

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

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

CONSOLIDATED CRIMINAL APPEAL NOS. 39 & 40 OF 2016

DIRECTOR OF PUBLIC PROSECUTION APPELLANT

VERSUS

- | | | |
|---|---|------------------|
| <ul style="list-style-type: none">1. FARID HADI AHMED2. MSELEM ALI MSELEM3. MUSSA JUMA ISSA4. AZAN KHALID HAMDAN5. SULEIMAN JUMA SULEIMAN6. KHAMIS ALI SULEIMAN7. HASSAN BAKARI SULEIMAN8. GHARIB AHMAD OMAR9. ABDALLA SAID ALI10. FIKIRINI MAJALIWA | } |RESPONDENTS |
|---|---|------------------|

**(Appeal against the Ruling and Order of the High Court of
Zanzibar at Vuga)**

(Mahmoud, J.)

Dated 15th and 31st day of January, 2014 a2014

In

Criminal Appeal No. 09 of 2012

RULING OF THE COURT

25th & 30th November, 2016

MBAROUK, J.A.:

According to the cause list of the Court of Appeal of Tanzania held at Zanzibar, 2016, Criminal Appeal No. 39 and 40 of

2016 were cause listed for hearing on 25th November, 2016. When the appeals were called on for hearing, the Court invoked Rule 69(1) of the Court of Appeal Rules, 2009 (the Rules) and ordered them to be consolidated. This was for the reason that both appeals arose from the same trial i.e Criminal Case No 9 of 2012 of the High Court of Zanzibar. In this consolidated appeal, the appellant/ Director of Public of Prosecutions was represented by Mr. Ali Rajab Ali, learned Senior State Attorney as a lead counsel, assisted by Mr. Walid Mohamed Adam, learned Senior State Attorney and Ms. Rahima Kheri Iddi, learned State Attorney. On the other hand, Mr. Salum Toufiq, Mr. Abdalla Juma, Mr. Suleiman Salim and Mr. Rajab Abdalla, learned advocates appeared for the 1st, 2nd, 5th, 6th, 7th, 8th, 9th and 10th Respondents. As for the 3rd Respondent, the Court earlier on granted the prayer to withdraw the appeal against him made by Mr. Ali Rajab Ali as the said Respondent was unable to be located for service. The Court also granted the prayer made by the same learned Senior State Attorney to invoke Rule 80 (6) of the Rules

and proceed with the hearing of the appeals in the absence of the 4th Respondent who was reported sick.

It transpired that both appeals comprised of notices of preliminary objections which were filed earlier on by the learned advocate for the 1st, 2nd, 5th, 6th, 7th, 8th, 9th and 10th Respondents. The two notices comprised of the following objections:-

1. That, the Notice of Appeal filed on 5th day of February, 2016 by the appellant is in conflict/ contravention with Rule 68(7) of the Tanzania Court of Appeal Rules, 2009.
2. That, the memorandum of Appeal is not in conformity with the Notice of Appeal.

Arguing in support of the 1st preliminary objection, Mr. Toufiq vehemently submitted that the notice of appeal found at page 202 of the record of appeal contain contradictory dates i.e at the introductory part, the notice of appeal has indicated that it intends to appeal against the ruling and order of the High Court of

Zanzibar made by Hon. Fatma Hamid Mahmoud, J. dated 31st day of February, 2014 in Criminal Case No. 9 of 2012. Whereas in the body of the notice of appeal, it shows that the appeal is against the Ruling of Hon Justice Fatma Hamid Mahmoud dated 31st day of January, 2014.

He emphatically submitted that, such a defect of stating an incorrect date in the notice of appeal renders the appeal incompetent. In support of his submission he cited to us the decisions of this Court in the cases of **Denis Kasege v. The Republic**, Criminal Appeal No. 359 of 2013 and **Marwa Kachang'a v. The Republic**, Criminal Appeal no 84 of 2015(Both unreported), where therein, various decisions of the Court were cited to have emphasized the necessity of compliance with the requirements under Rule 68 of the Rules. For instance, **Albanus Alyoce and Another v. R**, Criminal Appeal No. 258 of 2014, **Hamis s/o Yazid and Another v. R**, Criminal Appeal No. 234 of 2013, **Abeid s/o Seif v. R**, Criminal Appeal No. 228 of 2013,

Elia Masemo Kachala, and Two Others, v. R. Criminal Appeal No 156 of 2012 and **Nichontinze s/o Rojeli v. R,** Criminal Appeal No. 177 of 2011 (All unreported).

Mr. Toufiq then proceeded by submitting that in the case of **Nichontinze Rojeli and Hamis s/o Yazid and Another** (supra) the Court stated matters to which a notice of appeal must contain so as to comply with Rule 68 of the Rules, which are:-

“(1) Indicate the correct date of the judgment intended to be appealed against.

(2) Insert the name of the High Court Judge and number of the case to be appealed against.

(3) State briefly the nature of the acquittal, conviction, sentence, order or finding which it is desired to appeal.” (Emphasis added).

Mr. Toufiq further added that in terms of Rule 68 (7) of the Rules a notice of appeal shall be substantially in Form B in the First Schedule to the Rules, but in the instant case the appellant’s

notice of appeal has failed to indicate a correct date of the judgment sought to be appealed against. Mr. Toufiq further contended that the appellant had ample time to pray to amend the defect in their notice of appeal which was filed since 5/2/2014 but they have failed to do so. For that reason, he urged us to find that the notice of appeal in this consolidated appeal is incurably defective rendering the appeal incompetent. He then prayed for the consolidated appeal to be struck out.

In his reply to the 1st preliminary objection, Mr. Ali Rajab strongly argued against the said objection. He started by urging us to distinguish the two cases cited by the advocate for the Respondents.

Having said so, the learned Senior State Attorney submitted that their notice of appeal has not failed to show a correct date of the judgment sought to be appealed against in the substance or body of the notice of appeal. He however, agreed that in the introductory part of the notice of appeal the date varies with that

in the body of the notice of appeal. He then urged us to find that, the correct date should be considered as that in the body and not that found in the introductory party. The learned Senior State Attorney further urged us that, such an ambiguity on contradictory dates in their notice of appeal can be cured by the presence of other documents. In support of his argument, he cited the decision of this Court in the case of **National Insurance Corporation v. Kweyambah Quaker** [1999] TLR 150. For that reason, he prayed for the 1st preliminary objection to be overruled.

Having considered the arguments in this matter, we have found it prudent to reproduce the notice of appeal subject to the 1st preliminary objection which reads as follows:-

***"IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
CRIMINAL CASE NO OF 2014
BETWEEN
DIRECTOR OF PUBLIC
PROSECUTIONS.....APPELLANT
AND***

**FARID HADI AHMED AND 9 OTHERS.....
RESPONDENTS**

*(Appeal from the ruling and order of the High Court of Zanzibar holdent at Vuga given by the Hon. Fatma Hamid Mahmoud J, on the **31st day of February, 2014** in the Criminal Case No. 9 of 2012)*

NOTICE OF APPEAL

TAKE NOTICE THAT the Director of Public Prosecution appeals to the Court of Appeal of Tanzania against the Ruling of the Honourable Justice Fatma Hamid Mahmoud given at Zanzibar on the **31st day of January, 2014** whereby the High Court decided to proceed with the case by entertaining bail to the respondents regardless of the appeal lodged by the Director of Public Persecutions to the Court of appeal of Tanzania.....” (Emphasis added).

It is evident and there is no doubt that the dates of the judgment sought to be appealed against in this consolidated appeal contradict each other. The introductory party of the notice

of appeal shows the date of the judgment sought to be appealed against is 31st February, 2014, whereas in the body of that notice of appeal it shows to be 31st January, 2014.

There is no flicker of doubt that the dates of the judgment desired to be appealed against found in the notice of appeal in this consolidated appeal contradict each other. This Court in the case of **Marwa Kachang'a** (supra) interpreted Rule 68(7) of the Rules and stated as follows:-

"Clearly from its wordings sub rule (7) of Rule 68 of the Rules is an imperative provision as far as substantial matters required to be contained in Form B/1 of the First Schedule to the Rule are concerned. It means therefore that a notice of appeal must contain the important matter required to be shown in that Form. The name of the Judge who decided the case is one of those

*important matters. **Other matters are the date of the decision, intended to be appealed against,** the nature of conviction, sentence or findings against which the appellant intends to appeal.”*
(Emphasis added).

According to various decisions cited earlier on, it is evident that it is now settled that failure by an appellant to comply with the requirements under Rule 68 of the Rules renders the appeal incompetent.

In the instant case, the notice of appeal in the consolidated appeals bears contradictory dates of the decision against which the appellant intends to appeal. The presence of contradictory dates in the notice of appeal is an ambiguity on which among the two dates is correct. We are of the considered opinion that, such an anomaly renders the notice of appeal incurably defective. The Court cannot be given a task to choose which is a correct date

among the two contradictory dates. It is upon the appellant himself to make necessary amendment so as to comply with the requirements of the Rules. The appellant had ample time to apply for amendments or corrections since 5th February, 2014 but they have failed to do so. For such a failure to make necessary corrections, it is the appellant who should blame himself for not having filed its notice of appeal in compliance with the mandatory requirements of Rule 68 of the Rules even if he had ample time to do so.

We are of the opinion that in terms of Rule 68(7) of the Rules, the whole notice of appeal has to be substantially in Form B to the Schedule. The appellant cannot choose which part of the notice of appeal he has to conform with and which he can not. Taking into account that it is the notice of appeal which institutes the appeal as stated under Rule 68(1) of the Rules, and the notice of appeal is defective, we are constrained to find this consolidated appeal incompetent.

At this juncture, we have found that our decision on the 1st preliminary objection can dispose of the appeal and there is no need to go on with the 2nd preliminary objection.

For that reason, we hereby strike out this consolidated appeal. It is so ordered.

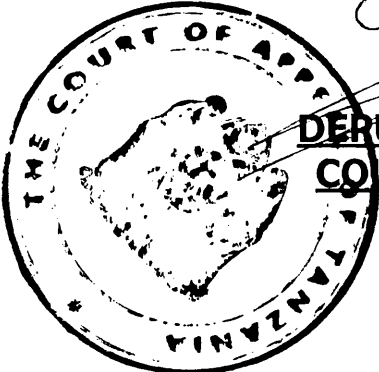

DATED at ZANZIBAR this 29th day of November, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL