IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPLICATION NO. 7 OF 2015

ISSA SAID .... APPLICANT

VERSUS

THE REPUBLIC .... RESPONDENT

(An application for review of the judgment of the

Court of Appeal at Mtwara)

(Bwana, J.A, Oriyo, J.A and Kaijage, J.A.)

Dated the 02nd December 2014)

In

Criminal Appeal No. 10 of 2014

RULING OF THE COURT

4th &10th July, 2017

MWANGESI, J.A.:

By notice of motion that has been preferred under the provisions of Rules 48 (1) (4) and 66 (1) (a) of the Court of Appeal Rules, 2009 (the Rules), the applicant is moving the Court to review its decision that was handed on the 03rd day of December 2014 whereby, his second appeal to

challenge the holding of the first appellate court that did uphold the findings of the trial court was dismissed in its entirety. The notice of motion has been supported by an affidavit that was sworn by the applicant. On the other hand, the notice of motion has been resisted by the respondent/Republic in the affidavit in reply that was sworn by one Kauli Makasi.

When the application was called on for hearing, the applicant did enter appearance in person as he was not legally represented whereas, the respondent/Republic had the services of Mr. Paul Kimweri, learned Senior State Attorney. When the applicant was asked to take the floor and present his application before the Court, he did request the respondent/Republic to respond to his grounds contained in the application first before he could respond if the need demanded so.

Responding to the grounds which have been advanced by the applicant in his application to move the Court to review its decision, the learned Senior State Attorney did submit that, upon going through the notice of motion of the applicant as well as the affidavit in support of the

same, he was of the view that, the application does not fall within the ambit of the provisions of Rule 66 (1) of the Court of Appeal Rules, 2009 (the Rules). This is from the fact that, the grounds which have been indicated in the notice of motion are in essence grounds of appeal, which had already been considered by this Court while considering the appeal that was before it. In the circumstances, the learned Senior State Attorney has urged us to dismiss the application because it is baseless.

When the pendulum was reverted to the applicant for the second time to respond to what was submitted by the learned Senior State Attorney, still nothing useful could be extracted from him on the obvious reason that, being a lay person, he was not in a position to chip in anything relevant as the whole issue was centered on legal technicalities wherein, he was not versed with. In the circumstances, the issue that stands for deliberation and determination by the Court is whether the application by the applicant for review is founded on sound reasons.

The jurisdiction of this Court to review its own decision is obtainable from the provisions of Rule 66 (1) of the Rules, which has been couched in the following terms that is:

> "*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 miscarriage of justice; or*
> *b) A party was wrongly deprived of an opportunity to be heard:*
> *c) The court's decision is a nullity: or*
> *d) The court had no jurisdiction to entertain the case: or*
> *e) The judgment was procured illegally, or by fraud or perjury.*
>
> *[Emphasis supplied]*

In the application at hand, we are therefore enjoined to gauge if the grounds mentioned by the applicant in the notice of motion and the affidavit in support of the application, are compatible with the stipulation under the above quoted provision of law. The **first** anomaly which we

managed to note is the fact that, the notice of motion and the affidavit in them-selves are not compatible. While the notice of motion has specifically cited Rule 66 (1) (a) of the Rules as the provision under which the application has been made, nothing has been mentioned in all paragraphs of the affidavit affirmed by the applicant to support or elaborate the contention contained in the notice of motion. **Secondly,** it is noted that, the grounds of the notice of motion, which will shortly be mentioned hereunder, do not fall under paragraph (a) of Rule 66 (1) of the Rules.

It is as well pertinently noted that, the catch word that has been applied in the provision of Rule 66 (1) of the Rules quoted above is "**shall**", of which its import is that, compliance with stipulation under the provision is imperative. So in order to be properly placed in appraising the grounds presented by the applicant to move us to review our decision, we hereby reproduce the paraphrased three grounds of the applicant that have been named by the applicant which are:

First, that, the appellant's evidence in defense was not considered by the Court..

Secondly, that, there was no any iota of evidence neither from PW4 nor from the PF 3, which was admitted in evidence as exhibit P1, to indicate that, the spermatozoa found in the victim's vagina was of the appellant.

Third, that, the case was not proved beyond reasonable doubt, because there was no proper identification of the appellant at the scene of incident, by PW1 who was the victim of the incident.

As earlier on highlighted above, the three grounds named above do not fall within the perimeters of paragraph (a) of sub-rule (1) of Rule 66 of the Rules, under which the notice of motion has been pegged, which is in respect of a manifest error on the face of the record. Conversely, the grounds of the notice of motion are in respect of evaluation of the evidence, which unfortunately does not fall within our domain. The review envisaged under the provisions of Rule 66 (1) (a) – (e) of the Rules of which our jurisdiction is restricted to, is limited in scope as per the holding of this Court in the case of **Peter Ng'homango Vs Gerson K. Mwangga and Another,** Civil Application No. 33 of 2002 (unreported), where

inspired by the holding of the Supreme Court of India in **Meera Bhanja Vs Nirumala Kumar Choudury** (1955) ISCC India**,** did state that it is exercisable under basically two situations that is, **first**, it is used normally for correction of a manifest mistake inadvertently occasioned by the Court in the course of composing a decision. And **Secondly,** that, it should not be utilized as a backdoor method to unsuccessful litigants to re-argue their case, which is tantamount to the exercise of appellate jurisdiction. The same position was taken in the cases of **Abubakar Hamisi Vs Republic**, Criminal Application No. 6 of 2008, **Miraj Seif Vs Republic**, Criminal Application No. 2 of 2009 and **Charles Barnabas Vs Republic,** Criminal Application No. 13 of 2009 (all unreported), just to mention but a few.

In yet another case of **Salumu Nhumbuli Vs Republic,** Criminal Application No. 2 of 2013 (unreported), the stance expressed in the above case was reiterated when this Court held that, an application for review is not meant to challenge the merits of the earlier decision of the Court. Put it in another way, an application for review so to speak, is not an appeal or a second bite by a party in the aftermath of the dismissal of his appeal. And the reasons for such stance, are not farfetched. In the **first instance,** it is

aimed at creating confidence of the people to the Court, if it will be consistent in its decisions. **Secondly,** it serves to maintain the policy of the country, which advocates for finality of litigation between disputants so as to pave way for other development activities.

Mindful of what we canvassed in the above cited cases, we now revert to consider the application under discussion. Even if for the sake of argument, we were to go by what is contained in the paragraph under which the notice of motion has been pegged that is, paragraph (a) of Rule 66 (1) of the Rules, we find that, the applicant has failed to point out the alleged manifest error on the face of our decision neither in his affidavit in support of the notice of motion, nor in his oral submission in Court. The implication which we draw is that, such failure is a clear indication that, the alleged manifest error in our earlier decision is non – existent and has just been mentioned in the notice of motion without any founded bases.

And, with regard to the grounds mentioned in the notice of motion, which in essence are not backed up by the provision of law under which they have been made, we note that, all the three paraphrased grounds,

are inviting us to re-evaluate the evidence that was applied in holding him culpable to the charged offence. As plainly discussed in the authorities that have been cited above, the law does not permit us to sit as an appellate Court of our own decisions. Besides, it is conspicuously exhibited in our impugned decision that, the complained of grounds were adequately traversed in our decision. For instance, the issue of the defense of the applicant not being considered was discussed and concluded on paragraph 2 of page 6 of our judgment where we said:

> *"On the strength of the foregoing extracts, we are satisfied that, the appellant's defense was considered, but was quashed. The fact that the defense was rejected, doe not mean that the same was not considered. Upon this finding, we dismiss the first ground of appeal."*

As regards evaluation of the evidence as contained in the other two grounds in the application, our evaluation was capped on paragraph 3 of page 7 of our impugned judgment, where we held that:

> *"We hasten to say that, no better direct evidence could have been adduced by the prosecution to*

establish the offence of rape than the evidence of PW1, the victim."

In line with the foregoing therefore, it is evident that the application which has been preferred by the applicant, which essentially is an appeal in disguise, is misconceived and uncalled for. Without any further ado, we hereby dismiss it.

Order accordingly.

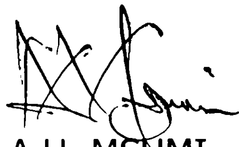
DATED at **MTWARA** this 6th day of July, 2017.

M.S MBAROUK
JUSTICE OF APPEAL

S.E. MUGASHA
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