

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 407 OF 2013

1. DAUDI S/O MWAKALINGA

2. BARAKA LYELA

.....**APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Chocha, J.)

dated the 22nd day of July, 2013

in

PC. Criminal Appeal No. 13 and 14 of 2013

RULING OF THE COURT

20th & 22nd October, 2014

MJASIRI, J.A.:

In the Primary Court of Makangolosi in Chunya District, the appellants Daudi Mwakalinga and Baraka Lyela were charged and convicted of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. They were each sentenced to fifteen (15) years imprisonment.

Being aggrieved by the decision of the Primary Court they appealed to the District Court of Chunya.

Their appeal was unsuccessful. Their appeal to the High Court was struck out for being incompetent, hence this appeal.

When the appeal was called on for hearing, Mr. Edwin Kakolaki, learned Principal State Attorney rose to raise preliminary points of law, a notice of which was filed earlier in terms of Rule 107(1) of the Tanzania Court of Appeal Rules 2009 (the Court Rules). The preliminary objections were based on the following grounds which are reproduced as under: -

- "1. The appeal is incompetent in law for containing a defective notice of appeal.*
- 2. The appeal is improperly before this Honourable Court as there is no certificate to prove that a point of law is involved."*

In relation to ground No. 1, Mr. Kakolaki submitted that the notice of appeal is defective and that the appeal is therefore incompetent and should be struck out. The notices of appeal are against the decision of Chocha, J., in criminal case No. 18 of 2009. Chocha J. did not hear Criminal Case No. 18 of 2009, and did not determine PC criminal appeal (No. 18 of 2009) on merit as the appeal was struck out for being incompetent. He made reference to Rule 68(1) of the Court Rules and stated that, it is the notice of appeal which institutes the appeal. He also relied on the case of **DPP V. ACP ABDALLAH ZOMBE AND 8 OTHERS**, Criminal Appeal No. 254 of 2009 CAT (unreported).

On the second ground of objection, Mr. Kakolaki submitted that as the appeal originates from the Primary Court a certificate on a point of law needs to be issued by the High Court before an appeal can be considered by the Court of Appeal. This is in accordance with Section 6(7) (b) of the Appellate Jurisdiction Act, 1979, Cap. 141, R.E. 2002. He made reference to **EMMANUEL KABENGA V. REPUBLIC**, Criminal Appeal No. 37 of 2013 CAT (unreported).

Both appellants, who appeared in person and without the benefit of any legal representation did not have much to say, as the issues raised by the learned Principal State Attorney were points of law. We on our part entirely agree with the submissions made by Mr. Kakolaki.

It is evident from the record that the notices of appeal filed by the appellants are defective. Indeed it is the notice of appeal which institutes the appeal as provided under Rule 68(1) of the Court Rules. The relevant provision is reproduced as under: -

"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."

[Emphasis ours].

The law is settled that if a defective notice is lodged there is no competent appeal which is capable of being entertained by the Court. See **ELIA MASENA KACHALA AND OTHERS V REPUBLIC**, Criminal Appeal No. 156 of 2012; **JOHN PETRO V REPUBLIC**, Criminal Appeal No. 257 of 2008, CAT (both unreported) and **DPP V ACP ABDALLAH ZOMBE** (supra).

The absence of a certificate on a point of law is an obvious non-compliance with the requirements under the law. Section 6(7) (b) of the Appellate Jurisdiction Act provides as follows: -

"Either party to a proceedings of a criminal nature under Head (c) of the Part III of the Magistrates' Court Act Cap. 11, R.E. 2002 may if the High Court certifies that a point of law is involved, appeal to the Court Appeal."

In view of the fact that no certificate was sought and/or obtained, the appeal is incompetent. See **RAJABU NGWADA AND THREE OTHERS V. REPUBLIC**, Criminal Appeal No. 238 of 2010, CAT (unreported).

For the foregoing reasons we uphold the preliminary objections raised by the learned Principal State Attorney and we hereby strike out the appeal for being incompetent.

The appellants can still pursue their rights subject to the laws of limitation by first applying in the High Court for extension of time to lodge their appeal in the High Court. Hearing of the application (and the appeal in the event the application is granted) should be given a priority and should be heard before a different Judge.

It is so ordered.

DATED at **MBEYA** this 20th day of October, 2014.



E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "P. W. Bampihya", is written over a horizontal line.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL