

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

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.,)

CRIMINAL APPEAL NO. 272 OF 2014

BAHATI NDUNGURU @ MOSESAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of Resident Magistrate Court
of Ruvuma at Songea)**

(Dyansobera, PRM (Ext. Juris))

dated 13th day of June, 2013

in

Criminal Session No. 4 of 2012

RULING OF THE COURT

25th August & 1st September, 2015

MWARIJA, J.A.:

This appeal arises from the decision of the Resident Magistrate's Court of Ruvuma at Songea (W.P. Dyansobera, PRM with Extended Jurisdiction). In that court, the appellant was convicted of the offence of Murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. He was found guilty of having murdered one Cyprian Nyoni on 6th September 2011. He was consequently sentenced to suffer death by hanging. Aggrieved, the appellant has lodged this appeal.

At the hearing of the appeal, the appellant was represented by Mr. Rwezaula Kaijage, learned counsel while the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned State Attorney.

Before the learned counsel for the parties were called upon to argue the appeal, the Court wanted to satisfy itself as to the validity or otherwise of the notice of appeal. What prompted the Court to raise *suo motu* that point of law, is the omission by the appellant to indicate in his notice of appeal, the number of the case against which he has preferred the appeal.

Mr. Kaijage readily conceded that the notice of appeal is defective for failure by the appellant to comply with the requirement stated above. He argued that since by virtue of Rule 68(1) of the Court of Appeal Rules, 2009 (the Rules), it is the notice of appeal which institutes an appeal, the defect, renders the appeal incompetent. According to the learned counsel, this is because the requirement under Rule 68(2) of the Rules is that a notice of appeal must contain the number

of the case against which it is desired to appeal is mandatory and thus the omission to do so renders a notice fatally defective.

Mr. Kaijage added also that the notice suffers other defects. He pointed out that although the case which gave rise to this appeal was heard in the Resident Magistrate's Court by a PRM – Ext Jur., in the notice it is shown that the case was heard by the High Court. The learned counsel stated yet another defect, that the offence on which the appellant was convicted is confusing because, apart from s. 196 of the Penal Code, the appellant indicated that he was convicted under sections 26(1) of the same Act and 322(2) of the CPA (Criminal Procedure Act Cap. 20 R.E. 2002).

On his part, Mr. Ndunguru, agreed that the notice of appeal is defective for the reasons stated by Mr. Kaijage. Since the defects are fatal, Mr. Nduguru argued, the appeal is rendered incompetent. He therefore prayed to the Court to strike it out.

On our part, we are inclined to the position stated by the learned counsel for the parties that on the basis of the apparent defects in the notice, the appeal is incompetent. Rule 68(2) of the Rules provides for matters which a notice of appeal must contain. The provision states as follows:

"68 (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, and shall contain a full and sufficient address at which any notice or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 17, shall be signed by the appellant or his advocate."

The requirements stated under Rule 68 (2) of the Rules are clearly specified in Form B of the First Schedule to the Rules. Which according to sub-rule (7) of Rule 68 of the Rules, a

notice of appeal shall be substantially complied with. The sub-rule provides as follows:

" (7) A notice of appeal shall be substantially in the Form B in the First Schedule to the Rules and shall be signed by or on behalf of the appellant."

It was on mandatory requirement therefore that the appellant's notice of appeal must have contained the matters specified in Form B of the First Schedule to the Rules. One of those matters, as the learned counsel for the parties have submitted, is the number of the case whose decision the appellant has sought to appeal against.

This Court has emphasized in a number of cases that a notice of appeal which does not comply with the provisions of Rule 68 (2) and (7) of the Rules becomes incurably defective rendering the appeal incompetent. The Court has repeatedly emphasized that in order for a notice of appeal to be valid, it must contain the correct date of the judgment intended to be

appealed against, the name of the High Court judge and the number of the case whose decision is intended to be appealed against. The notice must also state briefly the nature of the acquittal, conviction, sentence order or finding against which it is desired to appeal. See for example the cases of **Nichontinze v. The Republic**, Criminal Appeal No. 228 of 2013, **Martin Haule v. The Republic**, Criminal Appeal No. 75 of 2014 and **Matinda Lesaito v. The Republic**, Criminal Appeal No. 92 of 2013 (All unreported).

We wish to add here that, where the decision intended to be appealed against originates from a decision of a Resident Magistrate with (Extended Jurisdiction, the name of the Magistrate and the Resident Magistrate's Court must be contained in the notice.

In this case as conceded by the learned counsel for the parties one of the defects of the notice of appeal is that it does not contain the number of the case which the appellant intends to appeal against. The omission makes the notice incurably defective. From the position of the law as stated

above, that defect alone suffices to make the notice of appeal fatally defective.

For these reasons as correctly submitted by Mr. Kaijage, since it is the notice of appeal which institutes a criminal appeal, the nature of the defect in the appellant's notice renders the appeal incompetent. As a result therefore, we hereby strike out the appeal for being incompetent.

Order accordingly.

DATED at **IRINGA** this 31st day of August, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL