

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT MBEYA**  
**(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)**

**CRIMINAL APPEAL NO. 130 OF 2014**

**CHARES SIMBAO @ MSILIKWA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania  
At Sumbawanga)**

**(Khaday, J.)**

**Dated the 30<sup>th</sup> day of May, 2012**

**in**

**DC. Criminal Appeal No. 22 of 2011**

.....

**RULING OF THE COURT**

8<sup>th</sup> & 12<sup>th</sup> April, 2016

**MUGASHA, J. A.:**

In the District Court of Sumbawanga the appellant together with two other persons **JUMA s/o FURAHISHA & MEDISON RAMADHANI** (2<sup>nd</sup> and 3<sup>rd</sup> accused) were charged with two counts of Burglary and Stealing contrary to sections 294(1) and 265 of the Penal Code [**CAP 16 R.E. 2002**], respectively. They all pleaded not guilty, but during pendency of the trial, the prosecution reported the 3<sup>rd</sup> accused to be dead and the 2<sup>nd</sup> accused to be at large. Subsequently, the appellant

attended at the trial up to 27/3/2008 when the prosecution closed its case and the trial court ruled that, the prosecution had established a *prima facie* case against all the accused persons. On 25/4/2008, the appellant addressed the trial court that he was the only witness for the defence and he intends to testify on oath. However, from 13/5/2008 to 31/7/2008 the appellant did not enter appearance in the trial court to present his defence. As such, the appellant was together with the 2<sup>nd</sup> accused convicted in *absentia* and sentenced to imprisonment for twenty (20) years for the first count and seven (7) years in respect of the second count. The sentences were ordered to run concurrently. According to the record of trial, the appellant resurfaced on 12/09/2011 when the respective sentence was pronounced to him.

Aggrieved, the appellant unsuccessfully, appealed to the High Court where his appeal was dismissed hence this appeal. In the memorandum of appeal the appellant has basically raised three grounds of appeal. **One**, that his conviction was based on the charges which were not proved according to standard set by the law; **Two**,

there is no proof that the appellant was identified at the scene of crime in the absence of any identification parade and **Three**, the first appellate court did not consider a point of law and disregarded the defence evidence.

When the appeal was called on for hearing, the appellant appeared in person and the respondent Republic was represented by Ms. Catherine Gwaltu, learned Senior State Attorney. She raised a preliminary objection on a point of law that, the notice of appeal is defective and the appeal is rendered incompetent. She pointed out that, in the notice of appeal the appellant seeks to appeal against the decision of Mwambegele, J. dated on 3/10/13 while the decision sought on appeal is that of Khaday, J. dated on 30/5/12. Furthermore, she submitted that, the notice of appeal wrongly indicates that, the appellant was convicted of unlawful possession of firearm and given fine of Tshs. 1,000,000) = (one million shillings) while he was convicted of unlawful possession of stolen property and sentenced to imprisonment for ten years. She added that, the appeal was time barred having been filed more than a year from the date of filing the

notice of appeal. With the said shortfall, the learned Senior State Attorney urged the Court to strike out the incompetent appeal.

On the other hand, the appellant threw the blame on the Prison Authorities who prepared the notice of appeal. The appellant informed the Court to have filed a proper notice of appeal different from the defective one which appears in the record of appeal. He lamented to have complained to the Prison Authorities but he was advised to file an application to file notice of appeal out of time. However, before the process materialised he was told to pursue the appeal because he was already served with the record of appeal. In this regard, he asked the Court to determine the merits of the appeal because he is not responsible with the defects in the notice of appeal.

What institutes a criminal appeal in this Court is a valid notice which in terms of Rule 68 (2) of the Court of Appeal Rules, 2009, 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.....”*

It is further provided under Rule 68 (7) 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. This was reiterated in the case of **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 at hand, the notice of appeal at page 54 of the record of appeal shows that, the appellant was convicted of the offence of unlawful possession of fire arms contrary to section 4(1) of Cap. 223, which was a subject of Criminal Appeal No. 9 of 2013 determined on 3/10/2013 by Mwambegele, J. However, at page 52 of the record of appeal the decision sought to be appealed against is High Court Criminal Appeal No. 22 of 2011 which was determined by Khaday, J. on 30/5/ 2012.

In this regard, the issue for our determination is whether the appeal is competent.

Initially, the appellant's notice of appeal is incorrect to indicate his appeal is against Criminal Appeal No. 9 of 2013 which was determined by Mwambegele, J. because the decision which is a subject of appeal is Criminal Appeal No. 22 of 2011 which was determined by Khaday, J. on 30/5/ 2012.

Moreover, the notice of appeal wrongly shows that, the appellant was convicted of unlawful possession of firearm and ordered to pay a fine of Tshs. 1,000,000/= (one million shillings) instead of unlawful possession of stolen property and sentenced to imprisonment for ten years as substituted by the first appellate court. In a nutshell, the notice of appeal filed by the appellant neither shows the decisions to be appealed against nor the offence which the appellant was convicted of.

In view of the aforesaid shortfalls, the notice of appeal is defective and it contravenes Rules 68 (2) and (7) of the Court of Appeal Rules, 2009.

We agree with Ms. Gwaltu learned Senior State Attorney that there is no valid notice of appeal. Since under Rule 68 (1) a notice of appeal is a fundamental document that institutes an appeal, given the said defects before the Court there is no competent appeal which can proceed to be determined on merits. In absence of a valid notice the purported appeal is incompetent and we hereby strike it out.

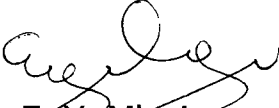
DATED at MBEYA this 11<sup>th</sup> day of April, 2016.

N.P. KIMARO  
**JUSTICE OF APPEAL**

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

R.E. MZIRAY  
**JUSTICE OF APPEAL**

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

  
E. Y. Mkwizu  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**