

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LUANDA, J.A., MJASIRI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 48 OF 2012

SHUKURU TUNUGU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the
High Court of Tanzania at Sumbawanga)**

(Rwakibarila, J.)

**dated the 4th day of July, 2011
in
Criminal Appeal No. 11 of 2011**

RULING OF THE COURT

18th & 19th June, 2013

JUMA, J.A.:

This Ruling relates to a Notice of Preliminary Objection filed by the respondent Republic on 17th June 2013 under Rule 4 (2) (a) of the Tanzania Court of Appeal Rules, 2009. By this notice, the respondent draws the attention of this Court to the record of appeal which the appellant, Shukuru Tunugu filed without including a copy of a Notice of Appeal.

This appeal, the subject of preliminary point of objection, may be traced back to 30th May 2006 when the appellant was convicted by the District Court of Mpanda (A.L. Mlegehi- Honorary Magistrate) for the offence of rape contrary to sections 130 (2) (a) and 131 of the Penal Code, Cap. 16. He was sentenced to serve thirty years in prison. On appeal, the High Court of Tanzania at Sumbawanga (Rwakibarila, J.) not only confirmed his thirty year prison sentence; but in addition the first appellate court ordered the appellant to suffer twelve strokes of the cane, and to pay the victim of his crime a sum of Tshs. 2,000,000/=. In this second appeal, the appellant preferred seven grounds of appeal for determination by this Court.

When this appeal came up for hearing on June 18, 2013, Ms Scholastica Lugongo, learned State Attorney for the respondent, expounded on the point of objection and informed the Court that a copy of the notice of appeal was not included in the record of appeal. Placing reliance on Rule 68 (1) of the Court of Appeal Rules, 2009, Ms Lugongo submitted that a notice of appeal in writing, lodged with the Registrar of the High Court within thirty days of the date of that decision; is a

mandatory legal requirement which the appellant has not complied with. The learned State Attorney submitted that without a Notice of Appeal there is nothing on which this appeal can stand, consequently, the appeal should also be struck out. She emboldened her argument by referring us to our decision in **CRIMINAL APPEAL No. 203 of 2009, HILDA ANDOLILE @ PANJANI VS THE REPUBLIC (unreported)**, Ms. Lugongo urged us to strike out this appeal.

When asked to respond to the suggestion that his appeal should be struck out for lack of Notice of Appeal the appellant expressed his surprise why the record is lacking the Notice of Appeal a copy of which he has in his prison file. The appellant, though conceding that a copy of his Notice of Appeal is missing from the record of appeal, urged this Court to grant him a short adjournment to rectify the anomaly and pave the way for hearing of his appeal. Ms Lugongo would have none of this possibility of short adjournment. The learned State Attorney insisted that hearing of this appeal is guided by the contents of the record of appeal, and it is not enough to fill a Notice of Appeal if the record of appeal does not have any

such copy. She advised the appellant to make a fresh start in accordance with the law.

From submissions, the learned State Attorney has with due respect articulated the correct position of the law laid down in many of our decisions including the case of **HILDA ANDOLILE @ PANJANI (supra)** which she cited. The position is, without a Notice of Appeal there would be no competent appeal for determination by this Court. In his submissions, the appellant suggested that he had with him a Notice of Appeal dated 6th July 2011 which should be regarded as sufficient notice for purposes of this appeal. Unfortunately, for purposes of appeals to this Court, we rely on record certified by the relevant District Registrar of the High Court as a true copy of the original. Therefore, notice of appeal must be one forming part of the record of appeal which the Registrar of the High Court of Tanzania at Sumbawanga certified on 6th June 2012.

Needless to say, appeals to this Court are governed by the Appellate Jurisdiction Act, Cap. 141 and the Tanzania Court of Appeal Rules, 2009. The law is now settled that it is a notice of appeal filed in accordance with

Rule 68 (1) of the Rules, which institute criminal appeals in this Court (**see for example:** CRIMINAL APPEAL NO. 97 OF 2009, **ISRAEL ABRAHAM VS THE REPUBLIC** (unreported); **HILDA ANDOLILE @ PANJANI (supra)**; and CRIMINAL APPEAL NO. 156 OF 2012, **1. ELIA MASENA KACHALA, 2. ANDREA CHAKWE, 3. SAMWEL MAKAGO VS. THE REPUBLIC** (unreported)). The relevant Rule 68 (1) is couched in a mandatory language, it provides:

68.-(1) Any person who desires to appeal to the Court shall give notice in writing, 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 thirty days of the date of that decision, and the notice of appeal shall institute the appeal.

This Rule required the appellant to lodge his Notice of Appeal within thirty days of 4th July 2011 when Rwakibalira, J. delivered his decision. The missing Notice of Appeal is a clear non-compliance with the mandatory provisions of Rule 68 (1). A record of an appeal which does not contain a Notice of Appeal is not only incomplete but it is also fatally defective and invalid for purposes of initiating an appeal to this Court. Without a Notice

of Appeal the record of appeal and memorandum of appeal are all defective.

Having found that the notice of appeal which lawfully institutes this appeal is missing, there is no competent appeal before the Court. It is; however, still open to the appellant to file a fresh appeal, as per requirements of the law.

Otherwise this appeal is struck out. It is so ordered.

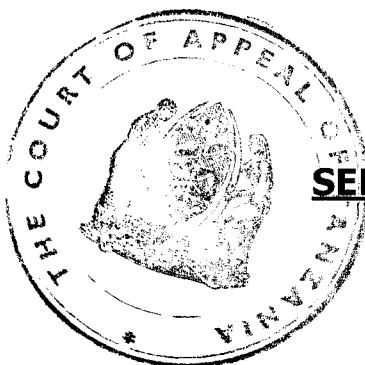
DATED at MBEYA this 18th day of June, 2013.


B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL