IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPLICATION NO. 07/01 OF 2022

CHRISTIAN UGBECHI ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Application for review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam]

(Mwambegele, Levira And Maige, JJ.A.)

Dated the 15th day of December, 2021
in

Criminal Appeal No. 274 of 2019

RULING OF THE COURT

23rd April & 03rd May, 2024

MGEYEKWA, J.A.:

In this application, the Court is being asked to review its decision in Criminal Appeal No. 274 of 2019 dated 15th December 2021. The applicant, Christian Ugbechi, was before the High Court (Corruption and Economic Crimes Division) sitting at Dar es Salaam, charged with the offence of trafficking in narcotic drugs.

The applicant through a notice of motion has raised eight (8) grounds of review predicated upon rule 66(1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) that the impugned decision was based on a manifest error on the face of record resulting in the miscarriage of justice. Paragraphs 1.1, 1.2, 1.3, 1.4 and 2.0 of the notice of motion deal with the alleged errors. To be more precise, in paragraph 1.0, the applicant faults the judgment of the Court for containing irregularities that resulted in a manifest error on the face of the record, which occasioned a miscarriage of justice. On paragraph 1.1, the applicant faults the judgment of the Court for failure to effectively determine some important issues in the case. In paragraphs 1.2, 1.3 and 1.4, the applicant faults the Court for failure to evaluate the evidence on record and in paragraph 2, the applicant claimed that the applicant was wrongly deprived of an opportunity to be heard.

On the other hand, the respondent Republic resisted the application by an affidavit in reply. In essence, the respondent contends that all grounds relied upon by the applicant as manifest errors on the face of the record do not constitute grounds for review to warrant this Court to exercise its jurisdiction to review the impugned decision.

Facts of this application as gleaned from the record, are summarized hereunder. It was alleged that, on the material day, the appellant arrived at the Julius Nyerere International Airport (the JNIA) ready to fly to Vienna via Addis Ababa. According to PW2, when he questioned the applicant, he appeared nervous. Therefore, the applicant was put under observation of the police at the airport. The search was conducted, and they managed to retrieve 56 pellets suspected to contain narcotic drugs from the appellant's bag and socks. While under observation, from 29th to 30th January, 2018, the appellant defecated 23 pellets making a total of 79 pellets seized from him.

On 1st February, 2018, the pellets were sent to the Government Chemist for examination. According to the examination report, the pellets contained Heroin Hydrochloride. Subsequently, the appellant was arrested and arraigned before the High Court (Corruption and Economic Crimes Division) charged with the offence of trafficking in narcotic drugs. He pleaded not guilty to the charge.

At the end of trial, the learned trial Judge was ultimately convinced that a case had been proved against the applicant. The appellant was, as a result, convicted and sentenced by the trial court to thirty (30) years

imprisonment. Dissatisfied, the applicant unsuccessfully appealed to this Court. Undaunted, he has again approached the Court, but this time, as alluded to above, by way of an application for review.

At the hearing of the application, the applicant was represented by Mr. Kung'e Wabeya, learned counsel while the respondent was represented by Ms. Florida Wenceslaus assisted by Ms. Edith Mauya both learned State Attorneys.

Before elaborating on the written submissions in support of the application, Mr. Wabeya abondoned grounds 1.1(a) and 2.0 of the review appearing on page 3 of the written submission filed on 18th April, 2024. He also prayed to argue on an additional ground of review appearing on page 2 of the written submission, the prayer of which was granted.

In his submission, Mr. Wabeya urged us to adopt the notice of motion, the applicant's supporting affidavit and written submissions. On ground number 1.0, the learned counsel briefly contended that the impugned decision contains apparent errors on the face of the record which necessitates a review under rule 66(1) (a) and (b) of the Rules hence the

instant application. The errors alleged by Mr. Wabeya were elaborated in the grounds number 1.1, 1.2, 1.3, 1.4 and additional ground.

Submitting on the additional ground of review, Mr. Wabeya asserted that section 26(1) of the EOCCA requires the consent of the DPP to be issued before commencement of any trial involving economic offence. He went on submitting that in the instant application, the consent of the DPP which confer jurisdiction to the trial court was not issued and, therefore, the trial court had no jurisdiction to try the case. On being probed by the Court, he conceded that the applicant did not raise the issue on jurisdiction at the first appellate Court. However, Mr. Wabeya maintained his submission and argued that the issue of jurisdiction can be raised at any stage. Two cases were cited by the learned counsel to support his position, these are: **Salum Andrew Kamande v. Republic**, Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (22 March 2023) TanzLII and **Omary Bakari @ Daudi v. Republic**, Criminal Appeal No. 52 of 2022 [2022] TZCA 254 (9 May 2022) TanzLII, where the Court nullified the subordinate court proceedings because the consent of the DPP went missing. The learned counsel urged the Court to do the same and set the applicant free.

In his submission in relation to grounds 1(b) and 1(c), Mr. Wabeya contended that the applicant was convicted because he was found in possession of 947.57 grams of Heroin Hydrochloride. He clarified that, the allegations were not proved because the evidence of PW1 shows that the seized substance contained a mixture of other substances which are not narcotic drugs, such as paracetamol. He drew our attention to section 15(3) of the DCEA and argued that the said section was not complied with because the subordinate court did not differentiate Heroin Hydrochloride from other substances in order to ascertain whether the seized substance weighed more than 200 grams.

In his written submission, Mr. Wabeya stressed that Heroin Hydrochloride is not a synonym of Heroin Diacetyl morphine and there is no provision of law for Heroin Hydrochloride. To support his submission, he referred us to page 49 of the record of appeal and the case of **Zainabu Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015 (unreported). He stressed that in accordance with the DCEA, the four substances found in the suspected drugs by the Government chemist, as testified in court, are not indeed narcotic drugs.

In conclusion, Mr. Wabeya urged us to review our previous decision and grant the application.

In response, Ms. Wencelaus forcefully opposed the application and stated that there is no error in the impugned judgment. On the issue of jurisdiction, Ms. Wenceslaus argued that in the review process, the Court cannot consider issues related to pre-trial proceedings but only errors in the judgment and orders. To buttress her submission, she cited the case of **Lilian Jesus Fortes v. Republic**, Criminal Application No. 10/01 of 2013 2020] TZCA 1936 (2 September 2020) TanZLII.

Ms. Wenceslaus continued to argue that grounds 1(b) and (c) do not qualify for review but are merely grounds of appeal. As for the contention that the Court failed to differentiate Heroin Hydrochloride from other substances, the learned Senior State Attorney referred us to pages 13 and 19 of the record where it shows that the Court made it clear that the suspected drugs could not be separated. She clarified that, for an error to warrant review, it must be an obvious and patent error and not discerned from a long-drawn process of reasoning. Reliance was placed in the case of

Emmanuel Kondrad Yasipati v. Republic, Criminal Appeal No. 90/07 of 2019 [2019] TZCA 25 (19 February 2019) TanzLII.

Submitting in response to grounds 1.0, 1.2, 1.3 and 1.4, Ms. Wenceslaus was brief and straight to the point. She contended that there was no any miscarriage of justice because the Court determined the appeal and concluded that the case was proved beyond reasonable doubt. As such, the learned State Attorney beckoned us to dismiss the application on the strength of the above submission.

In his rejoinder, Mr. Wabeya reiterated his submission in chief. He prayed the Court to consider the applicant's grounds of review and allow the application.

Having carefully considered the submissions advanced by the parties for and against the application, and after going through the notice of motion and the supporting affidavit as well as the affidavit in reply, it is now our turn to consider them in the light of the established principles in application for review.

Before we delve in the merit of this application, we think it is appropriate to recapitulate the provision of rule 66 of the Rules in which the applicant has, in this application confined his grievances. For clarity, rule 66(1) provides that:

> *"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; or*
>
> *(c) the Court's decision is a nullity; or*
>
> *(d) The Court had no jurisdiction to entertain the case; or*
>
> *(e) The jurisdiction was procured illegally or by fraud or perjury".*

The principles governing the exercise of the power of review are well established by our previous authorities. See, for instance, the case of **Rizali Rahabu v. The Republic**, Criminal Appeal No. 4 of 2011 (unreported) in which the Court held that:

"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. 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..."

In determining the appropriateness of the instant application, we shall be guided by the above provision of law and the cited authorities. The applicant's counsel has submitted on six (6) grounds for review to move the Court to review and set aside its Judgment in Criminal Appeal No. 576 of 2016 dated 15th December, 2021.

Starting with ground number 1.0 which relates to manifest error on the face of record, the applicant complained that the decision of the Court was based on a manifest error on the face of the record resulting in miscarriage of justice to the applicant. In **Chandrakant Joshubhai Patel v. The Republic**, Criminal Application No. 8 of 2002 (unreported), the issue on what amounts to an error manifest on the face of the record was fully

addressed by the full Court at page 25. The Court adopted the passage from Mulla on the Code of Civil Procedure (14th Edition); pages 2335-2336 as follows:

> *"**An error apparent on the face of record must be such as can be seen by one who runs and reads,** that is, 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**. ... Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record...But it is no ground 6 for review that the judgment proceeds on an incorrect exposition of the law [Chajju Ram v. Neki (1922) 3 Lah. 127]. **A mere error on law is not a ground for review under this rule.** That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori.94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. It can be said of an error that is apparent on the face of the record when it is obvious and self- evident and does not*

require an elaborate argument to be established..."
[Emphasis added]

Applying the above position in the matter at hand, it is clear that, the remedy of review is limited in scope. It is commonly used for correction of apparent mistakes and not something that can be established by a long-drawn process of reasoning on points on which there may conceivably be two or more opinions. In the applicant's supporting affidavit in particular paragraphs 5, 6, 7 and 8, he has dealt with the alleged errors. In paragraph 5 he faults the judgment of the Court for contained manifest error on the face of record which occasioned miscarriage of justice.

To be more precise, on grounds number 1(b), (c), 1.2. 1.3 and 1.4 in the notice of motion and paragraphs 6 and 7 of the applicant's supporting affidavit, he faults the Court for failure to differentiate Heroin Hydrochloride from other substances and to determine the weight of the narcotic drug which was found in possession of the applicant. A cursory glance at the impugned judgment in particular at pages 48 and 49 of the record of appeal, it is noticeably clear that the Court dealt at lengthy on the purported errors while addressing ground 18 of the Memorandum of Appeal. More so, the

alleged errors do not fall within the scope of review but rather grounds of appeal. Therefore, raising it at this juncture is to misconceive the purpose of the review. We have held a similar position in our previous decisions. For instance, in the case of **EX F. 5842 D/C Maduhu v. Director of Public Prosecutions**, Criminal Application No. 46/06 of 2019 [2020] TZCA 322 (17th June, 2020) TanzLII, the Court held that:

> *"As submitted by the learned State Attorney, the move by the applicant was aimed at inviting us to re-evaluate the evidence, which is not the essence of a review."*

The considerations were restated in the case of **Rizali Rajabu v. Republic** (supra) where the Court held that:

> *"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.* ***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..." [Emphasis added].*

See also **Jackson Sifael Mtares & 3 Others v. The Director of Public Prosecution**, Civil Application No. 608/01 of 2021 (unreported), the Court emphasized that a review should not be utilized as a back door method to unsuccessful litigants to re-argue their cases. The above explanation renders the 1.0. 1(b), (c), 1.2, 1.3 and 1.4 grounds of review to lack merit.

We now turn to the additional ground raised by the applicant in his written submission. We think that this ground should not detain us much. The contention that the Court had no jurisdiction is a new ground that was not brought to the attention of the Court when hearing the appeal. Even if it was raised, the question that came to our minds is whether or not such an issue can be raised at review stage or not. As rightly submitted by Mr. Wabeya, it is trite law that issues of jurisdiction can be raised at any stage of proceedings. However, it is noteworthy that, the jurisdictional issue raised at review stage must be apparent on the judgment or ruling of the Court sought to be reviewed. We are at one with Ms. Wenceslaus that the jurisdictional issue being raised relate to pre- trial process which is outside the scope of review. Therefore, the Court cannot be faulted. The above explanation renders the additional ground of review also to lack merit.

For the aforesaid reasons, we find and hold that the instant application falls far from proving any grounds that would warrant a review of the impugned judgment. Therefore, the application is devoid of merit and it is hereby entirely dismissed.

DATED at **DAR ES SALAAM** this 02nd day of May, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 03rd day of May, 2024 in the presence of Ms. Consolatha Mtana, who took brief of Mr. Kung'e Wabeya, learned counsel for the applicant and Mr. Lenard R. Chalo, Senior State Attorney for the respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL