IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 268 OF 2014

ELLY MILLINGA ..... APPELLANT

VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, PRM. Ext. Juris)

.....
in
RM. Criminal Session No. 25 of 2012
.....

RULING OF THE COURT

21st & 25th August, 2015

MBAROUK, J.A.:

When the appeal was called on for hearing, it transpired that there was a notice of preliminary objection filed by Mr. Shaban Mwegole, learned State Attorney representing the respondent/Republic, notice of which was filed earlier on 20th August, 2015. The said notice raised three points of law to the effect that the notice of appeal is defective, which are as follows:-

1. It has a wrong title of the Court.

2. *It contains confusing provisions of the law which the appellant was not convicted with.*
3. *It does not adequately state the finding on which the appellant is based on it.*

At the hearing, the learned state Attorney out-rightly started his submission on the first point of preliminary objection to the effect that the notice of appeal is wrongly titled. This is because, he said, the case to which this appeal is derived from was conducted by the Principal Resident Magistrate's (with Extended Jurisdiction) sitting at the Resident Magistrate's Court, Songea and not at the High Court of Tanzania Songea. He further submitted that at page 118 of the record of appeal, there is a specific order of transfer made under section 256 A of the Criminal Procedure Act Cap. 20 (R.E. 2002) (the CPA) which ordered Criminal Session Case No. 28 of 2012 to be transferred to the Court of the Resident Magistrate at Songea for trial before Mr. W.P. Dyansobera, Principal Resident Magistrate with Extended Jurisdiction as from 08th day of January, 2013.

However, he added that, at page 125 of the record of appeal where the notice of appeal is found, it has been shown in the title that this appeal is from the decision of the High Court of Tanzania at Songea, while it is not the case as the matter was transferred from the High Court to the Resident Magistrate's Court, Songea for trial before Mr. W.P. Dyansobera, PRM with Extended Jurisdiction. He added that taking into account the fact that Rule 68 (1) of the Court of Appeal Rules, 2009 (the Rules) states the it is the notice of appeal which shall institute the appeal and as the notice of appeal is defective for being wrongly titled, he urged us to find such a defect fatal, and that renders the appeal incompetent. He then cited to us the decision of this Court in the case of **Director of Public Prosecutions v. ACP Abdallah Zombe and 8 Others,** Criminal Appeal No. 254 of 2009 in support of his argument.

In response to the submissions made by the learned State Attorney on the first point in the preliminary objection, Mr. Barnabas Pascal Nyalusi, learned advocate who represented

the appellant submitted that, there is no doubt that there are defects found in the appellant's notice of appeal. He however, said that those defects are not fatal considering the fact that the notice of appeal was filed by the appellant who is a lay person and who is in prison facing death penalty. After all, he said, the said notice of appeal was drafted by Prison Officers and not the appellant himself.

In addition to that, Mr. Nyalusi submitted that, section 45 (1)(b) of the Magistrates' Courts Act, Cap. 11 R.E. 2002 (the MCA) states that the resident magistrate conferred with extended jurisdiction shall be deemed to be a judge of the High Court, and the court presided over by him while exercising such jurisdiction shall be deemed to be the High Court. For that reason, Mr. Nyalusi urged us to find that it was right for the appellant to indicate in his notice of appeal that this appeal is from the decision of the High Court.

In addition to that, Mr. Nyalusi cited to us Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977

which directs that in dealing with criminal or civil cases, courts shall administer substantive justice without undue regard to technicalities. Mr. Nyalusi argued that the defect of showing a wrong court which decided the case to be appealed against in the title of the notice of appeal is a mere technicality which has not prejudiced the respondent. After all, he added that, Rule 68 (7) of the Rules states that a notice of appeal shall be substantially in the Form B in the first schedule to the Rules.

For those reasons, Mr. Nyalusi urged us to find that the defect of wrong title found in the notice of appeal is not a fatal defect.

On our part, we are of the opinion that, there is no doubt that the appellant's notice of appeal has shown that this appeal is from the decision of the High Court of Tanzania at Songea. There is no dispute that, that was a defect because even the learned advocate for the appellant conceded to that effect. Hence, we are of the view that the only issue for determination is whether the defect is fatal or not.

To begin with, let us resume with the premise that at page 118 of the record of appeal there is a transfer order made under section 256A of the CPA which ordered a transfer of Criminal Session Case No. 28 of 2012 from the High Court to the Court of the Resident Magistrate at Songea. With all due respect to Mr. Nyalusi, we are not in agreement with him when he cited section 45 (1)(b) of the MCA to support his argument that it was right for the appellant to have shown in his notice of appeal that his appeal is from the decision of the High Court. This is because according to the Oxford Advanced Learner's Dictionary, New 8th Edition, the word "deem" has been defined as follows:-

> *".....usually used in the progressive (tenses) to have a particular opinion about."*

We are of the opinion that Mr. Nyalusi has wrongly interpreted the meaning of the word "deemed" as Mr. W.P. Dyansobera was not a sitting judge of the High Court but he was merely "deemed" to be a judge of the High Court and the Court presided over by him was merely "deemed" to be the High

Court. This Court in the case of **Shiminimana Hisaya & Another v. Republic,** Criminal Appeal No 6 of 2004 (unreported), lucidly stated as follows:-

> ***"Now if a resident magistrate with extended jurisdiction who, of course, is not a judge of the High Court, purports to sit in the High Court to hear a High Court appeal which was transferred to them, the proceedings and decision will be null and void because of want of jurisdiction ....."***
>
> *(Emphasis added).*

In essence, we are of the opinion that, when a resident magistrate is conferred with extended jurisdiction to entertain a specific hearing of a case or an appeal in the High Court, his status and that of the court to which he has been assigned to sit does not change and make him as a Judge or sitting in the High Court, he is merely deemed to be a judge or deemed to sit at the High Court. That is why once a formal order of transfer has been made, the transferred appeal shall be

registered in the Court of Resident Magistrate, given a fresh number and be heard and determined in that Court. Thereafter, an appeal from that decision of that court lies directly to this Court. This is what has happened in this case. See **Erney Gasper Asenga v. Republic,** Criminal Appeal No. 238 of 2007 (unreported) to support that position.

We are further not in agreement with the interpretation of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 made by Mr. Nyalusi. This is because, taking into account the position made in the decision of this Court in the case of **Zuberi Mussa v. Shinyanga Town Council,** Civil Application No. 100 of 2004 (unreported), where this Court had the following to say on the provisions of Article 107A (2)(e) of the Constitution:-

> *".....article 107A (2)(e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation.* ***A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as iron clad***

rule which bars the courts form taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered .....one cannot be said to be acting wrongly or unreasonably when he is executing the dictates of law." *(Emphasis added).*

We are increasingly of the view that, Article 107A (2) (e) featured in our Constitution does not do away with all rules of procedure in the administration of justice in this country or that every procedural rule can be outlawed by that provision of the Constitution. See **China Henan International Cooperation Goup v. Salvand K.A. Rwegasira,** Civil Reference No. 22 of 2005 (unreported) where it was stated as follows:-

"The role of rules of procedure in the administration of justice is fundamental ..... that is, their function is to facilitate the administration of justice....."

In the case, of **Director TOS Filling Station v. Ayoub and 9 Others,** Civil Application No. 30 of 2010 (unreported) where the notice of appeal was wrongly titled just as in this case this Court stated as follows:-

> *"Taking into account that the notice of appeal is wrongly titled ....., the same is fundamentally defective. Certainly that is not a minor defect, it is a fundamental irregularity which goes to the root of the matter affecting the validity of the notice of appeal which is a vital document with regard to this application."*

Taking into account that, that was a decision in a civil matter, we think that in a criminal matter its effect would be more alarming as Rule 68 (1) of the Rules mandatorily states that it is the notice of appeal which **shall** institute the appeal. As pointed out herein above, in the instant appeal, the appellant's notice of appeal is wrongly titled, hence that renders it to be defective. We are of the considered opinion that, such a defect is a fundamental irregularity which goes to

the root of the matter affecting the validity of the notice of appeal. For that reason we are firm that the appeal is incompetent.

As regards to the 2nd point in the preliminary objection, which is to the effect that the notice of appeal contained confusing provisions of the law which the appellant was convicted of the learned State Attorney submitted that, the appellant's notice of appeal found at page 125 of the record of appeal has shown that apart from section 196 of the Penal Code under which he was convicted, it has also indicated therein that he was convicted under sections 198, and 26 of the Penal Code and section 322 (2) of the Criminal Procedure Act, Mr. Mwegole urged us to find that, that brings confusion and it is not clear as to which among those provisions the appellant was convicted of. Hence Mr. Mwegole urged us to find the notice of appeal defective and the appeal incompetent.

In his response to the 2nd point of preliminary objection, Mr. Nyalusi submitted that under Rule 68 (2) of the Rules,

there is no requirement to state in the notice of appeal a section or sections of the law under which the appellant was convicted. He said, what has featured in the appellant's notice of appeal is "over citation" which does not go to the root of the matter. Hence, he urged us to find that, such a defect is not fatal. In support of his argument, he cited to us the decision of this Court in the case of the **Judge i/c High Court, Arusha and Attorney General, v. N.I.N. Munuo Ng'uni,** [2004] T.L.R. 44 where this Court cited the case of **General Marketing Co. Ltd. v. A.A. Shariff** [1980] T.L.R. 61 at 65 where it was stated that the rules of procedure are handmaids of justice and should not be used to defeat justice. In the same case Article 107A (2)(e) of our Constitution was used to substantiate the observation of the Court in that case.

On our part, we agree with the learned State Attorney that the appellant's notice of appeal was confusing as it contained omnibus or mixed convictions. In that notice of appeal, for example sections 198 and 26 of the Penal Code were stated as among the sections which were used to convict

the appellant. However, looking at the record of appeal, non of those sections were used to convict the appellant. In essence, section 198 of Penal Code is based on the punishment for manslaughter which is completely irrelevant as it was not a section used to convict the appellant in this case. Also, section 26 of the Penal Code is for sentence of death which is also not a section used to convict the appellant.

We are of the considered opinion that, the appellant should have been specific in his notice of appeal on the correct section of law of the offence under which he was convicted. Even if Mr. Nyalusi wanted us to believe that the inclusion of various or mixed sections in the notice of appeal as the sections used to convict the appellant is a mere technical defect, but with due respect, we are not in agreement with him. We are of the view that, specific section of the offence and the offence to which the appellant was convicted with has to be shown in the notice of appeal. This is to avoid confusion as on which offence and section the appellant was convicted of. As pointed out earlier in the case of **Zuberi Mussa v. Shinyanga Town**

council (supra) that rules of procedure have been kept to enhance the quality of justice delivered and courts cannot be faulted when they execute the dictates of the law.

There is no doubt in the instant case we are executing the dictates of Rule 68 (2) of the Rules, hence we are of the view that we cannot be faulted merely because of the presence of Article 107A (2)(e) of the Constitution which was wrongly interpreted by Mr. Nyalusi. For those reasons, we find that showing confusing sections of law in the notice of appeal assumed to have been used to convict the appellant while it was not the case, is a fundamental irregularity which leads us to find the notice of appeal defective and hence renders the appeal incompetent.

As to the 3rd point in the preliminary objection to the effect that the notice of appeal does not adequately state the finding upon which the appellant intends to appeal therefrom, Mr. Mwegole submitted that, the appellant was supposed to state clearly in his notice of appeal whether his appeal is

against conviction only or against conviction and sentence or sentence only. He contended that, as the appellant's notice of appeal is not clear that he is appealing against which part among these three aspects, the notice of appeal is incurably defective.

On his part, Mr. Nyalusi submitted that, this again is a technical defect which is not fatal. In support of his argument, he cited the case of the **National Housing Corporation v. Etienes Hotel,** Civil Application No. 10 of 2005 (unreported), where this Court stated that the courts shall refrain from giving technicalities undue consideration. Hence, he urged us to find that such a technical defect is not fatal.

On our part, we are of the view that Rule 68 (2) of the Rules have specifically stated the requirements to be included in the notice of appeal, such as the nature of the acquittal, conviction, sentence, or finding against which it is desired to appeal. On the other hand however, Rule 68 (7) of Rules directs that **the notice of appeal shall be substantially** in

the Form B in the first schedule to these Rules. It seems such requirement to specify whether the appellant intends to appeal against conviction only, or against conviction and sentence or sentence only is not among the mandatory requirements under Rule 68 (2) of the Rules. Hence we find such an omission as a minor defect which has not gone to the root of the matter. This is because, the meaning of the word **substantially** according to the Oxford Advanced Learner's Dictionary, New 8th Edition, means:-

"*even if not completely.*"

We are of the considered opinion that, in this case, such a defect is not fatal as the notice of appeal has substantially complied with the requirements under Rule 68 (2) of the Rules.

Taking into account that it is the notice of appeal which shall institute the appeal as per Rule 68 (1), and as we have established that the notice of appeal is wrongly titled and contain confusing provisions upon which the appellant was convicted with, we find the appeal incompetent.

In the event, we uphold and sustain the 1st and 2nd preliminary points of objection and overrule the 3rd point of preliminary objection. For that reason, we hereby strike out the appeal for being incompetent.

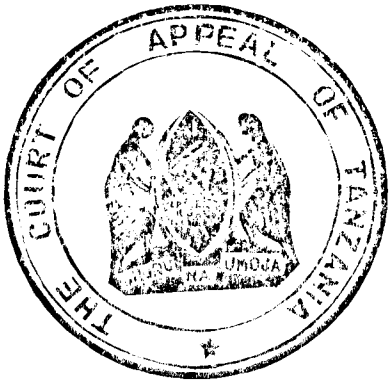
DATED at IRINGA this 24th day of August, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

B. K. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



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