

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 117 OF 2018

MBARUKU DEOGRATIAS..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Bukoba)**

(Kairo, J.)

dated the 31th day of August, 2017

in

Criminal Appeal No. 52 of 2015

RULING OF THE COURT

30th August & 4th September, 2018

MKUYE, J.A.:

The appellant, Mbaruku Deogratias, was charged with the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 in the District Court of Bukoba. It was alleged that on 12-8-2013 at Kashai area within Bukoba Municipality in Kagera Region he did unlawfully have sexual intercourse with one Lilian Gregory who was a girl of 10 years old. Following a full trial, the appellant was found guilty convicted and was sentenced to 30 years imprisonment. He

unsuccessfully appealed to the High Court. Hence, he has now lodged his second appeal to this Court.

The appellant filed a memorandum of appeal comprising eleven (11) grounds of appeal. However, the said memorandum of appeal was greeted with a preliminary objection, the notice of which, was filed by the respondent Republic on 28-8-2018 to the effect that:

" The appeal before the Court is incompetent, for a defective Notice of Appeal which indicates wrong registration number of the appeal in the lower court".

When this appeal came before us for hearing, the appellant appeared in person and was unrepresented. The respondent Republic was represented by Mr. Nestory Paschal Nchimani, learned State Attorney.

Due to the practice of this Court where there is a notice of preliminary objection filed in an appeal or application, we allowed the preliminary objection to be heard first before the appeal could be heard on merit.

Mr. Nchimman submitted that the notice of appeal found at page 105 of the record was defective. He pointed out that, though the appellant has indicated in the notice of appeal that he intended to appeal against the decision of Kairo, J. in Criminal Appeal No. 102 of 2013, but the said judge did not deal with that case. He said, Kairo, J dealt with Criminal Appeal No. 52 of 2015 to which its decision was delivered on 31/8/2017. While relying on the case of **Elia Masena Kachala & 2 Others v. Republic**, Criminal Appeal No. 156 of 2012 (unreported), he contended that the notice of appeal ought to comply with the provisions of Rule 68(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which prescribes the matters to be shown in the notice of Appeal. He said, since the notice of appeal which institutes the appeal in terms of Rule 68(1), is defective, there is no appeal before the Court. He, therefore, urged the Court to strike out the appeal.

The appellant being a lay person had no contribution to the shortfall but he lamented that, he being a prisoner who depended on the prison's authority to draft the documents, he could not have known the shortfalls. He, thus, prayed to the Court's indulgence to assist him to achieve his intended justice.

It is without question that under Rule 68 (1) of the Rules, it is a notice of appeal which institutes the appeal. Subrule (2) of Rule 68 of the Rules sets out a mandatory requirement that the notice of appeal must indicate the nature of acquittal, conviction, sentence, order or finding against which it is desired to appeal. On top of that sub rule (7) of the same Rule, provides for the notice of appeal to be substantially in Form B prescribed under that provision which also emphasizes the requirement to indicate the correct registration number of the case against which the appellant seeks to appeal.

In this case, the notice of appeal, as was correctly argued by Mr. Nchimani shows that the appellant intends to appeal against the decision of the High Court of Tanzania (Kairo, J.) in Criminal Appeal No. 102 of 2013. Our perusal of the record has revealed that Criminal Appeal No. 102 of 2013 has never been before Kairo, J. If anything, Kairo, J. had dealt with is Criminal Appeal No. 52 of 2015 in which she handed down her decision on 31/8/2017. Incidentally, Criminal Appeal No. 102 of 2013 referred to, with the exception of type of case was dealt with by the District Court of Bukoba at Bukoba in Original Criminal Case No. 102 of 2013, which could not in any way be appealed to this Court. This

means that the appellant has cited a wrong registration number of the High Court Criminal Appeal intended to be appealed against.

There are a number of this Court's decisions which have emphasized the compliance of the requirements of Rule 68(2) of the Rules and in particular on the matters to be indicated in the notice of appeal. In the Case of **Nichontinze Rojeli v. Republic**, Criminal Appeal No. 177 of 2014, this Court stated that;

"The notice of appeal must contain the following:

- 1). *Indicate a correct date of the 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 finding against which it is desired to appeal."*

[Emphasis added]

Also, in the case of **Elia Masena Kachala & 2 others (supra)** in emphasizing on the validity of a notice of appeal, the Court stated as follows:-

*" For a notice of appeal to this Court to be valid it is mandatory that it must indicate not only the date of challenged judgment and the name of the trial/appellate judge/magistrate, but also the **trial/appellate court and the correct registration number of the case/appeal in the lower Court.**"*

[Emphasis added]

Applying the principle set out in the above cited cases, we are satisfied that in the notice of appeal under discussion, the appellant did not indicate a correct registration number of the High Court's decision he desired to appeal against.

With what we have demonstrated earlier on, we agree with Mr. Nchimani that the notice of appeal which was lodged by the appellant is incurably defective for having indicated an incorrect registration number

of the High Court Criminal Appeal sought to be appealed against. Also being defective, it could not institute a competent appeal. Hence, even the appeal is incompetent before the Court.

Given the circumstances, we accordingly strike out the appeal under Rule 4(2) (a) of the Rules. The appellant may, if he wishes, file a fresh notice of appeal after complying with the requirements of the law relating to limitation.

DATED at **BUKOKA** this 4th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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



E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL

