

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: OTHMAN, CJ, KIMARO, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 72 OF 2015

EXAUD NYALI..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mwambegele, J.)

Dated 16th January, 2014

in

DC. Criminal Appeal No. 33 of 2013

.....

RULING OF THE COURT

24th & 27th April, 2016

MUGASHA, J.A.:

In the District Court of Mpanda, the appellant **EXAUD NYALI** and one **ZAKAYO ANGOUFON** (the 2nd accused) were jointly charged with armed robbery contrary to section 287 A of the Penal Code [**CAP 16 RE.2002**]. As the 2nd accused was still at large, on 15/6/2012 the charge was read over to the appellant and preliminary hearing conducted on 28/06/2012. Following the arrest of the 2nd accused his plea was not taken. However, the two were jointly tried and convicted of the lesser offence of attempted armed robbery contrary to section 287 B of the Penal Code [**CAP 16 RE.**

2002]. They were sentenced to imprisonment to a term of fifteen (15) years. They appealed to the High Court in Criminal Appeal No. 33 of 2013 whereby on 16/01/2014, the trial against the 2nd accused was nullified and the sentence set aside because his plea was not taken as required by section 228 of the Criminal Procedure Act [**CAP 20 RE.2002**]. The appellant's conviction and sentence was sustained.

Further aggrieved, the appellant has preferred an appeal to this Court. The appellant, took initial steps to institute the appeal whereby on 20/01/2014, he lodged what he considered to be a Notice of Appeal.

According to Rule 68(1) of the Tanzania Court of Appeal Rules, (the Rules), it is a Notice of Appeal which institutes a criminal appeal in this Court. Therefore, a valid notice of appeal must comply with mandatory provisions of Rule 68(2) of the Rules which among other things, requires;

"Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal....."

Under Rule 68 (7) it is further provided that, the Notice of Appeal "shall be substantially in Form B in the First Schedule to the Rules". One of the essential prerequisites is the identity of the matter in the High Court

sought on appeal before the Court as stated by the Court in the **MNAZI PHILIMON V. THE REPUBLIC**, Criminal Appeal No. 53 of 2013 and **PATRICK NGONGI KINDANYANI V. REPUBLIC**, Criminal Appeal No. 253 of 2005 (all unreported). In the matter under scrutiny, the respective decision is dated 16/01/2014 in High Court Criminal Appeal No. 33 of 2013.

When the matter was called on for hearing, the Court *suo motu* required Mr. Stambuli Ahmed, learned Senior State Attorney for the respondent Republic, to address the Court on the competence of the appeal filed pursuant to the Notice of Appeal lodged on 20/01/2014.

In his brief submission, the learned Senior State Attorney immediately pointed out that, the Notice of Appeal erroneously indicates that, the decision sought to be appealed against was delivered on 20/01/2014 in Criminal Appeal No 151 of 2012. He argued that, the Notice of Appeal is defective for citing a non-existent decision because the proper decision to be appealed against was delivered on 16/01/2014 in Criminal Appeal No. 33 of 2013. In this regard, the learned Senior State Attorney urged the Court to invoke revisional powers under section 4(2) (a) and strike out the appeal.

On the other hand, the appellant who was unrepresented , when he was referred to the respective defects in the Notice of Appeal, being a lay

person he could not meaningfully make any response apart from shifting the blame to the prison officer who prepared the Notice of Appeal.

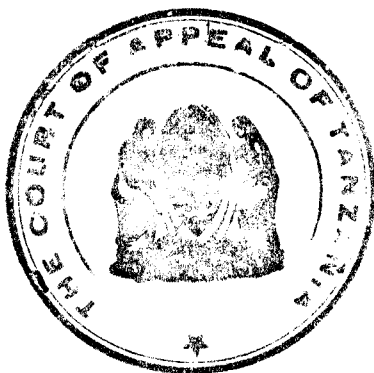
It is now settled law that, in terms of rule 68(2) of the Rules, a Notice of Appeal must state the nature of conviction and sentence and the date of the decision or order sought to be appealed against. Moreover, the mandatory requirement for the Notice of Appeal to be substantially in Form B entails among other things, indicating the correct citation of the decision sought to be appealed against. Since it is a Notice of Appeal which institutes an appeal, a Notice of Appeal which does not indicate the nature of conviction, the High Court Criminal Appeal number and date of the decision sought for appeal cannot be said to have effectively instituted an appeal. **(SEE MBUKI JAMES KIRUMA VS REPUBLIC, CRIMINAL APPEAL NO. 163 OF 2012, MWANYA ALLY DAD @ HAMISI MUSA MTONDOIMA VS REPUBLIC, CRIMINAL APPEAL NO. 105 OF 2013 and TANO MBIKA VS REPUBLIC, CRIMINAL APPEAL NO. 200 OF 2013, CHARES SIMBAO @ MSILIKWA VS REPUBLIC, CRIMINAL APPEAL NO. 130 OF 2014 (all unreported).**

In the matter under scrutiny, the purported Notice of Appeal at page 70 of the record indicates that; **one**, the intended appeal is sought against High Court Criminal Appeal No 151 of 2012 which was determined on

20/01/2014; and **two**, the nature of conviction is armed robbery c/s 287 instead of attempted armed robbery contrary to section 287 B of the Penal Code.

In view of the aforesaid shortfalls, the Notice of Appeal, is defective and it contravenes Rules 68 (2) and (7) of the Rules. Since under Rule 68(1), it is a notice of appeal which institutes the appeal, there is no proper appeal before us. We agree with the learned State Attorney that, given the said defects, the purported appeal is incompetent and we accordingly strike it out.

DATED at MBEYA this 25th day of April, 2016.



M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL