

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

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

CRIMINAL APPEAL NO. 192 OF 2015

1. YAHONA KULWA @ MWIGULU
2. NG'WANA SELELI @ MASELE
3. NGASA JOHN
4. MASHAKA JACKSON

..... APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

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

(Kaduri, J.)

dated the 17th day of February, 2011

in

Criminal Appeals No. 125, 179, 180 & 181 of 2007

.....

RULING OF THE COURT

5th & 8th April, 2016

MASSATI, J.A.:

The appellants in this case, were all set for the hearing of their joint appeal today. But when the appeal was called on for hearing, Mr. Miraji Kajiru, learned State Attorney, who appeared for the respondent/Republic rose to argue a point of law to block the said hearing. In a notice of preliminary objection that he had earlier on filed, the learned counsel notified the 4th Appellant, **MASHAKA JACKSON**, that:-

*"this appeal is incompetent before this Court for failing to comply with Rule 68 (2) and (7) of the Tanzania Court of Appeal Rules of 2009, as also stated in Criminal Appeal No. 234 of 2013 in **KAGOMA RENALO @ LABAN AND ANOTHER vs REPUBLIC** – CAT at Tabora (unreported). The Respondent therefore will pray that his appeal be struck out."*

Taken aback, the 4th Appellant had no option but to sit back and hear what the learned counsel had to say.

In his brief submission, Mr. Kajiru argued that the Notice of Appeal was defective for referring to Magori, RM, as the "judge" who delivered the impugned decision, instead of Kaduri, J. This, he said, was a serious omission, and offended Rule 68 (2) of the Court of Appeal Rules, 2009 (the Rules). In support, he referred us to a decision of this Court in **KAGOMA RENALO @ LABAN AND ANOTHER vs R.** (*supra*). Finally he prayed that the Appellant's appeal be struck out, since the defective notice could not have instituted a competent appeal.

On his part, the Appellant basically admitted the defect in his Notice of Appeal and attempted to shift the blame to prison officials who helped him in preparing the document. However, he prayed for further directions from the Court on what to do next.

Rule 68 (1) of the Rules, provides:-

*68 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days of the date of that decision, **and the notice of appeal shall institute the appeal.** (emphasis supplied).*

Rule 68 (2) provides:-

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 notices 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.

Read together, the two subrules mean that a valid notice of appeal is one that is in writing; among others, and which briefly states the nature of the acquittal, conviction, sentence or order etc. It is also clear that in criminal appeals, it is the Notice of Appeal which institutes an appeal to this Court. (See **PATRIC LAZARO AND NESTORY BERNALDO vs R.**, Criminal Appeal No. 331 of 2013 (BKB) (unreported)).

Apart from **KAGOMA RENALO @ LABAN AND ANOTHER vs R.** (*supra*) there is a long chain of this Court's decisions to the effect that a defective notice of appeal renders the appeal incompetent. Examples include, the **DPP vs ACP ABDALLAH ZOMBE AND 8 OTHERS**, Criminal Appeal No. 254 of 2009 (unreported), **ELIA MASENA KACHALA AND TWO OTHERS vs R.**, Criminal Appeal No. 156 of 2012 (unreported). Of particular interest, it was held in **DPP vs ACP ABDALLAH ZOMBE AND 8 OTHERS** (*supra*) that it was a grave error in law for the appellant to lodge an appeal without indicating the correct judicial position of the judge/magistrate who delivered the judgment.

It is not disputed that in this case, the judicial officer who delivered the judgment sought to be impugned in this Court is Kaduri, J. It was therefore a grave error for the Notice of Appeal to refer to Magori RM, who delivered the judgment in the trial court. This renders the Notice defective, and so the 4th Appellant's appeal incompetent. It ought to be struck out, as we hereby order it to be.

What has exercised our minds considerably is this. There are four appellants in this appeal. Although each of the appellants has lodged a separate notice of appeal, those were consolidated into one, and was to be disposed of as such. So, what should happen now that the 4th appellant's appeal has been struck out? Should we proceed with disposing of the appeal of the remaining appellants?

The power of the Court to consolidate criminal appeals is set out in Rule 69 of the Rules. The policy of the Rule is in favour of consolidation. Of particular interest here is Rule 69 (2) which provides:-

"69 (2) Where two or more persons convicted by a subordinate court have appealed to the High Court where their appeals were consolidated and any two

or more of them give notice of appeal to the Court, their appeals shall, unless the Court orders otherwise be consolidated and shall proceed as one appeal.”

This provision governs the situation at hand. The appellants were tried together, and convicted. Their separate appeals in the High Court were consolidated and heard together, and their appeal to this Court is one. Consolidation of the appeals was therefore not an option, but a matter of law.

The purpose of consolidating cases arising from a similar background is not only intended to maximise convenience at the hearing, but also to maintain consistency in decision making against the parties to an appeal. Although we appreciate the plight of the remaining appellants in this case to bring their appeal to an end, the loftier interests of justice dictate that they wait for the 4th Appellant to rectify his situation and spring back to their common appeal so that it (the appeal) be disposed of together as one.

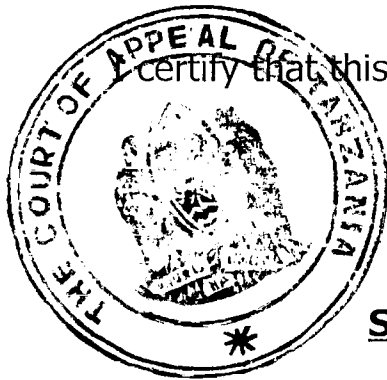
It is so ordered.

DATED at TABORA this 6th day of April, 2016.


S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL



certify that this is a true copy of the original.


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL