IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 316 OF 2007

MHULI JIBUNGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mziray, J.)

dated the 6th day of July, 2007
in
Misc. Criminal Application No. 15 of 2004

RULING OF THE COURT

7th & 11th June, 2010

MBAROUK, J.A.:

The appellant and another, were convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code in Criminal Case No. 8 of 1993 by the District Court of Meatu at Mwanhuzi. They were sentenced to thirty (30) years imprisonment and twelve strokes of the cane each. The appellant stayed for a period of ten (10) years without filing his appeal before the High

Court. This was since 1-9-1994 when the trial court convicted and sentenced the appellant until 31-12-2003 when he filed his application before the High Court for extension of time to lodge his notice of intention to appeal and petition of appeal. The High Court (Mziray, J.) dismissed the application for being devoid of merit. Dissatisfied, the appellant has lodged his notice of appeal and memorandum of appeal to this Court.

In this appeal, the appellant appeared in person, whereas the respondent/Republic was represented by Mr. Jackson Bulashi, the learned Senior State Attorney.

At the hearing, Mr. Jackson Bulashi, raised an objection to the effect that Rule 61 (2) of the Court of Appeal Rules, 1979 has not been complied with. He submitted that, in this appeal, the appellant's notice of appeal is against conviction and sentence. However, he noted that the High Court's (Mziray, J.) ruling is from the application filed by the appellant seeking for an extension of time to lodge a notice of intention to appeal and petition of appeal before

the High Court. Mr. Bulashi contended that Rule 61 (2) requires every notice of appeal to state briefly the nature of acquittal, conviction, sentence, order or finding against which it is desired to be appealed. In the instant case he said, the appellant has not complied with the provisions of Rule 61 (2), by stating that he really intends to appeal against the ruling of Mziray, J. dated 6.7.2007, instead he has stated that he is appealing against conviction and sentence. Mr. Bulashi reiterated that, that is in contravention to Rule 61 (2) of the 1999 Rules. For such a defect, Mr. Bulashi urged us to find the appeal to be incompetent, hence he prayed for it to be struck out.

On his part, the appellant being a lay person had nothing much to say, except for his prayers that the Court considers his status as a prisoner and that he cannot do anything in jail with the directions from Prison Authorities. He then left to the Court to reach to a just decision.

We, on our part, have carefully considered the rival submissions from both sides to the objection raised by the learned

Senior State Attorney. Thereafter we have arrived to the following conclusion: looking at the Rules of this Court as our guide, we are of the considered opinion that, surely Rule 61 (2) of the 1979 Rules was not complied with by the appellant. The said Rule reads as follows:

> ***"Every notice of appeal shall state briefly the nature*** *of the acquittal, conviction, sentence,* ***order or finding against which it is desire 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).

In the instant appeal, the notice of appeal shows that the appellant is appealing against the conviction and sentence and not appealing against the ruling of the High Court (Mziray, J.) which dismissed his application for extension of time. The appellant could not have appealed against conviction and sentence, because the High Court has yet to entertain his appeal on merits. Rule 61 (2) of the

1979 Rules is couched in mandatory terms by using the word "*shall.*" In this appeal, there is no doubt that the mandatory requirements of Rule 61 (2) were not complied with. Similarly, Rule 61 (1) of the 1979 Rules which fortunately is also couched in mandatory terms states that the notice of appeal **shall** institute the appeal.

Since a notice of appeal institutes an appeal, whereas the notice of appeal in the instant appeal has been found to be defective that surely renders the appeal to be incompetent. (See, for instance, the decisions of this Court in **Luchalamila Mawanga v. R**, Criminal Appeal No. 319 of 2007 and **Gimaleni Olemashale** and **Letweti Marika v. R.**, Criminal Appeal No. 254 of 2007 (both unreported)

In the event, we find the appeal to be incompetent, and we hereby strike it out. The appellant is at liberty to re-institute his appeal in accordance with the existing provisions of the law if he so wishes.

DATED at TABORA this 9th 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