

**IN THE COURT OF APPEL OF TANZANIA**

**AT MTWARA**

**(CORAM: KIMARO, J.A., KAIJAGE, J.A. And LILA, J.A.)**

**CRIMINAL APPEAL NO. 160 OF 2016**

**EDWIN THOBIAS PAUL.....APPELLANT**

**VERSUS**

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

**(Appeal from the decisions of the High Court of Tanzania**

**at Mtwara)**

**(Mzuna, J.)**

**dated the 16<sup>th</sup> day of October, 2015**

**in**

**Criminal Session No. 40 of 2014**

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**RULING OF THE COURT**

27<sup>th</sup> & 29<sup>th</sup> July, 2016

**LILA, J.A.:**

This is a second appeal. Edwin Thobias Paul, the appellant, was arraigned before the District Court of Lindi at Lindi with an offence of attempted rape contrary to section 132(1) and (2) of the Penal Code (Cap 16 R.E, 2002). He was sentenced to serve a life term of imprisonment. His first appeal to the High Court of Tanzania at Mtwara partly succeeded in that the sentence imposed by the trial Court was reduced to thirty years imprisonment. As it were, the conviction was sustained. Dissatisfied, the appellant wishes to try his lucky in this Court. He accordingly lodged his

notice of intention to appeal on 13/11/2015 well within the time required for lodging notice of appeal. He, later, lodged his memorandum of appeal constituting of only two grounds of appeal. These are:-

1. That the learned trial judge erred in law and in fact by not considering that on material day the appellant was drunk (sic) and he did not know what he was doing at the scene of the crime as he raised a defence of intoxication.
2. That hounourable judge the appellant humbly prays your honourable Court to grant him lenient sentence because the 30 years imprisonment is very excessive punishment.

Mr. Kauli George Makasi, learned State Attorney, appeared for the respondent. The appellant appeared in person, unrepresented.

As the parties sat ready to argue the appeal, the Court interrupted and asked the learned State Attorney to give his views on the propriety of the notice of appeal incorporated in the record of appeal. The notice, actually, shows that the appellant was convicted with the offence of Rape contrary to section 131(1) and (2) of the Penal Code.

Mr. Makasi, learned State Attorney, straight away stated that the notice of appeal lodged by the appellant wrongly showed that the appellant was convicted with the offence of rape. He, instead, told this Court that according to the record of appeal, the trial court convicted the appellant with the offence of attempted rape contrary to section 132(1) and (2) of the Penal Code which offence he stood charged with and that such conviction was not faulted by the High on the first appeal. He said the notice of appeal is defective and the defect renders the purported appeal incompetent. He urged this Court to invoke the provisions of rule 4(2) (b) of the Court of Appeal Rules, 2009 to strike out the appeal for want of proper notice of appeal.

On his part, the appellant conceded to the defect and showed readiness to have his appeal struck out for being incompetent.

We, on our part, find that this is not a matter to detain us so much. This Court, times without number, has reiterated the necessity to comply with the requirements under Rule 68 of the Rules. The reason for such exposition of law is based on sound reason that it is a notice of appeal which institutes an appeal under Rule 68(1) of the Rules. This Court's decisions in unreported cases of **Albanus Aloyce and Another v. R, Criminal Appeal No. 258 of 2014, Hamisi 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**, sealed the legal position that Rule 68 of the Rules is couched in mandatory terms and it should be complied fully in initiating an appeal.

In the instant appeal, the defect is on the nature of the offence with which the appellant was convicted. The appellant has indicated rape instead of attempted rape. As to what constitutes a proper notice of appeal this Court's decision in **Nichontinze s/o Rojeli** (supra) was very clear as it listed down all that should be contained in a notice of appeal, failure of which renders it defective. These are:-

1. Must indicate the correct date of judgment intended to be appealed against.
2. Insert the name of the High Court Judge and the number of the case to be appealed against.
3. State briefly the nature of the acquittal, **conviction**, sentence, order or findings which it is desired to appeal.

It is undisputed that the notice of appeal wrongly stated the nature of the offence the appellant was convicted with.

On the strength of the above cited authorities and Rule 68 as it now stands, the present notice of appeal under our consideration is incurably defective for failure to properly state the proper nature of the offence the appellant was convicted with. It is now settled [see **Onesmo Joseph and Another v. R, Criminal Appeal No. 21 and 22 of 2012** and **Hassan Said v. R, Criminal Appeal No. 193 of 2013** (both unreported)] that the natural consequences of such defect is to render the purported appeal incompetent and should be struck out.

That said, we accordingly strike out the purported appeal.

**DATED at MTWARA** this 28<sup>th</sup> day of July, 2016.




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

S.S. KAIJAGE  
**JUSTICE OF APPEAL**

S.A. LILA  
**JUSTICE OF APPEAL**

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

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