



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPLICATION NO.4 OF 2015 (UR 1/2015)

BETWEEN

GEORGE OYENGO BARASA.....APPLICANT

AND

REPUBLIC**RESPONDENT

(An Application to recall, rescind, set aside, cancel or review the Judgment of the Court of Appeal at Kisumu (J.W. Onyango Otieno, F. Azangalala & S. ole Kantai, JJ.A) dated 26th September, 2013

in

C.A. NO. 366 OF 2011)

RULING OF THE COURT

1. The applicant was upon trial for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code convicted and sentenced to death. Upon the dismissal of his appeal by the High Court, he preferred a second appeal to this Court which was, on 26th September 2013, also dismissed
2. Undaunted, this applicant has returned to this Court, this time round, with an application under **Articles 48, 51, 159 and 259** of the Constitution; **Sections 3A and 3B** of the Appellate Jurisdiction Act; and **Rules 29 and 35** of the Court of Appeal Rules requiring this Court to "*recall, rescind, set aside, cancel and/or review its said judgment dated 26th September, 2013.*"
3. At the hearing of the application before us, Mr. Mochere, learned counsel for the applicant, basing his submissions upon the grounds set out on the face of the application and the averments in the applicant's affidavit sworn on 5th March 2015 in support of the application, argued that the applicant was convicted upon a fraudulent manipulation by the police of the prosecution evidence. He argued that while the charge sheet has the name of one Felix Makhaya Murunga (Murunga) as the complainant in count one, the person who testified in court as the complainant is one Felix Makhaya Mwanje (Mwanje), a completely different person.
4. Counsel further argued that as is clear from the statements of these two people made to the police, copies of which are annexed to the applicant's said affidavit in support of this application, Murunga

claimed that the offence was committed on 15th August 2008 while according to Mwanje it was committed on 22nd August 2008. In the circumstances, counsel concluded, there has been a miscarriage of justice which this Court must remedy.

5. In response to those submissions, Mr. Sirtuy, learned Principal Prosecution Counsel, dismissed this application as a non-starter on the ground that this Court has no jurisdiction to entertain it. He submitted that Rule 35(1) of the Court of Appeal Rules is a slip rule intended to enable the court to correct typographical errors in its judgments. It is not intended to facilitate the re-opening up of concluded cases. He said if the applicant has discovered new evidence as he claims, then he should have filed a constitutional petition in the High Court under **Article 50(1)** of the Constitution.

With those submissions, counsel urged us to dismiss this application.

6. In his riposte, Mr. Mochere argued that Article 50(1) deals with situations where new trials are sought. In this case, the applicant is seeking a review of this Court's judgment and not a retrial.

7. Having considered the averments in the application and the affidavit in support as well as counsel's rival submissions and the authorities cited, we find that the major issue raised in this application is whether or not this Court has jurisdiction to entertain this matter. If it has, then we should consider whether or not the application has merit.

8. We have no doubt that this Court has jurisdiction to correct accidental slips in its judgments. **Rule 35** of the Court of Appeal Rules makes this quite clear on this:

“(1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.

(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it purports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected. ”

9. Clearly, besides authorizing the court to correct "*clerical or arithmetical mistake in the judgment of the Court or error arising therein from an accidental slip or omission,*" this Rule also confers the Court with jurisdiction to correct anything which "*does not correspond with*" its judgment.

10. Several decisions of this Court have demarcated the scope of this Rule. Citing its earlier decisions in **Raniga v. Jivraji, [1965] EA 700** and **Lakhamshi Brothers Ltd v. Raja & Son, [1966] EA 313** in the recent case of **Jennifer Koinante Kitarpei v. Alice Wahito Ndegwa & Others [2014] eKLR**, this Court stated that it will only apply the slip rule to give effect to the manifest

"intention of the court at the time when the judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention. " In **Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd, [2014] eKLR** this Court had stated that the residual jurisdiction granted by Rule 35 is especially to be applied to review its decisions from which there is no appeal to correct errors of law that may have occasioned a miscarriage of justice that may erode public confidence in the administration of justice. The court will be reluctant to invoke this jurisdiction where the applicant has been indolent or where "*legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice.*"

11. With these principles in mind, does this Court have jurisdiction to review its judgment in this matter? We think not.

12. The basis of this application is the claim that after the delivery of this Court's judgment of

26th September,2014 the.

•applicant and/or his lawyer "got", he does not state from where, two statements made to the police, one by Mwanje and the other by Murunga. The authenticity of those statements cannot itself be vouchsafed. True, the statement attributed to Mwanje claims that the offence was committed on 22nd August 2008. However, in his submissions before us, Mr. Mochere, learned counsel for the applicant conceded that in court Mwanje testified that the offence was committed on 15th August 2008 which is the date given in the charge sheet. We cannot therefore telescope sworn evidence tested by cross-examination in preference of a statement the authenticity of which, as we have stated, cannot be vouchsafed.

13. In our view, this is an attempt by the applicant to have another bite at the cherry which is legally untenable. Consequently, we dismiss this application.

DATED and delivered at Kisumu this 3rd day of June, 2015.

D.K.MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K.MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR