IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM:MBAROUK, J.A., MANDIA,J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 178 OF 2013

1. EDWIN FABIAN TALLAS
2. MOHAMED ALLY MASHA } **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzaniaat Tabora)

(Lukelelwa, J.)

dated the 18th day of February, 2013
in
Criminal Appeal No. 24 & 25 of 2009

.....

RULING OF THE COURT

20th&25th September, 2013

MANDIA, J.A.:

The appellants appeared in the Court of Resident Magistrate of Kigoma at Kigoma on a charge sheet containing twenty four counts, the particulars of which were shown in the charge sheet. The appellants had been charged jointly with one Athumani Waziri

Mahanyu who was acquitted after the prosecution had closed its case after the trial court made a finding that the prosecution had not made out a prima facie case against him. This left the two appellants to make out their defence, at the end of which the trial court found them guilt, convicted them and sentenced each one of them to respective sentences of imprisonment ranging from two years to seven years, with an order that the sentences be served concurrently.

In addition to the terms of imprisonment, the trial court ordered the first appellant to compensate the Kigoma District Council Shs. 25, 700,000/=, and the second appellant to compensate the Kigoma District Council Shs. 51, 400,000/=. These sums are monies which the appellants were adjudged to have obtained from the Kigoma District Council through false pretenses.

The appellants were dissatisfied with the conviction, sentence and orders of compensation and preferred a joint appeal to the High Court of Tanzania at Tabora which upheld the conviction against the first appellant in all the counts except the 13th, 23rd and 24th Courts

and also upheld the conviction against the second appellant only in the 23rd count. As regard sentence, the appellate sentence of four years imprisonment against the first appellant in the counts where conviction was upheld, and also imposed a sentence of imprisonment for four years against the second appellant in the 23rd counts where conviction was upheld. The appellants were not satisfied with the convictions and sentences entered by the appellate High Court, hence this appeal.

When the appeal came up for hearing the appellant was represented by Mr. Godfrey Wasonga, learned advocate, while the respondent Republic was represented by Mr. Jackson Bulashi, learned Principal State Attorney assisted by Mr. Hashim Ngole, learned Senior State Attorney and Ms. Jane Mandago, learned State Attorney. The respondent Republic has filed a notice of preliminary objection on a point of law which was argued by Mr. Hashimu Ngole. Mr. Hashim Ngole pointed out two defects in the notice of appeal which he claimed were fundamental defects which make the appeal incompetent. The first defect is the heading of the appeal. Instead of

the appellant showing that it is a Criminal Appeal, he showed that it is an election appeal. Further down, however, the appellant showed that the appeal is from the decision of the High Court of Tanzania presided over by Mr. Justice Lukelelwa dated 18th February, 2013 in Criminal Appeal No. 24 of 2012 and Criminal Appeal No. 25 of 2012. Mr. Hashim Ngole pointed out a second defect in which he said the notice of appeal does not point out the conviction, sentence, finding or order being appealed from. He referred us to the authorities of Daud Mwampamba versus The Republic, Criminal Appeal No. 204 of 2009 (unreported). Emmanuel Andrew Karengo versus The Republic, Criminal Appeal No. 432 of 2007 (unreported) to buttress his argument that the defects he pointed out were fatal, and that the appeal was incompetent and should be struck out.

In reply to the address by Mr. Hashim Ngole, Mr. Godfrey Wesonga argued that the appearance of the word election appeal in the heading is a typing error which has not caused a miscarriage of justice and is correctable through amendment. On the failure to comply with Rule 68(2) of the Court of Appeal Rules, 2009, Mr.

Godfrey Wesonga conceded that the defect is fundamental and fatal and can only lead to the appeal being struck out. He pointed out to another defect which is non-compliance with Rule 68 (6) of the Court of Appeal Rules, 2009.

We have given due scrutiny of the notice of appeal, the gist of which is reproduced below:-

TAKE NOTICE that EDWIN FABIAN TALAS and MOHAMED ALLY MASHA, the Appellants herein above named being dissatisfied with the part of decision of the Honourable Mr. JUSTICE LUKELELWA given at Tabora on the 18th day of February, 2013 in Criminal Appeal No. 25 of 2012 intend to appeal to the court of Appeal of Tanzania against the whole of the said decision not in favour of the appellants.

We have had a close look at the Notice of Appeal filed by the "Election Appeal No..... of 2013." But further down it clearly indicates that the appellants have the intention of appealing against a decision of the High Court of Tanzania which sat as an appellate court exercising its Criminal jurisdiction. We are satisfied that what appears

is a typographical error as argued by the appellant, and that this error can be corrected in the manner specified in Rule 20 of the Court of Appeal Rules, 2009.

Things are more serious, however, when we come to the content of the notice. The notice purports to appeal *"against the whole of the said decision not in favour of the appellants."* The Daud Mwampamba case (supra) and Kanengo case (supra) have interpreted the purport of Rule 61(2) of the Court of Appeal Rules, 1972 which is in pari material with Rule 68 (2) of the Court of Appeal Rules, 2009. In addition, there is Criminal Appeal No. 105 of 2013, Mwanya Ally Dadi @ Hamisi Mussa Mtondoima which interpreted Rule 68 (2) of the court of Appeal Rules, 2009. The authorities cited lay down two points of law. The first point is that laid down in the Daud Mwampamba case (supra), that to qualify as a notice of appeal, such notice must state the nature of conviction sentence order or finding against which it desires to appeal. The second point is raised in the Emmanuel Andrew Karengo case (supra) as well as in the Daud Mwampambwa case (supra), and this is that failure to adhere to the mandatory

requirements of Rule 68 (2) makes an appeal incompetent for want of a valid notice of appeal. An incompetent appeal can only be struck out.

We accordingly strike out the appeal before us. The appellant is free to file a fresh notice of appeal if he is still desirous of pursuing his appeal.

It is so ordered.

DATED at TABORA this 25th day of September, 2013.

M. S. MBAROUK

JUSTICE OF APPEAL

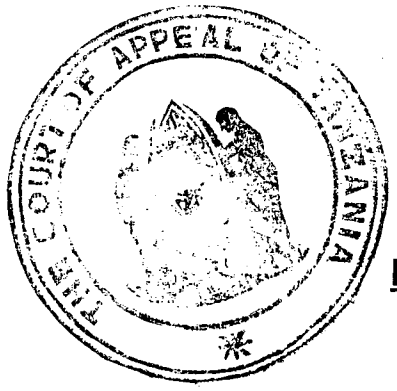
W. S. MANDIA

JUSTICE OF APPEAL

B. M. MMILLA

JUSTICE OF APPEAL

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



Z. A. MARUMA

DEPUTY REGISTRAR

COURT OF APPEAL