

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 36 OF 2013

FRENK BENSON MSONGOLE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwangesi, J.)

dated the 09th day of July, 2012

in

Criminal Appeal No. 49 of 2010

RULING OF THE COURT

21st October, 2014

MJASIRI, J.A.:

This appeal arises from the decision of the District Court of Mbeya where the appellant was charged and convicted of rape contrary to section 130(2) of the Penal Code Cap. 16 R.E. 2002 (the Penal Code) on the first count and abduction contrary to sections 246 and 249 of the Penal Code. He was sentenced to thirty years imprisonment on the first count and three years imprisonment on the second count. His appeal to the High Court was unsuccessful.

At the hearing of the appeal the appellant appeared in person and was unrepresented whereas the respondent Republic had the services of Ms Rhoda Ngole.

Ms. Ngole raised a preliminary objection that the Court has no jurisdiction to entertain the appeal as the notice of appeal is defective. She submitted that the notice of appeal makes reference to Criminal Case No. 202 of 2009, (Mwangesi, J.) which is non-existent. She argued that it is the notice of appeal which institutes the appeal.

The appellant on his part, a layman without any legal representation did not have much to say. He only lamented that this is not his fault as all the necessary paperwork is processed by the prison authorities and then filed in Court. He urged the Court to proceed with the appeal.

We on our part are inclined to agree with the learned State Attorney, that the notice of appeal is indeed defective as it makes reference to a non-existent matter.

Rule 68(1) of the Tanzania Court of Appeal Rules, 2009 (the Court Rules) clearly indicate that it is the notice of appeal which institutes an appeal. Therefore once the notice of appeal is defective the appeal is incompetent.

Rule 68(1) of the Court Rules 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 the decision, **and the notice of appeal shall institute the appeal.**"*

[Emphasis ours]

The law is settled. As long as the notice of appeal on record is defective and is purporting to institute an appeal against a non-existent judgment, there is no competent appeal before the Court. See for instance **ELIA MASENA KACHALA AND OTHERS V REPUBLIC**, Criminal Appeal No. 156 of 2012 and the **DIRECTOR OF PUBLIC PROSECUTIONS VERSUS ACP ABDALLAH ZOMBE AND 8 OTHERS**, Criminal Appeal No. 254 of 2009 CAT (both unreported).

The issue of defective notice in essence involves the question of jurisdiction which is so fundamental. See **TANZANIA REVENUE AUTHORITY v KOTRA CO. LTD**, Civil Appeal No. 12 of 2009 CAT (unreported).

In view of the reasons stated hereinabove we are of the considered view that the appeal is incompetent and it is hereby struck out. The

appellant is at liberty to pursue his rights in the High Court by applying for extension of time to file a notice of appeal.

DATED at **MBEYA** this 21st 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.


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL