

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

(CORAM: OTHMAN, C.J., KIMARO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 89 OF 2015

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONAPPELLANT

VERSUS

SAID ABDALLA KINYANYITE AND 11 OTHERS.....RESPONDENT

**(Appeal against the orders and rulings of the High Court of Zanzibar
at Vuga)**

(Makungu, C. J.)

dated 20th day of January, 2012 and 1st day of July, 2014

in

Criminal Case No. 01 of 2012

RULING OF THE COURT

30th November, 2015 & 8th December, 2015

OTHMAN, C.J.:

When the appeal was called on for hearing, Dr. Masumbuko Lamwai, learned Advocate for the 7th respondent, raised a point of law amounting to a preliminary objection that it was improper in this appeal for the appellant Republic to have impleaded in the notices of appeal, the 1st respondent,

Said Abdallah Kinyanyite as he had neither appeared before the High Court nor had he been tried by it in Criminal Case No. 01 of 2012 giving rise to this instant appeal.

He added that the appellant Republic's notices of appeal filed on 21/01/2014, 24/03/2014 and 01/07/2014 were defective in that they had named the 1st respondent only and even if his name was struck out under Rule 4(2)(b) of the Court of Appeal Rules, 2009, its effect would be that there was no appeal against the other 11 respondents as the notices of appeal would be against "11 others", whose identities have not been spelt out.

Furthermore, he submitted that the notices of appeal did not meet the requirements of Rule 68(1) and (2) as, (a) they were all titled "Criminal Appeal" instead of "*In the matter of an intended Criminal Appeal*" and in particular, (b) the notice of appeal dated 01/07/2014 against the order of the High Court delivered on 30/06/2014 had indicated that the intended appeal was against an order "dismissing" the case, while the actual order being appealed against was one "discharging" the respondents. The notices of appeal, he urged, were not substantially in FORM B in the First Schedule to the Rules as required by Rule 68(7).

In support of the preliminary objection, Mr. Salim Mkonje, learned Advocate for the 1st respondent, submitted that it was mandatory under Rule 68(2) for a notice of appeal to indicate the name of the respondent and a full and sufficient address. The appellant Republic's notices of appeal had serious shortcomings. They contained the names of only four Law Firms or Chambers and as such did not meet the requirement of Rule 68(2). He also faulted the notices of appeal for not having been properly indorsed by a learned State Attorney as required under section 4 of the Law Practitioners Decree, Cap. 28, Laws of Zanzibar.

Agreeing, Mr. Hamid Mbwezeleni, learned Advocate for the 2nd, 3rd, 4th, 9th, 10th, 11th and 12th respondents submitted that in a criminal appeal the Court proceeds against an individual. That if the name of the 1st respondent who was absent in the proceedings in the High Court and in this Court, is removed, the individual persons who would remain on the appeal would only be "11 others". It is an erroneous assumption to consider that these unnamed "11 others" are the same accused persons who appeared before the High Court in Criminal Case No. 1 of 2012. That the notices of appeal been properly brought the "11 others" on appeal

before this Court and are thus the notices of appeal were incurably defective.

Mr Abdallah Juma, learned Advocate for the 6th and 8th respondents agreed.

Opposed to the preliminary objection, Ms. Aziza Suedi, learned Senior State Attorney readily conceded that the 1st respondent had never appeared before the High Court in Criminal Case No. 01 of 2012. She clarified that it is not known whether or not he is alive or dead and his whereabouts are unknown even to his family. She vehemently disagreed that striking out the name of the 1st respondent in the notices of appeal would render them defective. She contended that there is no requirement under Rule 68 (2) and (7) to name each and every respondent in the notice of appeal. That it was also an acceptable Court practice to name and refer in a notice of appeal, additional respondents as "others". That if the name of the 1st respondent is struck out from the notices of appeal, they would either read '*Director of Public Prosecutions v. 11 others*' or the 2nd respondent (i.e. second accused at the High Court, Makame Hasnu Makame) would be automatically substituted and the notices of appeal would read '*Director of Public Prosecution v. Makame Hasnu Makame and*

10 others'. She relied on **Director of Public Prosecution v. Farid Haji Ahmed and 9 others**, Criminal Appeal No. 96 of 2012 (CAT, unreported).

Ms. Suedi acknowledged that the appellant Republic had omitted to write as the title of the Notices of appeal "*In the matter of an Intended Criminal Appeal*" as provided in Form B in the First Schedule to the Rules. However, by writing instead, "Criminal Appeal" as the appellant Republic had done, the notices of appeal had served their intended purpose and were not rendered defective. Furthermore, it was sufficient that the notices of appeal indicated therein that the appellant Republic was dissatisfied with the orders of the High Court and they were all signed for and behalf of the Director of Public Prosecution. Rule 68(7), she contended, had been complied with.

Countering, Captain Ibrahim Bendera, learned Advocate for the 5th respondent submitted that **Farid Haji Ahmed's case** (*supra*) is distinguishable to the instant case as in the former, the 1st respondent, Farid Haji Ahmed, was present during the hearing of the criminal case in the High Court, while in this case, the 1st respondent, Said Abdalla Kinyanyile whom the appellant Republic does not know whether he is alive or dead had never appeared at all in the proceedings in the High Court. On

his part, Dr Lamwai submitted that the *ratio decidendi* in **Farid Haji Ahmeds'** (*supra*) was on jurisdiction and the Court's pronouncement with regard to impleading as respondents, "the others" was *obiter dictum*.

It is undisputed that the 1st respondent, Said Abdallah Kinyanyite has never appeared in Criminal Case No. 01 of 2012 before the High Court since the commencement of the proceeding against him and the other respondents, on 20/01/2012. He never had any occasion to enter a plea to the Information containing Two hundred and Twenty Three (223) counts of manslaughter c/ss. 195 and 196 of the Penal Decree (Amendment), Act No. 6 of 2004 that was preferred by the Director of Public Prosecution. The appellant Republic is uncertain and cannot confirm whether or not he is still alive or dead. Judging from the appellant Republic's memorandum of appeal it would appear to us that the notices of appeal critical to the determination of the preliminary objection are those dated 20/01/2014 and 01/07/2014.

Given the above facts and circumstances; the conduct of trial proceedings in the High Court in the 1st respondent's absence; the fundamental concept of individual criminal responsibility which forms the foundation of criminal liability and our criminal law; the requirements of a

fair trial and due process and not to seriously prejudice the 1st respondent's entitlement to be present at the hearing of the appeal under Rule 80(1), we would agree with Dr. Lamwai and the other learned Advocates for the respondents that the 1st respondent was wrongly impleaded in the impugned notices of appeal.

The question that arises next is whether or not that, together with the other alleged discrepancies in the notices of appeal render them defective and thus the purported appeal incompetent. In essence, the issue is whether the appellant Republic complied with Rule 68(1),(2) and (7).

Having closely scrutinized the record and attentive to the rival submissions by the learned Advocates and the Senior State Attorney, in our respective view, the relevant two notices of appeal could not be cured even if we were minded to strike out the name of the 1st respondent under Rule 4(2)(b), as vainly proposed.

It is trite law that under Rule 68(1), it is the notice of appeal that institutes a criminal appeal. The removal of the name of the 1st respondent on the notices of appeal would make them read "*Director of Public Prosecution v. 11 Others*". Plainly read and as expressed, none of the "11

others” are individually discernible. Moreover, we would agree with Capt. Bendera that **Farid Haji Ahmed’s case** (*supra*) is diametrically distinguishable to the instant case. First, therein, the 1st respondent, Farid Haji Ahmed was present in the proceedings in the High Court, while in this case, 1st respondent, Said Abdallah Kinyanyite was glaringly absent throughout the proceedings in the High Court, which were conducted *in abstentia* in his regard. Second, the notice of appeal in the former case read, “Farid Haji Ahmed and 9 others”, while here, if the 1st respondent’s name is struck out, the notices of appeal would read “11 others”, a figure and word from which the name or true identity or any identifying information on any of the remaining respondents is absent. The 2nd respondent, anonymously lumped together and impleaded as “ 11 others” also cannot be automatically substituted in this Court in the place of the named 1st respondent, as by that figure and word his identity in the “others” is unknown for the purpose of rendering proper the notices of appeal.

We would also agree with Dr. Lamwai that the Court’s observation in **Farid Haji Ahmed’s case** (*supra*) that the notice of appeal therein would have equally been valid by citing “Farid Haji Ahmed and others” was *obiter*

dictum. In any event, it cannot be pressed into the appellant Republic's advantage in the instant situation as in that case Farid Haji Ahmed was present in the High Court proceedings and was correctly brought into the record in the proceedings in Court, while in the case at hand, the 1st respondent, Said Abdalla Kinyanyite was absent in the proceedings in the High Court and as stated earlier, had not been properly been impleaded and brought in the Court record.

A further close scrutiny of the notices of appeal reveal that the whole introductory paragraph of FORM B in the First Schedule of the Rules has been omitted and the two notices of appeal are titled "Criminal Appeal" instead of " *In the matter of an intended Criminal Appeal*" as required under Rule 68(7). Worst still, the notice of appeal dated 1/7/2014 erroneously states that the impugned order *dismissed* the case, while the intended and proper order being appealed against had *discharged* the respondents under section 227 of the Criminal Procedure Act, 2004. Thus it incorrectly stated the nature of the order against which it was desired to appeal against to this Court, offending Rule 68(2). All said and done and considered as a whole, it cannot be convincingly argued that that notices of appeal are substantially in FORM B in the First Schedule to the Rules and

met the requirement of Rule 68(7). The discrepancies pointed out render the notices of appeal incurably defective.

For all the above reasons, we accordingly uphold the preliminary objection, declare the purported appeal incompetent and strike it out. The appellant Republic, no doubt, is at liberty to institute a proper appeal, subject to the laws on limitation. Ordered accordingly.

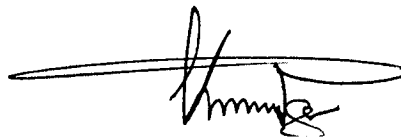
DATED at **ZANZIBAR** this day of 7th December, 2015.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL