

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 254 OF 2007**

**1. GIMALENI OLEMASHALE**  
**2. LETWETI MARIKA** } ..... **APPELLANTS**  
**VERSUS**

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

**(Appeal from the Ruling of the High Court of Tanzania  
at Tabora)**

**(Chinguwile, J.)**

**Dated the 23<sup>rd</sup> day of February, 2007  
in  
Criminal Application No. 99 of 2003**  
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**RULING OF THE COURT**

4 & 7 JUNE, 2010

**MBAROUK, J.A.:**

Earlier on in this appeal, the 1<sup>st</sup> appellant's appeal was marked abated under Rule 78 (1) of Court of Appeal Rules, 2009 after the Court was informed that he has died since 31-7-2008 as per the death certificate filed in Court. Thus we are left with only the 2<sup>nd</sup> Appellant Letweti s/o Marika in this appeal.

At the District Court of Meatu at Mwanhuzi, the appellant and two others were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. On 27-6-1997, the three accused persons, appeared before the trial court and apparently pleaded guilty. They were consequently convicted as charged and sentenced to forty (40) years imprisonment and twenty (20) strokes of case each.

The appellants were late in filing their appeal before the High Court. On 9.4.2003, the appellant and the late Gimaleni filed separate applications seeking for an extension of time to file both the notice of intention to appeal and the memorandum of appeal. The High Court (Chinguwile, J.) consolidated the applications and arrived to a decision at dismiss the consolidated application for lack of merits. Undaunted, they filed their notices of appeal and memorandum of appeal.

At the hearing, the appellant appeared in person, whereas the respondent/Republic was represented by Mr. Edgar Luoga, the learned Senior State Attorney. Mr. Luoga raised an objection to the effect that the appeal is incompetent before the Court having contravened Rule 61 (2) of the Court of Appeal Rules, 1979. He submitted that the notice of appeal lodged by the appellant states that, "*the appellant is appealing against conviction and sentence*", which is not the case. Mr. Luoga said, the High Court has yet to hear the appeal on conviction and sentence of the trial court on merit. He added that, what the High Court has done is only to hear an application for extension of time and thereafter dismissed it. He further contended that Rule 61 (2) of the 1979 Rules requires every notice of appeal to state briefly the nature of acquittal, conviction, sentence, order or finding against which it is desired to appeal. However, he said, the appellant contravened the mandatory provision of Rule 61 (2) by stating he is appealing against conviction and sentence instead of appealing against the ruling of the High Court which dismissed his application for extension of time.

For that reason, Mr. Luoga urged us to strike out the appeal for being incompetent.

The appellant left to the Court to reach to a decision understandably so being a lay person not conversant with this purely legal and technical issue.

On our part, we fully agree with Mr. Luoga that Rule 61 (2) of the 1979 Rules has been violated by the appellant. The same reads as follows:

***"Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal, and shall contain a full and sufficient address of which any notice or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 14, shall be signed by the appellant or his advocate."*** (Emphasis added).

The notice of appeal filed by the appellant has failed to state the nature of an order or finding of the High Court against which it is desired to appeal. The notice of appeal shows that, the appellant is appealing against conviction and sentence, instead of appealing against the ruling of the High Court after having his application for extension of time dismissed. After all, the High Court has yet to determine the appeal on conviction and sentence on merits. That surely, a in contravention of Rule 61 (2) of the 1979 Rules.

Rule 61 (1) of the 1979 Rules mandatorily states that the notice of appeal shall institute the appeal. However, having found that Rule 61 (2) has been contravened, that makes the appellants' notice of appeal incompetent. Since a notice of appeal institutes an appeal, and since the notice filed by the appellant is incurably defective, the appeal is incompetent. We are increasingly of the view that this appeal should be struck out.

In the event, and for the reasons stated herein above, the appeal is hereby struck out with liberty to re-institute it if the appellant so wishes.

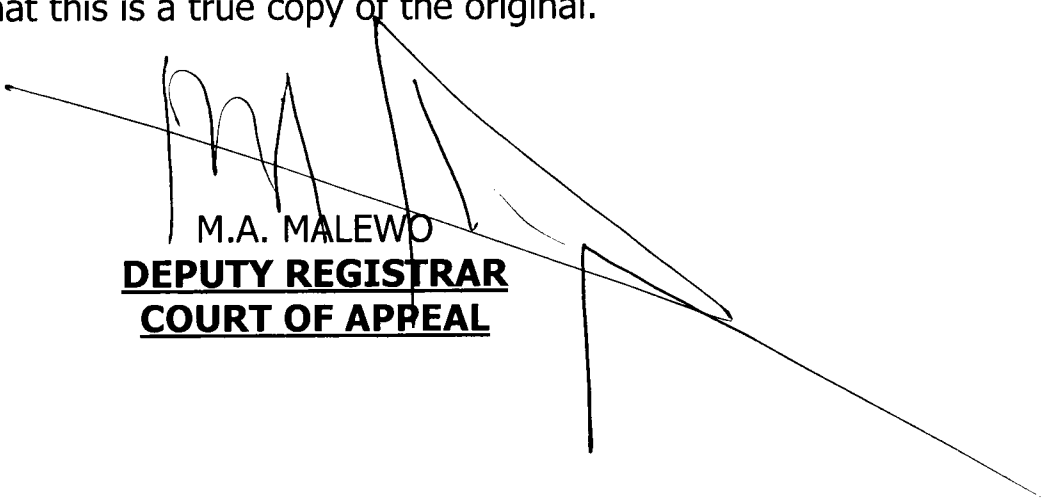
DATED at TABORA this 5<sup>th</sup> day of June, 2010.

E.M.K. RUTAKANGWA  
**JUSTICE OF APPEAL**

M.S. MBAROUK  
**JUSTICE OF APPEAL**

S.A. MASSATI  
**JUSTICE OF APPEAL**

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

  
M.A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**