**IN THE COURT OF APPEAL OF TANZANIA**

**AT MTWARA**

**(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)**

**CRIMINAL APPLICATION NO. 92/07 OF 2019**

**MASUDI SAID SELEMANI.....APPLICANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Application for Review of the Decision of the Court of Appeal of Tanzania at Mtwara)**

**(Msoffe, Oriyo and Kaijage, JJA.)**

**dated the 22nd day of November, 2014**

**in**

**Criminal Appeal No. 162 of 2013**

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## RULING OF THE COURT

19th & 25th February, 2020

**KWARIKO, J.A.:**

Initially, the applicant was arraigned in the High Court of Tanzania at Mtwara with the offence of murder of his close relative one Siajabu Pius contrary to section 196 of the Penal Code [CAP 16 R.E. 2002]. At the end of the trial, he was convicted and sentenced to a mandatory punishment of death by hanging. His appeal before this Court was dismissed on 22/11/2014 for lack of merit.

Still aggrieved, the applicant has knocked the Court's doors applying for review of the said decision. The application has been filed by way of a notice of motion made under section 4(4) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 and Rules 48(1) and 66(1)(a)(b)(c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on the grounds that: -

*a) The decision was based on manifest error on the face of record which resulted in the miscarriage of justice.*

*b) He was wrongly deprived of an opportunity to be heard.*

*c) The Court's decision was a nullity.*

The notice of motion is supported by the affidavit of the applicant where he essentially complains that the Court's decision failed to notice that the High Court Judge omitted to properly direct the assessors on the meaning of malice aforethought before getting their opinions.

On the other hand, the respondent Republic filed an affidavit in reply sworn by Mr. Kauli George Makasi, learned Senior State Attorney wherein he opposed the application on the ground that neither is there

any manifest error on the face of the record nor is there any ground upon which this Court can rely to grant this application.

At the hearing of the application, the applicant appeared in person unrepresented, while the respondent Republic was represented by Mr. Makasi. The applicant sought leave of the Court to let the State Attorney to respond first to the grounds of the review reserving his right to respond later, if need be.

On his part, Mr. Makasi prefaced his submission by opposing the application. Submitting in relation to the first ground, the learned counsel argued that there is no any manifest error on the face of the record in the impugned decision. To lend credence to his position, he referred us to the Court's decision in the case of **Justus Tihairwa v. Chief Executive Officer, TTCL,** Civil Application No. 131/01 of 2019 which referred the case of **Chandrakant Joshubhai Patel v. R** [2004] T.L.R 218. In those cases, it was held that the alleged manifest error should be apparent on the face of the record not requiring long-drawn process of reasoning.

Mr. Makasi went on to argue that the applicant explained in his affidavit that the error complained of relates to the omission by the trial Court's failure to address the assessors on the meaning of malice

aforethought. According to him, this is not an error apparent on the face of the record but it fits to be a ground of appeal. He thus submitted that the applicant ought to have raised that issue as one of the grounds in his appeal before the Court. He argued that the Court cannot sit as an appellate court on its own decision.

On whether the applicant was denied an opportunity to be heard which forms the second ground for review, Mr. Makasi argued that the applicant was accorded opportunity to be heard through his advocate, Mr. Hussein Mtembwa as shown from page 4 of the impugned decision.

In the third ground, the learned Senior State Attorney argued that the applicant has not shown how the impugned decision is a nullity. He added however that, he has not found anything wrong in that decision to support this complaint.

Mr. Makasi finally submitted that the applicant has failed to establish existence of any of the grounds for review and prayed for the dismissal of the application for lack of merit.

In his rejoinder, the applicant first complained that the Court's decision favoured the trial Judge as well as the deceased. According to

the applicant, this is so because while he had quarreled with Lameck Pius, he was instead implicated with the death of the deceased.

As regards the denial of the opportunity to be heard, the applicant argued that he did not discuss his case with his advocate who represented him before the hearing as they only met in Court.

We have considered the parties opposing submissions and the issue that calls for determination is whether this application has merit. The Court has powers to review its own decisions. Rule 66 (1) of the Rules provides thus: -

> *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 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.*

This Rule is more or less similar to what was held by the Court in **Chandrakant Joshubhai Patel** (supra) where it was stated among other things that: -

> *"The Court of Appeal has inherent jurisdiction to review its decisions and it will do so in any of the following circumstances (which are not necessarily exhaustive):*
>
> *(a) where the decision was obtained by fraud;*
>
> *(b) where a party was wrongly deprived of the opportunity to be heard; and*
>
> *(c) where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice."*

In the present application, the applicant has invoked sub-rule 1 (a) (b) and (c) of Rule 66 of the Rules, that is, the impugned decision was based on a manifest error on the face of the record which occasioned injustice to him, he was denied opportunity of being heard and that the decision was a nullity.

To start with the first ground, the law says that for a decision to be based on manifest error apparent on the face of the record, the error must be clear to the reader not requiring long- drawn arguments or reasoning. There are various decisions of the Court to that effect including **Chandrakant Joshubhai Patel** (supra), which was followed in the case of **Justus Tihairwa** (supra) relied upon by Mr. Makasi. Others are: **African Marble Company Ltd v. Saruji Corporation Limited,** Civil Application No. 132 of 2005 and **Said Shabani v. R,** Criminal Appeal No. 7 of 2011 (both unreported), to mention but a few. To underscore this point, the Court in **Chandrakant** cited with approval *Mulla, Indian Civil Procedure Code,* 14th Edition at pages 2335-36 and stated that: -

> *"An error apparent on the face of the 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..."*

Applying the above holding in the present application, it is clear that what the applicant has termed as a manifest error apparent on the face of the record cannot be established without long arguments from the

opposing parties which will probably lead to two opposing opinions. The alleged error is, therefore, not apparent on the face of the record. As rightly argued by Mr. Makasi, this complaint fits to be a ground of appeal. The applicant was at liberty if he deemed so to raise it when he presented his appeal before the Court. To raise it now is tantamount to moving the Court to sit as an appellate court on its own decision which is contrary to the law. Apparently, a similar issue arose in **Karim Kiara v. R,** Criminal Application No. 4 of 2007 (unreported) where the Court referred to the case of **Lakhamshi Brothers Ltd v. R. Raja and Sons** [1966] 1 EA 313 in which it was held that: -

> *"In a review the court should not sit on appeal against its own judgment in the same proceedings. In a review, the court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the court had some matter not been inadvertently omitted."*

The first ground thus fails.

The second ground is that the applicant was denied opportunity to be heard. He explained in this respect that he did not discuss his case with his advocate before the hearing date. On our part, we agree with Mr. Makasi that the applicant was heard through his

advocate, Mr. Mtembwa who was assigned to represent him in terms of Rule 31 (1) of the Rules as evidenced from page 4 of the impugned decision. We are further of the considered opinion that, had the applicant found that the advocate's submissions were short of his grounds of appeal, he ought to have consulted him at that moment or otherwise raised it before the Court. This is the position we took in the recent decision in the case of **Godfrey Gabinus @ Ndimba and Two Others v. R,** Criminal Application No. 91/07 of 2019 where we said thus;

> *".... Had they have any misgivings with the assigned advocate, there is no reason why they failed to bring it to the Court's attention in the course of hearing."*

This ground too fails.

The applicant complains in the third ground that the impugned decision was a nullity. He argued that the decision favoured the trial Judge and the deceased because, while he had quarreled with Lameck Pius, he was instead convicted in relation to the death of the deceased. Essentially, this complaint attacks the findings of the Court on the facts of the case presented before it in that the decision was erroneous. However, it is settled law that a mere error of law is not a ground for review consistent with the holding in **Chandrakant's** case. As we have

already said when discussing the first ground, an erroneous decision is open to an appeal and not subject to review. The third ground thus fails.

Consequently, we are settled in our mind that the applicant has failed to prove his grounds for review rendering the application non-meritorious and we hereby dismiss it.

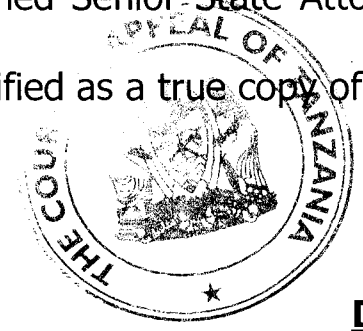
**DATED** at **MTWARA** this 22nd day of February, 2020.

A. G. MWARIJA
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

The Ruling delivered this 25th day of February, 2020 in the presence of the applicant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**