

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

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And LUANDA, J.A.)

CRIMINAL APPEAL NO. 265 OF 2014

RASHIDI MAKORANI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Arusha)**

(Munisi, J.)

Dated 19th day of February, 2014

in

Criminal Appeal No. 77 of 2009

RULING OF THE COURT

20th & 27th October, 2014.

MBAROUK, J.A.:

In the District Court of Same at Same, the appellant was arraigned for the offence of rape contrary to sections 130 (1) and 131 (3) of the Penal Code, Cap. 16 R.E. 2002. The particulars of the offence were to the effect that on the 13th day of September, 2007 at about 14:00 hrs. at Gonja Village

within Same District in Kilimanjaro Region, the appellant had unlawfully sexually intercourse with Fatuma d/o Muhaka a child of four months. The trial District Court convicted the appellant under section 235 of the Criminal Procedure Act, 1985 and sentenced him to life imprisonment. Dissatisfied, his appeal before the High Court (Munisi, J.) partly succeeded when the offence of rape was substituted with the offence of Grave Sexual Abuse contrary to section 138 C (1) (a) and (2) (b) of the Penal Code. After being convicted with the offence of Grave Sexual Abuse, the sentence of life imprisonment was set aside and substituted thereof with the sentence of thirty (30) years imprisonment. Undaunted, the appellant preferred this appeal.

At the hearing of the appeal, the appellant fended for himself, whereas Ms. Neema Mwanda, learned Principal State Attorney, represented the respondent/Republic. The appellant preferred a memorandum of appeal containing seven grounds

of appeal, but in essence they were reduced into three grounds of appeal as the remaining four grounds of appeal were not before the High Court. The existing three grounds of appeal read and we quote them verbatim:-

- "1. That, the learned trial magistrate and the first appellate court erred in law and fact for holding and making findings to convict the appellant with an offence which was not proved at all as the law required as charged.*
- 2. That, the first trial court and the Senior Court on first appeal grossly erred both in law and fact for holding and making findings to convict the appellant without noted that the prosecutor did not*

mention nor name the number of intended witnesses to call.

3. That, the first court and the first appellate court grossly erred in law and fact for holding and making findings to convict the appellant while they failed to comply with section 186 (3) of the CPA, Cap. 20 R.E. 2002."

In the course of hearing the appeal, the Court noted a serious issue which needed to be resolved first, before the appeal proceeded for hearing. The pertinent issue which prompted the Court to raise the issue *suo motu* is the defect found in the notice of appeal. In that notice of appeal, the appellant indicated to have been convicted of the offence of rape, but the record of appeal at page 53 shows that the

appellant was convicted of the offence of Grave Sexual Abuse and not rape.

Rule 68 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) mandatorily states and the same reads as follows:-

*"(2) Every notice of appeal **shall** state briefly the nature of the acquittal, **conviction**, sentence, order or finding against which it is desired to appeal,"*

[Emphasis added].

In the instant appeal, the appellant failed to comply with the mandatory requirements of the provisions of Rule 68 (2) of the Rules. Instead of stating that he was convicted of the offence of Grave Sexual Abuse in his notice of appeal, the appellant indicated to have been convicted of rape. This

defect surely renders the notice of appeal and the appeal incompetent for violating the requirements of Rule 68 (2) of the Rules.

Ms. Mwanda out-rightly agreed that the requirements under Rule 68 (2) of the Rules were violated for failure to state the offence he was convicted with. She added that as far as Rule 68 (1) of the Rules mandatorily states that it is the notice of appeal which shall institute the appeal, and as far as the notice of appeal is defective that means there is no appeal before the Court. For that reason, she urged us to strike out the appeal.

As pointed out earlier, the defect was noted by the Court in the course of hearing the appeal, hence we have seen no need of discussing the grounds of appeal raised in the memorandum of appeal. We fully agree with Ms. Mwanda

that, non-compliance with Rule 68 (2) of the Rules renders the appeal incompetent, hence this appeal has to be struck out. In the event, the appeal is hereby struck out. It is so ordered.

DATED at **ARUSHA** this 22nd day of October, 2014.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

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


F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL