidence of the 4th respondent is not founded. Similarly, there is no doubt that the Court in its reevaluation of evidence looked at the evidence on the record as a whole and later came to the conclusion that the evidence of the 4th respondent coupled with the conduct of the applicant sufficed to ground conviction of the applicant as demonstrated in the Court's judgment. The Court could not therefore have looked at other independent and non-extent evidence than it did to ground conviction of the applicant. Indeed, the Court which sat on first appeal performed its duty as required to reevaluate the evidence and come to its own conclusion. We therefore, find that the complaints of the applicant in paragraphs (iv), (v) and (vi) of the second ground of review are baseless.

We also think that the complaint that the Court simply interfered with the findings and decision of the learned trial judge who was better placed and visited the scene of crime is unfounded. We have amply addressed ourselves above concerning the main reasons which led the Court to substitute acquittal with conviction of the applicant. This also applies to the complaint that the Court relied on the evidence of the 4th respondent which was hearsay. As we have stated above the evidence of the 4th respondent was based on what he saw on the fateful day and was found to be truthful and reliable by the trial court and this Court. In the circumstances, we find the complaints in paragraphs (vii) and (viii) of ground two of review unwarranted.

Lastly, with due respect, we think that the allegation contained in paragraph (ix) of ground two of review that there is no evidence that it is CPL Saad who shot the deceased is plainly misplaced. The record is clear as per evidence of 4th respondent that it is CPL Saad who fully participated in shooting the deceased under the directions of his superior, the applicant. Nobody can doubt and the record is clear that CPL Saad is still at large todate but he fully participated in shooting the deceased persons. Since the evidence of the 4th respondent was not challenged by any credible evidence

on what transpired at Pande Forest, it remains in the record that CPL Saad shot the deceased in the presence of the applicant and the 4th respondent as found by the trial court and this Court. It also remains in the record that the 4th respondent though present at the scene, was not found guilty as the extent of his participation in the commission of the crime to make him aider and abettor was not conclusively established by the prosecution. The complaint in this paragraph is therefore misconceived.

Before we conclude our deliberation on this ground, we wish to remark that, it is most unfortunate that although the applicant has listed several points in support of the two grounds of review in his notice of motion, his affidavit in support of the same bears no witness to what is stated in the respective grounds. The affidavit simply introduces statements without exactly demonstrating the patent errors or mistakes in the judgment of the Court capable of being reviewed. There is also no sufficient explanation on how he was denied a right to be heard. For clarity, let the relevant paragraphs bear the testimony of the message we intend to convey: -

> *"5. That I have read the judgment of the Court which was also explained to me by my advocate Mr. Gaudiosus Ishengoma, and*

established that the same is reviewable for patently mistakes.

6. *That the decision of the Court is based on choosy and non-existent evidence. For clarification purposes, I state that in deciding the respondent's appeal the Court only dealt with the prosecution's examination- in- chief evidence and gave a cursory looking at the evidence of defence and particularly my defence.*
7. *That as a result of the above I state that the applicant has been denied visa vis the respondent of equal and fair opportunity of hearing. Further to the above I state there has been miscarriage of justice, resulting the way the Court dealt with evidence or record.*
8. *That for reasons of grounds set forth in the notice of motion it is appropriate that the Court review its decision to cure miscarriage of justice."*

From the reproduced paragraphs of the applicant's affidavit together with the grounds and considering our deliberations on his complaints, we cannot safely conclude that the applicant has managed to show the patent

mistake, leave alone the allegation that the alleged error or mistakes have resulted in the miscarriage of justice.

We think it is appropriate at this juncture to reiterate the holding of the Court in **Chandrakant Joshubai Patel v.Republic** [2004] TLR 218 *that: -*

> *"The Court will invoke its review jurisdiction where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."*

We wish to add that the said error on the face of the record must be obvious to the understanding of the Court and the parties, unmistakable and therefore not obscure or hidden. It follows that the Court cannot reverse its judgment based purely on the evaluation of questions of facts or law which have not and could not be considered under any definition of what entails a manifest error in the record.

In the event, we are satisfied that there is no any patent or obvious error which has been shown by the applicant as alleged in ground two of review. We accordingly find this ground wanting.

Overall, we decline the invitation by Mr. Ishengoma to treat the present application for review as unique simply because it is rare that the Court of Appeal substitutes acquittal entered by the lower court with conviction. We hope we have amply demonstrated in the course of our deliberations that the Court in totality approached the whole evidence in the record before it concluded that the applicant is guilty of the offence of murder and sentenced him to death. To decide otherwise will be to accede to the suggestion of the applicant which seems, with respect, to urge the Court to reopen the hearing of the appeal which has been conclusively determined. We are therefore settled that in this application, there is nothing to be reviewed on account of the alleged peculiar circumstances as suggested by Mr. Ishengoma.

At this juncture, we think it is not irrelevant to point out that the Court reached that finding and decision after it reevaluated the evidence on record and differed with the learned trial judge who appeared to have misinterpreted the provisions of sections 22 of the Penal Code and acquitted the applicant together with others on the reasoning that in the absence of the actual perpetrators, it is difficult to establish common intention among the accused persons. The Court firmly held so after reproducing and considering the provisions of section 22(1) (a) (b) (c) and (d) and observed

that all persons enumerated in that section are principal offenders and as such can be jointly or separately charged and convicted.

The Court arrived at that stance since that being a first appeal, the appellate court is entitled to re-evaluate and re-appraise the evidence to determine whether or not the trial court had erred in its approach in evaluating the evidence or had acted on wrong principle and came to its own conclusion as held in many decisions, suffice to mention **Salum Mhando v. Republic** [1993] TLR 170.

We must emphasize that in the instant application, since the applicant complaints are premised on the error on the face of the record and denial of the right to be heard, he is duty bound to prove that the alleged errors exist and that the same have resulted in miscarriage of justice. He is further supposed to show plainly that during the hearing he was denied the right to be heard.

It must be put to light that in undertaking review, the underlying principle is that the Court would not have acted or decided as it did if all the circumstances had been known. Unfortunately, we are afraid to say, the applicant has not demonstrated unimpeachably that during the re-evaluation

the Court approached the evidence on record wrongly to the effect that it came to a wrong conclusion. In our considered opinion, the applicant seems to have simply intended to urge the Court, in the current application, to come to a different conclusion in substitution of the former without convincing reasons. It must be insisted once again as was the case in **Marcky Mhango and 684 Others v. Tanzania Shoe Company Limited and Another,** Civil Application No.19 of 1999 (unreported) that a decision of the Court cannot simply be varied at any time at the whims of the losing party without cogent reasons. A lawfully determined appeal cannot be reopened for hearing in a style that ignores the principles of administration of justice which demands that litigation must have a finality.

In the present application, it is our settled opinion that the applicant has not shown any error on the face of the record which has resulted into injustice on his part. Indeed, the applicant has not raised any novel issue to be regarded as error on the face of the record or that deprived him of the right to be heard under the circumstances outlined in the two grounds of review to move the Court to review its judgement dated 16th September, 2016.

In the final analysis, in view of what we have stated with respect to the two grounds of review, we regret to state that, overall the applicant has not successfully convinced the Court that there is any manifest error on the record that occasioned injustice or that he was denied the right to be heard as alleged to convince us to review the judgement as prayed. It follows that the only option left at our disposal is to dismiss the application in its entirety.

DATED at **DAR ES SALAAM** this 06th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 14th day of August, 2019 in the presence of Mr. Gaudiosus Ishengoma, counsel for the Applicant and Mr. Genes Tesha, Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.

E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL