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

**(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)**

**CRIMINAL APPEAL NO. 308 OF 2015**

**1. MASUKE MALUGU @ MATINYI**
**2. DAUDI MISANGU @ KISHIMBA** ..... **APPELLANTS**

**VERSUS**

**THE REPUBLIC** ..... **RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania, at Tabora)**

**(Mruma, J.)**

**dated the 16th day of June, 2015**
**in**
**Criminal Session Case No. 75 of 2011**

.....

## RULING OF THE COURT

27th & 29th April, 2016

**MASSATI, J.A.:**

The appellants and four others were arraigned before the High Court of Tanzania, sitting at Maswa on an information for the murder of one KUSHAHA SILANGA. It was there, alleged that, they did so on the 19th day of August, 2008, at Nyakabindi Village, within Bariadi District in the then Shinyanga Region.

Upon pleading not guilty, the prosecution fielded 14 witnesses, and 5 documentary exhibits, and 3 other physical exhibits. By this evidence, the prosecution was out to prove that, while the deceased, who was a director of Nzagali ginnery, in Nyakabindi Village, was asleep in a house within the ginnery compound, at midnight, some armed bandits invaded the compound, and after some exchange of fire, he was shot and killed, while the bandits made away with an unascertained sum of money, set aside for purchase of raw cotton. One Ngwese Edward (PW1) who was with the deceased at the time in question, reported that the deceased met his demise immediately. The matter was then reported to the police. A post-mortem examination report (Exhibit P1) showed that the cause of death was severe *haemorrhage*.

The first appellant was one of the guards on shift on that night. He was taken in as a suspect, because after the incident, he disappeared. The second appellant was arrested following his identification by PW1, as one of the bandits who visited the scene of crime on that night. After the appellants and other suspects were rounded up, the second appellant gave a cautioned statement which was received in evidence as Exhibit P.5.

In their defence, both appellants completely disassociated themselves from the accusations. The first appellant told the trial court that upon being invaded by the bandits, he had to run away to safety. The second one also refuted the charges. He challenged PW1's evidence of his having identified him and retracted his cautioned statement (Exhibit P.5) alleging that it was extracted by torture.

However, the trial court decided that the prosecution case was credible, and so convicted the duo. The two are aggrieved and have lodged notices of appeal to institute the present appeal.

At the hearing, the first appellant was represented by Mr. Mugaya Mtaki, learned counsel. The second appellant was represented by Mr. Kamaliza Kayaga, learned counsel. The appellants themselves were also present in court. The respondent/Republic was represented by Mr. Rwegira Deusdedit, learned State Attorney.

When the appeal was called on for hearing, Mr. Deusdedit, sought leave to raise a point of law, which he should have made by way of a written notice of preliminary objection. As Mr. Mtaki and Mr. Kayaga did not oppose

the prayer, the Court allowed the learned State Attorney to address the Court on the point.

Mr. Deusdedit pointed out that the first appellant had lodged two notices of appeal. The **first** one was lodged on 18/6/2015, which appears on page 291 of the record. This notice is defective, for not stating the nature of the conviction contrary to Rule 68 (2) of the Court of Appeal Rules, 2009 (the Rules). The **second** notice, appears on page 289 of the record, and was lodged on 22/6/2015. This one is quite in order. He therefore, wondered aloud, which of the two notices should be taken to have institute the appeal. If it is the first one, the appeal would be incompetent because the notice is defective. If it was the second one, the appeal is competently before the Court.

With regard to the second appellant's notice of appeal, which appears on page 290 of the record, Mr. Deusdedit submitted that it is defective, again for not stating the nature of the conviction. So the second appellant's appeal is incompetent and should be struck out, he argued. However, he went on, since the two appeals are consolidated, it would be better if the competent appeal, could also wait for the second appellant to take the necessary steps and reinstitute his appeal, so that, the appeals could

continue to be treated and disposed of, as one. For inspiration he urged us to follow our recent decision in **YOHANA @ MWIGULU & 3 OTHERS vs R**, Criminal Appeal No. 192 of 2015 (unreported).

Mr. Mtaki agreed with the learned State Attorney, that his client's first notice of appeal was defective and could not have instituted a competent appeal. However, the learned counsel went on, the Court should take the second notice of appeal as having duly instituted the appeal, as long as it was lodged within the prescribed time. The learned counsel agreed that it would be in the interests of justice, if, in case, the Court finds that the second appellant's notice of appeal is defective, that the hearing of the whole appeal be put in abeyance, pending the second appellant taking the necessary steps to bring his appeal to order. Mr. Kayaga agreed with Mr. Mtaki and Mr. Deusdedit.

It is true that there are two notices of appeal lodged by the first appellant. The first one was lodged on 18/6/2015. The second one was lodged on 22/6/2015.

There is no dispute that the first notice is defective, because it did not state the nature of the conviction. This is contrary to Rule 68 (2) of the

Rules. The natural consequence would be that the appeal "instituted" by it would thereby be deemed incompetent. However, both Mr. Deusdedit and Mr. Mtaki have submitted that the second notice of appeal, which is not defective, could lawfully launch the appeal, as the first, defective one, is to be deemed to be non-existent; so long as the second one was lodged within the prescribed time.

Our own position is that, although undesirable, an appellant is entitled to file more than one notice of appeal within the time prescribed for so doing by the rules of the Court. But wherever there are more than one notice, and all of them were filed within the prescribed time, the appellant cannot use or rely on more than just one of the notices to argue the appeal. On that score, we are inspired and persuaded by the reasoning of ARIWOOLA, JSC of the Nigerian Supreme Court in **HALIMA HASSAN TUKUR vs GARBA UMAR UBA**. [SC 390/2011].

In this present case, the judgment sought to be impugned was delivered on 16th June, 2015. The first appellant lodged his first notice of appeal on 18/6/2015, and his second on 22/6/2015. So, both notices were filed within 30 days prescribed under Rule 68 (1) of the Rules. As both are in the record of appeal, and since the first one is defective, the appellant is

Mr. Mtaki and Mr. Deusdedit that, based on the second notice of appeal, the 1st appellant's appeal is competent.

With regard to the notice of appeal filed by the second appellant, we need not belabour that, it is defective for not stating the nature of the conviction. There are countless decisions of this Court to the effect that a notice of appeal which does not state the nature of the conviction sought to be appealed against, is incurably defective. (See **CREDO SIWALE vs R**, Criminal Appeal No. 137 of 2010; **YOHANA @ MWIGULU & 3 OTHERS vs R.** (*supra*) (both unreported), to cite just a few. In the event, we unhesitatingly pronounce that as the notice of appeal lodged by the second appellant is defective, the appeal lodged on its basis is incompetent. It is accordingly struck out. But the remaining question, is what should be done to the remaining appeal?

There were two options left to us on what to do with the 1st appellant's appeal. One option was that we could proceed with hearing it to its conclusion. The second one is to adjourn it in order to give space to the second appellant to put his appeal in order, so that it could again be

consolidated with that of the first appellant and be heard and be disposed of together.

Upon a serious reflection, we have decided to go for the second option. This is because the appellants were tried together, and their appeal in this Court is consolidated in terms of Rule 69 (1) of the Rules. As we had occasion to comment in **YOHANA @ MWIGULU & 3 OTHERS vs R.** (*supra*) consolidation of appeals is a guarantee for convenience and consistency. And that, to us, is a safer conduit to the higher interests of justice. Much as one would want the hearing of the first appellant's appeal to be speeded up, and much as speed is an important element in the dispensation of justice, however good the speed may be, justice is still better. (See **ALIMASI KALUMBETA vs R**, (HC, Mbeya, Criminal Appeal No. 175 of 1977 (unreported).

So for all the above reasons, we strike out the second appellant's appeal and exhort him to make all the necessary efforts to relodge a fresh notice of appeal, subject to the law of limitation, so that, his appeal may be reconsolidated with that of the first appellant, so that the appeal is brought back on track, and be disposed of together.

to a date to be fixed by the Registrar.

Order accordingly.

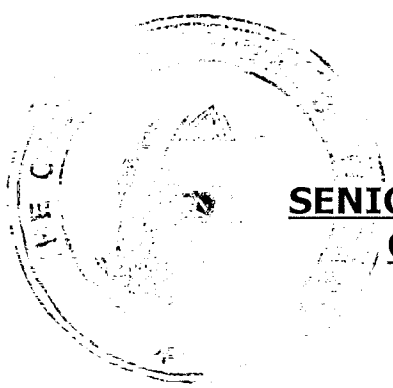
**DATED** at **TABORA** this 28th day of April, 2016.

S. A. MASSATI
**JUSTICE OF APPEAL**

K. M. MUSSA
**JUSTICE OF APPEAL**

A. G. MWARIJA
**JUSTICE OF APPEAL**

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



P. W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**