

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

(CORAM: LUANDA, J.A., LILA, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 470 OF 2016

**1. GEROLD AUGUSTINO MKULA }
2. MELICK MKULA } APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

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

(Sameji, J.)

dated 22nd day of August, 2016

in

DC Criminal Appeal No. 27 of 2016

JUDGMENT OF THE COURT

15th & 16th May, 2018

LILA, J.A.:

The two appellants, namely Gerold Augustino Mkula and Melick Mkula, together with one Evelina Mlonganile, were charged before the District Court of Njombe on four counts. These are:-

"1ST COUNT

STATEMENT OF OFFENCE

***BURGLARY: Contrary to section 294 (1) (a) and 294(2) of
the Penal Code [Cap 16 R.E. 2002]***

PARTICULARS OF OFFENCE

GEROLD S/O AUGUSTINO @MKULA and MERICK S/O MKULA on 29th day of May, 2015 at 22:30 hours at Ikelu village within the district and region of Njombe did break and enter the dwelling house of one **STULIDA D/O ALLONY** with intent to commit an offence of stealing therein.

2ND COUNT

STATEMENT OF OFFENCE

STEALING: Contrary to section 258 (1) and 265 of the Penal Code [Cap. 16, R.E 2002]

PARTICULARS OF OFFENCE

GEROLD S/O AUGUSTINO @ MKULA and MELICK S/O MKULA on the 29th day of May 2015 at Ikelu village within the District and Region of Njombe stole two mattress, solar battery, solar inventor, Tshs 70,000, Nokia phone, two curtains, property of one **STULIDA D/O ALLONY**.

3RD COUNT

STATEMENT OF OFFENCE

RAPE: Contrary to Section 130(2) (e) and 131(1) of the Penal Code, [Cap. 16 R.E 2002].

PARTICULARS OF OFFENCE

GEROLD S/O AUGUSTINO @MKULA and MELICK S/O MKULA on the 29th day of May 2015 at Ikelu village within the District and Region of Njombe, jointly and together had a carnal knowledge of one **JAMILA D/O DANIEL @MGUNDA**, a fourteen (14) years old girl.

4TH COUNT

STATEMENT OF OFFENCE

***BEING IN POSSESSION OF PROPERTIES SUSPECTED
TO HAVE BEEN STOLEN OR UNLAWFULLY ACQUIRED:***

*Contrary to section 312(1) (b) of the Penal Code [Cap. 16,
R.E 2002]*

PARTICULARS OF OFFENCE

AVELINA D/O MLONGANILE on the 30th day of May,
2015 at Ilunda Village within the District and Region of
Njombe, was found in a possession of the two mattresses,
solar battery, two curtains, reasonably suspected to have
been stolen or unlawfully acquired.”

The trial ensued and, at the end, all of them were convicted as charged. In the 1st count, the appellants were each sentenced to serve 12 months imprisonment; for the second count, they were each sentenced to serve 12 months imprisonment and for the 3rd count, they were each sentenced to serve thirty (30) years imprisonment, to suffer five (5) strokes of the cane and payment of Tshs. 500,000/= as compensation to PW, the victim of the offence. The sentences were ordered to run concurrently. Evelina Mlonganile was sentenced to serve six (6) months imprisonment upon being convicted on the 4th count. As it were, only the appellants were aggrieved with the conviction and sentence. Their

respective appeals to the High Court were turned (Sameji, J.) on a point of law that their respective notices of appeal and petitions of appeal made reference to two different decisions sought to be challenged on appeal. The High Court found that while the notices of appeal referred to Criminal Case No. 71 of 2015, the petitions of appeal referred to Criminal Case No. 12 of 2014. On that account, the High Court (Sameji, J.) in its "**Order of the Court**" dismissed the appeal.

Undaunted, the appellants filed two separate notices of appeal to the Court within time. They are couched thus.

That of Gerold Augustino Mkula reads;

"NOTICE OF APPEAL

*TAKE NOTICE that **MERICK MKULA** Appeal to the Court of Appeal of Tanzania against the decision of the Honourable Madam Justice SAMEJI given at Iringa on the 22nd August 2016*

*Where by the appellant was convicted of **1st COUNT:** BURGLARY C/S 294 (1) (a) AND 294 (2) OF THE PENAL CODE [CAP 16 R.E. 2002], **2ND COUNT:** STEALING C/S 258 (1) AND 265 OF THE PENAL CODE [CAP 16 R.E 2002], **3RD COUNT:** C/S 130 (2) (e) AND 131 (1) OF THE PENAL CODE [CAP 16 R.E 2002] and Sentenced to Serve 12 Months for the **1st Count**, 12 Months for the **2nd Count** and 30 years for the **3^d Count** Sentences to run Concurrently.*

*The appeal is against Conviction only/ Conviction and Sentence/ sentence only, and **order only**.*

*The appellant **intends**/ does not intend to be present at the hearing of the appeal.*

The address of service of the appellant:

**MERICK MKULA
IRINGA PRISON
P.O. BOX 364
IRINGA**

*Dated this **26th** day of **August 2016***

SignedAppellant

(Retained on to be prepared this notice /retained to appear at the hearing of the appeal /assigned to appear at the hearing of the appeal)

To: the Registrar of the High Court at Iringa lodged in the High Court of Tanzania at Iringa on the 29th day of August, 2016

.....
Registrar

For Appellant who was is in prison:

Date of Judgment and Conviction 20.04.2016

Date of entering the prison 20.04.2016

Signature of the officer in charge

Name of certifying officer in charge of the prison

.....
**(ACP. W.M. MWANANGWA)
IRINGA DISTRICT PRISON**

Date of transmission: 26.08.2016."

And that of Merick Mkula reads;

"NOTICE OF APPEAL

TAKE NOTICE that **GEROLD AUGUSTINO MKULA** Appeal to the Court of Appeal of Tanzania against the decision of the Honourable Madam Justice **SAMEJI** given at Iringa on the 22nd August 2016

Where by the appellant was convicted of **1st COUNT:** BURGLARY C/S 294 (1) (a) AND 294 (2) OF THE PENAL CODE [CAP 16 R.E. 2002], **2ND COUNT:** STEALING C/S 258 (1) AND 265 OF THE PENAL CODE [CAP 16 R.E 2002], **3RD COUNT:** C/S 130 (2) (e) AND 131 (1) OF THE PENAL CODE [CAP 16 R.E 2002] and Sentenced to Serve 12 Months for the **1st Count**, 12 Months for the **2nd Count** and 30 years for the **3rd Count** Sentences to run Concurrently.

The appeal is against Conviction only/ Conviction and Sentence/ sentence only, and **order only**.

The appellant **intends**/ does not intend to be present at the hearing of the appeal.

The address of service of the appellant:

GEROLD AUGUSTINO MKULA

IRINGA PRISON

P.O. BOX 364

IRINGA

Dated this 26th day of **August 2016**

SignedAppellant

(Retained on to be prepared this notice /retained to appear at the hearing of the appeal /assigned to appear at the hearing of the appeal)

To: the Registrar of the High Court at Iringa lodged in the High Court of Tanzania at Iringa on the 29th day of August, 2016

.....
Registrar

For Appellant who was is in prison:

Date of Judgment and Conviction 20.04.2016

Date of entering the prison 20.04.2016

Signature of the officer In charge

Name of certifying officer in charge of the prison

.....
(ACP. W.M. MWANANGWA)
IRINGA DISTRICT PRISON

Date of transmission: 26.08.2016."

When the appeal was called on for hearing both appellants appeared in person and unrepresented. Mr. Mwinyiheri Aristarick, learned State Attorney, represented the respondent, Republic.

At the outset, we wanted to satisfy ourselves whether or not the notices of appeal before us were proper. Parties were accordingly invited to address the Court on that issue.

Mr. Aristarick could not stand against the fact that the appellants' notices of appeal made reference to the offences they were convicted and the sentences thereof imposed by the trial district court. He said, they ought to have had indicated that the appeal is against the dismissal order made by Sameji, J. He accordingly urged the Court to strike out the appeal

on account of the defective notices of appeal which contravened the requirements of Rule 68 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Both appellants opted to let the matter be at the mercy of the Court as they were laymen and unrepresented.

We have given due consideration to the brief arguments by the learned State Attorney. We hasten to say that the arguments were straight to the issue under consideration.

We are alive to the legal position that a notice of appeal under Rule 68(1) of the Rules, initiates an appeal. That Rule states:-

" 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 if 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 added)

In addition, a valid notice of appeal is, under Rule 68(2) of the Rules, mandatorily required to state briefly the nature of the decision or order of the High Court sought to be impugned. It states:

" 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 ..."

The Court had an occasion to re-state the position in the case of **Mnazi Philimon V.R**, Criminal Appeal No. 53 of 2013 (unreported) that:-

*".... Furthermore, the Court has consistently held that "it is a mandatory requirement" of Rule 68 (2) of the Rules "for the notice of appeal to state the nature of the conviction, sentence, order or finding of the High Court against which it was desired to appeal." Failure to do so, according to settled law, renders the purported appeal incompetent; See for instance **Majid Goa Vedastus v. Republic**, Criminal Appeal No. 268 of 2006, **William Sunday v. Republic**; Criminal Appeal No. 432 of 2007, and **January Makanta v. Republic**, Criminal Appeal No. 55 of 2013 (all unreported)."*

In the case of **DPP v. Magubo Njige and 2 Others**, Criminal Appeal No. 193 of 2015 (unreported) the Court in an attempt to clear the doubts on what is meant by the word "*nature*" appearing in Rule 68 (2) of the Rules, stated that;

"Such particulars as would reflect the actual result in relation to the actual offence, sentence, order or finding complained of."

Now reverting to the present case, the appellants notices which we have taken pain to reproduce above very clearly make reference to the offences they were convicted and sentenced by the trial district Court. They do not refer to the High Court order which dismissed their appeal. They lack the specific order they seek to impugn. We accordingly agree with the learned State Attorney that the notices of appeal infringed the mandatory requirements set out under Rule 68 (2) of the Rules.

The obtaining consequences are that the notices are defective and could not initiate a valid appeal. This stance was insisted in the case of **Shukuru Tunugu vs. R**, Criminal Appeal No. 48 of 2012 where the Court stated:-

*"From the submissions, the learned State Attorney has with due respect articulated the correct position of the law laid down in many of our decisions including the case of **Hilda Andolile @ Panjani vs. Republic**, Criminal Appeal No. 203 of 2009 (unreported) which she cited. The position is, without a notice of appeal there would be no competent appeal for determination by this Court."*

Given the above position of the law, we are of a decided view that the notices of appeal are defective. They could not institute a competent appeal in terms of Rules 68 (1) of the Rules. The appeal is incompetent. It is struck out.

DATED at IRINGA this 16th day of May, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

