IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: KILEO, J.A., OTHMAN, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 117 OF 2005

1. MAKURU JUMANNE
2. MLOKOZI MISESE } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 15th day of December, 2004
in
HC Criminal Appeal Nos. 9 & 10 of 2004

RULING OF THE COURT

12 & 26 May, 2009

OTHMAN, J.A.:

Before us is a preliminary objection raised with prior notice by the respondent Republic to the effect:

> *That the Notice of Appeal is defective for non-compliance with sub-rule (5), (6) and (7) of rule 61 of the Court of Appeal Rules, Cap. 141 R.E. 2002 (hereinafter referred to as the Rules).*

On that point of law, the respondent Republic invited the Court to strike out the appeal, notice of which was instituted by the appellants, Makuru Jumanne and Mlokozi Misese on 24.12.2004.

Elaborating on the preliminary objection, Mr. Emily Kiria, learned State Attorney for the respondent Republic submitted, **first,** that the notice of appeal contravened Rule 61 (5) in that it did not contain a statement therein that the appellants intended or did not intend to appear at the hearing of the appeal. **Second,** he submitted that the notice of appeal also offended Rule 61 (6) as the learned advocate who signed it on behalf of the appellants did not indicate whether he was retained only to prepare the notice of appeal or retained to appear at the hearing of the appeal or assigned to do the same, as the case may be. The word **"shall"** in both Rule 61 (5) and 61 (6), he said, was key. **Third,** Mr. Kiria argued that the notice of appeal was not substantially in Form B in the First Schedule to the Rules (hereinafter referred to as Form B) as it did not specify under which provision of the law the notice of appeal was filed. He relied on **Maneno s/o Abdallah v R**, MZA Criminal Application No. 2 of 2005 (CA) (unreported) where an application for extension of time to

appeal against a ruling by the High Court in Misc. Criminal Appeal No. 45 of 2004 was held incompetent by the Court, *inter alia*, for non-citation of the relevant provision of the law which was to move it to grant the extension of time sought. He was of the firm view that as the notice of appeal was contrary to the fundamental requirements of Rule 61 (5), (6) and (7), there was before the Court no notice of appeal.

On his part, Mr. Benard Kabonde, learned advocate for the appellants disagreed. While he conceded that the notice of appeal had the two omissions pointed out by Mr. Kiria, which under Rule 61 (5) and (6) were to be spelled out therein, he submitted that the purpose of those provisions was to facilitate administrative communication between the Court and the appellants. They were, he said, purely administrative. There was no confusion that he was retained for the hearing of the appeal. The record of appeal had been sent to him by the Registrar on 21.05.2008 requiring him to submit a memorandum of appeal within fourteen days as required under Rule 65 (1). Moreover, the appellants who were summoned

have in fact appeared. That the respondent Republic was neither prejudiced nor did the omissions occasion any injustice.

On the question of citation, he submitted that the headings on the top of Form B in the First Schedule to the Rules which read:

"FORM B
(Rule 61)"

only indicate that the form owns its existence from Rule 61 as a whole. It was not a required citation in the notice of appeal. He urged that there was no requirement in law to cite any provision of the law when instituting a notice of appeal in a criminal case. This was also the practice.

Mr. Kabonde distinguished **Maneno s/o Abdullah's** case as it concerned an application to the Court by notice of motion seeking an extension of time to file a notice of appeal out of time against the ruling of the High Court, while what is involved in the instant situation is a notice of appeal. That the relevant provision of the law that moved the Court to exercise its jurisdiction to grant an extension of time had to be cited in **Maneno s/o Abdallah's** case as it was in

an application made by notice of motion. He was of the position that what is required in a notice of appeal in a criminal case is that it must be substantially in the Form B in the First Schedule to the Rules.

In rejoinder, Mr. Kiria insisted that a relevant provision of the law had to be cited in the notice of appeal in this criminal case under Rule 61 (7) or alternatively under the law as stated in **Maneno s/o Abdallah's** case. That non-citation can lead to confusion whether what is being sought is an appeal or a review. He admitted that the respondent Republic was neither prejudiced by the two omissions in the notice of appeal. However, he was quick to emphasize that the omissions had made the work of the Court difficult and in any case, the law had to be obeyed particularly by an advocate.

For convenience the relevant sub-sections of Rule 61, in controversy provide:

> *"61 (5) Where a notice of appeal is signed by or on behalf of an appellant who is in prison, it shall include* ***a statement that the appellant intends or does not intend, as the case may***

be, to appear at the hearing of the appeal.

(6) Where a notice of appeal is signed by an advocate, he shall add after his signature the words: ***"Retained only to prepare this notice", "Retained to appear at the hearing of the appeal" or "Assigned to appear at the hearing of the appeal,"*** *as the case may be.*

(7) A notice of appeal shall be ***substantially*** *in the Form B in the First Schedule to the Rules and shall be signed by or on behalf of the appellant"*(emphasis added).

The appellants who were each, *inter alia*, convicted of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002 and sentenced to 30 years imprisonment and 12 strokes corporal punishment by the District Court of Magu on 25.08.2002 had their appeal dismissed by the High Court (Masanche, J.) in Criminal Appeal No. 9 of 2004 on 15.12.2004. They lodged a Notice of Appeal

to this Court on 24.12.2004 – Rule 61 (1). It is undisputed that omitted therein is (i) a statement that they intended or did not intend to appear at the hearing of the appeal as is required under Rule 61 (5) and (ii) indication by Mr. Kabonde who signed the notice of appeal on behalf of the appellants whether he was retained only to prepare it or retained to appear at the hearing of the appeal or assigned to appear at the same occasion, as the case may be, this being a requirement of Rule 61 (6).

The crucial question for consideration that arises is what are the consequences of these two omissions in the notice of appeal. Given the purposes of Rule 61 (5) and (6) which go towards the appellants entitlement to be present at the hearing of the appeal or to forfeit the same; their right to legal representation by an advocate, if need be, retained by them or assigned by the Registrar or an appropriate authority; the present circumstances whereby the Court acted as if learned counsel had been retained, which fact he was; and the summoned appellants personally present at the hearing of the appeal, we fail to see how it can be convincingly urged that the omissions rendered the notice of appeal fatally defective. Admittedly,

neither was prejudice suffered by the respondent Republic, nor did the omissions occasion a failure of justice. Having carefully considered the whole matter, with respect, we are not inclined to find the omissions fatal, rendering the notice of appeal incompetent. The omissions are minor and do not go to the root of the notice of appeal.

The next question for determination, indeed a pre-eminent one, emerging out of the preliminary objection is whether or not the instant notice of appeal had to cite Rule 61 as contained in Form B in the First Schedule to the Rules or any other relevant provision of the law conferring on the Court jurisdiction to hear and determine the criminal appeal. The attractive argument by Mr. Kiria relying on Rule 61 and **Maneno s/o Abdallah's** case was that non-citation of Rule 61 as the relevant provision of the law in the notice of appeal rendered it incurably defective, and the appeal incompetent.

With respect, we are not persuaded. Having carefully reflected on the matter and the arguments advanced by learned counsel, **one,** we are of the considered view that one of the essential

requirements of Rule 61 (7) is that a notice of appeal shall be **substantially** in Form B. In other words, it must, in essential parts comply with it. Directing itself to the word **"substantially"** in Rule 76 (6) which is equally employed in rule 61 (7), the Court in **William Loitaime v Ashari Naftahi,** Civil Appeal No. 62 of 1999 (CA) (unreported) stated that that phrase used for emphasis and design does not call for one hundred percent compliance. After a cursory examination of Form B, we would agree with Mr. Kabonde that the heading **"Form B (Rule 61)"** contained in the proforma therein, disclosed indicates the relevant rule from where that form is nascent.

Two, we would also agree with Mr. Kabonde that **Maneno s/o Abdallah's** case is distinguishable. It dealt with a formal application and by notice of motion. What was being sought there was the grant by the Court of a specific relief, viz, extension of time, which it could only grant or deny possessed of jurisdiction. A notice of appeal is not such application.

Three, the plain purpose of the notice of appeal in a criminal case under Rule 61 is to put the Court and the adverse party or

parties on notice of the real intention of the party preferring it that dissatisfied, it is appealing against a decision of the High Court or a subordinate court exercising extended powers. If anything, it is also an official announcement to the Court and the prevailing party of an appellant's discontent with an appealable decision of the court below. It signals to an appellee that the criminal case has not ended A collateral purpose is to intimate and prompt the Registrar to prepare the record of appeal under Rule 64 (1). This responsibility incumbent upon him in a criminal appeal is activated by the notice of appeal. In addition, where this Court and the High Court have concurrent jurisdiction, for example, leave to appeal (section 5 (1) (c) Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and Rule 44) the notice of appeal indicates the proper channel to be pursued by an applicant in seizing the appropriate Court – **Jaffari Sanya Jussa and Another v Saleh Sadiq Osman,** Civil Appeal No. 54 of 1997 (CA) (unreported). By the notice of appeal the Court is not being invited to render any decision thereon and on that notice of its own accord.

Four, Rule 61 (1) provides:

> *"**Any prisoner who desires to appeal to the Court shall give notice,** which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and **the notice of appeal shall institute the appeai**"* (Emphasis added).

It is to be observed that in Rule 76, which governs a notice of appeal in a civil matter, it is not laid down therein that the notice of appeal institutes the civil appeal. Reading Rule 61 as a whole and in its context, it would seem to us that by prescribing in Rule 61 (1) that **"the notice of appeal shall institute the appeal"**, it was conceived that once the notice of appeal respectfully fulfilled the requirements laid down in Rule 61 (1) to (7) as a matter of law, the appeal is to be taken as duly instituted.

From an overall reading of the Rules, it may in passing be observed that given an appellant's statutory right of appeal in a criminal case where he or she is challenging a conviction and/or

sentence, it would be reasonable to suggest that the pedestal from which he or she institutes a notice of appeal is somehow different to that of an appellant in a civil appeal whom it is expected would be an initiator of the court process in seeking remedy or relief from the Court in an appeal. It stands to reason that a number of Rules go to unburden the appellant in a criminal case, (e.g. Rules 63, 64 (1)) and specially one who is in prison (e.g. 68 (2) (b)).

Five, the considerate view we are disposed to take is reinforced by yet another reason. A notice of appeal initiates an aggrieved party's right of appeal as granted by statute and regulated by the Rules. As directed in Rule 61 (1) it triggers the appeal process (see, **Tanzania Telecommunications Company Limited and Three Others v Tri Telecommunications Tanzania Limited,** Civil Appeal No. 61 of 2003 (CA) (unreported). The objectives as we have stated have a lot to do with formally informing the respondent Republic or prevailing party that the loosing party is seeking an appeal by the higher court and that the criminal case has not ended. An appellant who prefers a notice of appeal does not confer or grant jurisdiction to the Court to hear and determine the appeal. It is a

well settled principle of law that the Court's exercise of appellate jurisdiction is conferred by statute. Not by a party or parties to an appeal. We recall that the jurisdiction of this Court in criminal appeals is provided for in section 6 of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002.

That said, and for the avoidance of doubt, we are not at all suggesting that a competent notice of appeal is not a core or essential document in the record of appeal in a criminal case (see, Rule 64 (2) (j)). Undoubtedly, it is. A notice of appeal must dutifully comply with Rule 61 (1) to (7).

Taking the arguments ingeniously put forward by the respondent Republic, it would also be fair to observe that it was not pressed to us that the appellants memorandum of appeal lodged on 12.06.2008 pursuant to Rule 65 (1) and whose contents are required to comply with Rule 65 (2) and (4) also central to the determination of the appeal was also to be preferred by a citation of a relevant provision of the law granting the Court jurisdiction to entertain and determine the criminal appeal. What is required of a memorandum

of appeal under Rule 65 (4) is what is demanded of a notice of appeal by Rule 61 (7). When all is borne in mind, with respect, we are of the considered view that the non-citation of Rule 61 as the relevant provision of the law in the appellant's notice of appeal instituted on 24.12.2004 is not fatal. The essential contents of the notice of appeal complied with Rule 61 (7). It was undisputed that it had abided by Rule 61 (1) and it is to be taken as expressly stated therein to have duly instituted the appeal.

In the final analysis and for all the foregoing reasons, with respect, we are constrained to dismiss the preliminary objection, which we hereby do. Ordered accordingly.

DATED at MWANZA this 22nd day of May, 2009.

E. A. KILEO
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

S. A. L. MASSATI
JUSTICE OF APPEAL

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

(P. A. LYIMO)
DEPUTY REGISTRAR