

Citation	Parties	Legal Principles Discussed
<p>CRIMINAL APPLICATION NO.9 OF 2005 – COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM. Coram: RAMADHANI, J.A, NSEKELA, J.A AND MSOFFE J.A</p>	<p>ROBERT EDWARD MORINGE@KADOGOO VS THE REPUBLIC- (Application for Review from the judgment of the Court of Appeal of Tanzania at Arusha) – Criminal Appeal No.196 Of 2004. Nchalla,J</p>	<p>The Court may only review its decisions as spelt out in Chandrakand Joshubhai Patel Vs Republic, Criminal Application No.8 of 2002 (unreported) and also in transport equipment Ltd Versus Derram P. Valambhia, Civil Application No.18 of 1993 (Unreported).</p> <p>- that it has inherent powers of review under the following circumstances:-</p> <p>“Where there is manifest error on the face of the record which resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived the opportunity to be heard”. Which in this case did not meet the conditions.</p>

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: RAMADHANI, J. A., NSEKELA, J, A.AND MSOFFE, J. A.)

CRIMINAL APPLICATION NO.9 OF 2005

ROBERT EDWARD MORINGE @ KADOGOO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for Review from the Judgment of the Court of

Appeal of Tanzania at Arusha)
(Ramadhani, J.A., Nsekela, J.A. and Msoffe, J.A.)

Dated the 1st day of August, 2005
in
Criminal Appeal No. 196 of 2004

R U L I N G

17th October & 4th December, 2006

Msoffe: J, A.:

This is an application in which the Court is being asked to review its decision in Criminal Appeal No. 196 of 2004 dated 1/8/2005. The High Court (Nchalla, J.) sitting at Arusha convicted the applicant of the murder of Kassim Rashid on 25/12/1990 at Msitu wa Kati, Monduli Juu, Monduli District in Arusha Region. Consequently the applicant was sentenced to suffer death by hanging. On appeal, the conviction and sentence were upheld by this Court in the decision it is sought to be reviewed.

In our Judgment we set out the facts of the case as found by the trial High Court. The applicant's conviction was based on

circumstantial evidence. In upholding the conviction we stated as follows:-

*"Without necessarily repeating the evidence against the appellant in the instant case, we may respectfully say as follows. He was the last person to be seen with the deceased under circumstances which could not easily be explained away. On 25.12. 1990 he left with the deceased to travel to Monduli telling PW4 that he was going to charge a tractor battery he had earlier got from Usa River. It would be difficult to believe that a prudent person would travel all that way from Arusha to Monduli just to charge a battery!. Anyhow, he was later seen **without the deceased** at Monduli, Dukabovu, and Mto wa Mbu, **driving the car once driven by the said deceased**. At time of driving the car it was already blood stained. On 1.1.1991 the deceased's body was seen at **Msitu wa Kati** where, it will be recalled, was incidentally the same area where the appellant was seen by PW6 on 26.12.1990 in the car reg.no. 38344 stuck up in mud **without the deceased** who was later found dead. The appellant had to give an explanation of how they parted. It was not enough to say just simply that they were attacked by robbers without more. On the contrary the appellant was found with the vehicle of the deceased and denied that it belonged to the deceased. Surely, his conduct was such that it was reasonably inferred that he was the one who killed the deceased with the requisite malice aforethought."*

In this application the applicant is seeking review for a number of reasons. **First**, he did not quite follow the proceedings at the

appeal stage because the Court used English instead of Swahili language. **Second**, he had no faith in Mr.Chadha, learned advocate, in that at the hearing of the appeal the advocate came up with his own grounds of appeal instead of arguing the ones he had given to him. **Third**, PW2, PW3 and PW7 were not truthful in their evidence in asserting that on 5/1/1991 they identified the scar on the left thigh of the deceased's body because by that date the body must have decomposed beyond recognition. **Fourth**, on the whole the prosecution case against him was not established beyond reasonable doubt. **And**, lastly that in the judgment the deceased's name is shown as Kassim Mohamed instead of Kassim Rashid.

Mrs. Leticia Mutaki, learned State Attorney, appeared and resisted the application on behalf of the respondent Republic. In her brief submission she referred us to the circumstances under which the Court may review its decisions as spelt out in **Chandrakant Joshubhai Patel versus Republic**, Criminal Application No. 8 of 2002 (unreported). She took the view that the application did not meet any of the conditions for review set out in **Patel's** case. She

stated that the Court gave consideration to the circumstantial evidence available in the case in upholding the conviction. Issues of language, Mr. Chadha's "failures" etc. have nothing to do with the evidence, she urged. On the deceased's name being shown in the judgment as Kassim Mohamed instead of Kassim Rashid she attributed the omission to typographical error.

As stated by Mrs. Leticia Mutaki, in **Patel's** case this Court, quoting and reiterating its previous decision in **Transport Equipment Ltd Versus Devram P. Valambhia**, Civil Application No. 18 of 1993 (unreported), held that it has inherent powers of review under any of the following circumstances:-

"Where there is a manifest error on the face of the record which resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived the opportunity to be heard".

The Court in **Patel** was quick to point out though, that the above list is not exhaustive, citing **Tanzania Transcontinental Co. Ltd**

Versus Design Partnership Ltd, Civil Application No. 62 of 1996
(unreported).

The vexing question before us is whether there is sufficient material upon which to review our decision. Without hesitation, we are in agreement with Mrs. Leticia Mutaki that there is nothing in the application which meets the conditions in **Valambhia** and **Patel**.

We start with credibility of witnesses, notably on the complaint that on 5/1/1991 PW2, PW3 and PW7 could not have identified the scar on the left side of the deceased's body. With respect, this is not a strong point. As already observed, the conviction was based on circumstantial evidence and not on the identification of the scar in question. So, whether or not the witnesses saw the scar was immaterial.

Next, is the complaint raised against Mr. Chadha. In a sense, by raising the complaint the applicant wanted to impress upon us that he was denied the right to be heard in that Mr. Chadha brought

in grounds of appeal which were different from the ones he had instructed him to present and argue before us. It is true that Mr. Chadha came up with his own grounds and we expressed our disapproval of that. However, the complaint in this regard has no basis. A look at the judgment will show that we did not determine the appeal solely on the basis of Mr. Chadha's submission or on the basis of the grounds of appeal mentioned by the applicant. As already stated, the appeal was determined on circumstantial evidence.

The issue of language is an afterthought. The applicant was in court when the appeal was heard. Yet, he did not object that his understanding of English language was limited. We heard the appeal in English because of Mr. Chadha's limited knowledge of Swahili language. At any rate, even if the hearing of the appeal had been conducted wholly in Kiswahili the overall result of the appeal would still not be affected.

As for the name of the deceased, we agree with the applicant that the said deceased was actually known as Kassim Rashid and not Kassim Mohamed as shown in the judgment on appeal. The High Court proceedings clearly show that the deceased's name was Kassim Rashid. The omission appearing in the judgment was purely out of typographical error, as correctly submitted by Mrs. Leticia Mutaki. The omission did not, in our opinion, occasion a miscarriage of justice because the end result of the appeal was not affected.

In the end, as already observed, we are satisfied that there is nothing in the application which meets the circumstances laid out in **Valambhia** and **Patel**. The applicant has not shown any manifest error or fraud in the decision sought to be reviewed. Neither has he shown that he was denied the opportunity to be heard.

As already observed, we are aware that, as was stated in **Tanzania Transcontinental Ltd**, the list of the above circumstances is not exhaustive. However, in this application there is nothing which would add up to the list in **Valambhia** and **Patel**. We do not

therefore, find anything which would warrant the exercise of our review powers. The application fails and is accordingly dismissed.

DATED at DAR ES SALAAM this 27th day of October, 2006.

JUSTICE OF APPEAL

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I certify that this is a true copy of the original.

N.P.Z. Chocha
Ag. DEPUTY REGISTRAR