IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., LILA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 215 OF 2018

1. **FREEMAN AIKAEL MBOWE**
2. **PETER SIMON MSIGWA**
3. **SALUM MWALIM**
4. **JOHN JOHN MNYIKA**
5. **ESTHER NICHOLAS MATIKO**
6. **VINCENT BIYEGEZA MASHINJI**
7. **HALIMA JAMES MDEE**
8. **JOHN WEGESA HECHE**
9. **ESTER AMOS BULAYA**

..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Sameji, J.)

dated the 20th day of July, 2018
in
Misc. Criminal Application No. 126 of 2018

RULING OF THE COURT

26th September & 5th October, 2018

LILA, J.A.:

This appeal emanates from the High Court order which struck out the appellants' application for revision in which the appellants were seeking its indulgence to revise and correct various orders which were given by the Kisutu Resident Magistrate Court (henceforth the trial

court) in the due conduct of the criminal case the appellants were facing.

For a better appreciation of the nature of the matter which is before the Court, we find it apposite to narrate, albeit briefly, the background of the case which is as follows. The record of appeal bears out that the appellants were jointly and together arraigned before the trial court in Criminal Case No. 112 of 2018 on twelve various criminal offences allegedly committed on 1st and 16th February, 2018. Aggrieved with the way the proceedings were being conducted and various orders handed down by that court, they lodged an application for revision (Misc. Criminal Application No. 126 of 2018) before the High Court seeking the following orders:

> *"(a) this honourable Court be pleased to dispense with the requirement of the applicants annexing to this Application copies of the proceedings and rulings thereto for purposes of calling for and examine the record of proceedings in Criminal Case No. 112 of 2018 to satisfy itself as to the correctness, legality and propriety of the orders issues therein;*
>
> *(b) this Honourable Court be pleased to call for and examine the record if, proceedings in Criminal*

Case No. 112 of 2018 to satisfy itself as to the correctness, legality and propriety of the orders issued therein;

(c) *consequent to the calling for examination of the record of the proceedings the Court be pleased to quash the following trial court's orders:-*

(i) *refusing reference to this Court on constitutional questions arising from the charge sheet;*

(ii) *refusing to avail the applicants with all evidence to be used by the respondents in their trial;*

(iii) *for amendments of the defective charge sheet/defective counts and instead order for their striking out thereof;*

(iv) *refusing to register the Notice of Appeal duly lodged orally by the applicants; and*

(v) *quash all other orders made by the trial court in error and breach of rules of natural justice and rights to seek remedies in the higher court."*

The appellants' application was not well received by the respondent Republic as they raised a preliminary point of objection to

the effect that *'the application for Revision is incompetent for contravening the provisions of section 43(2) of the Magistrates' Courts Act [Cap. 11 R. E. 2002].'*

As is the practice, the preliminary point of objection was heard first. As it were, at its conclusion, the High Court (Sameji, J.) upheld the point of objection raised consequent upon which the application was struck out for being incompetent and premature before the High Court. For ease of reference we take pain to recite that order as hereunder:-

> *"In the event and for the foregoing reasons, I uphold the preliminary objection raised by the respondent and considering all the shortcomings and defects revealed in respect of this application, I proceed to declare that, the Misc. Criminal Application No. 126 of 2018 incompetent and premature before this Court and the same is hereby struck out".*

Aggrieved by the above order, the appellants, on 20/07/2018, filed a joint notice of appeal to challenge the said order.

At the hearing of the appeal all the appellants were in attendance and were represented by Mr. Peter Kibatala and Jeremia Mtobesya, learned counsel whereas; the respondent Republic had the services of Mr. Paul Kadushi, learned Principal State Attorney, who was assisted by Dr. Zainabu Mango, learned Principal State Attorney and Mr. Wankyo Simon and Ms. Jacqueline Nyantori, learned State Attorneys.

At the outset, we wanted to satisfy ourselves whether or not the joint notice of appeal lodged by the appellants complied with Rule 68(2) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules). We accordingly invited the counsel for the parties to address us on that issue.

Mr. Kibatala, in the first place, sought indulgence of the Court that the record of appeal is incomplete on account of the Kisutu Resident Magistrates Court failure to supply them with the proceedings conducted in that court within time. He urged the Court to grant him leave to lodge a supplementary record of appeal that would include the trial court's proceedings which will assist the Court grasp the nature of the complaint they sought the High court to intervene and correct in the application that was struck out.

Arguing in respect of the issue raised by the Court, Mr. Kibatala admitted that Rule 68(2) of the Rules requires the notice of appeal to show the nature of the acquittal, conviction, sentence, order or finding against which the appellants desired to be appealed against. In respect of the notice of appeal under our consideration, Mr. Kibatala tried to impress upon the Court that it complied with the law by indicating that the appeal is against the whole ruling and order of the High Court. He insisted that as opposed to other appeals where an aggrieved party may appeal against either an acquittal, conviction, sentence or order which are just part of the decision, in the present appeal the appellants are appealing against the whole ruling and order of the High Court, hence there was no need to specify the nature of the order sought to be appealed. He, further, contended that although Rule 68(2) of the Rules used the word 'shall' it does not mean that it is mandatory because the spirit of presenting a notice of appeal is simply to show one's dissatisfaction with the decision pronounced. Regarding the notice of appeal conforming to Form B in the First Schedule to the Rules as required under Rule 68(7) of the Rules, Mr. Kibatala was emphatic that, the notice under discussion substantially conforms to that form. He insisted that the word 'substantially' does not mean that it should

resemble in full or be identical to but rather it should tell why the appellant is appealing. He said even if the Court is to find that there was such a defect, the Court can invoke Rule 4(2)(b) of the Rules and disregard the defect so as to do justice to the parties by letting hearing of the appeal to proceed. He undertook to avail the Court with copies of the Court's decisions on that position to bolster his assertions. He lived to his undertaking by supplying us with copies of our three decisions – **Maneno Mengi Limited and Three Others v. Farida Said Nyamachumbe and The Registrar of Companies** [2004] T.L.R. 391, **Goodluck Kyando v. Republic** [2006] TLR 363 and **Said Abdallah and Another v. Ahmad Sood,** Civil Application No. 6 of 2013 (unreported).

On his part, Mr. Kadushi vehemently opposed the contentions made by Mr. Kibatala. He argued that the contents of the notice of appeal fell far short of complying with the requirements of Rule 68(2) and (7) of the Rules. He insisted that Rule 68(2) of the Rules is couched with mandatory terms making it imperative for the notice of appeal to show the nature of the order sought to be appealed against. He said that, the existence of that infraction is not disputed by the counsel for

the appellants; instead, the issue before us is whether that defect is fatal. He, while referring the Court to its decision in **Gidamdaiga Gidayaw v. Republic**, Criminal Appeal No. 93 of 2013 (unreported) in which the Court faced an identical situation, insisted that the defect is fatal hence rendering the appeal incompetent. He, like Mr. Kibatala, promised to file other Court's decisions on the matter which promise he fulfilled by presenting to the Court a copy of the decision in the case of **Mkome Nyang'ombe v. Republic**, Criminal Appeal No. 50 of 2014 (unreported). He, at the end, urged the Court to strike out the appeal.

Mr. Kadushi, with similar vigour, resisted the prayer made by Mr. Kibatala to be permitted to lodge a supplementary record of appeal incorporating the proceedings of the trial court. He gave two reasons. One; that if the Court is to arrive at a finding that the notice of appeal is fatally defective then the appeal will be struck out and the matter will end up there and there will be no need for lodging a supplementary record of appeal. Two; that the High Court refused to call for those proceedings as a result such denial now forms ground six of appeal. It would be improper, therefore, for the Court to allow such proceedings

be incorporated in the record of appeal before the appeal is determined, Mr. Kadushi asserted.

In rejoinder, Mr. Mtobesya reiterated what Mr. Kibatala had earlier on submitted and stressed that they could not show, in the notice of appeal, a specific order desired to be appealed against because the appeal is against the whole ruling. To do so, Mr. Mtobesya charged, would cause a long list of orders being listed in the notice of appeal such that there would be no difference between the nature of orders stated in the notice of appeal and grounds of appeal. In respect of the case cited by Mr. Kadushi; of **Gidamdaiga Gidayaw v. Republic** (supra), he said, the two cases are distinguishable because in the cited case the appeal was against a specific finding of the High Court as opposed to the present case where the appeal is against the whole ruling and order. As to whether the appellants should be allowed to lodge a supplementary record incorporating the trial court proceedings, Mr. Kibatala said such proceedings will enable the Court, in exercising its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA), to correct the illegalities committed by

the trial court. He was, however, quick to state that this will be possible only if the Court is to find that the notice of appeal is proper.

We have given a deserving weight to the contending submissions by counsel of both sides.

We, in the first place, wish to expound the legal position obtaining in respect of lodgement of notices of appeal in criminal appeals.

All criminal appeals to the Court, in terms of Rule 68(1) of the Rules, are instituted by lodging in Court notices of appeal. That Rule in very clear terms 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 of 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).

The requisite particulars or contents of a notice of appeal are well stated under Rule 68(2) of the Rules which provides thus:

*"**Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal**, and shall contain a full and sufficient address at which any notices or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 17, shall be signed by the appellant or his advocate". (Emphasis added).*

In addition, the Rules provide for a format of framing a notice of appeal. Relevant here is Rule 68(7) of the Rules which is couched thus:

" A notice of appeal shall be substantially in the Form B in the First Schedule to these Rules and shall be signed by or on behalf of the appellant".

The notice of appeal under consideration is drafted in the following manner; we hereunder quote only the relevant part thus:

"TAKE NOTICE THAT the Intended Appellant above-mentioned being dissatisfied with the

Ruling and Order of the High Court of Tanzania delivered on 20th July, 2018, Hon. Sameji, J. in Misc. Criminal Application No. 126 of 2018 ***intends to Appeal to the Court of Appeal of Tanzania against the whole Ruling and Order of the said High Court".*** (Emphasis added).

The issue under our consideration is whether the notice of appeal complies with the above legal requirements?

As rightly argued by the learned Principal State Attorney, comprehensively considering the submissions by the two learned counsel for the appellants, they seem to agree that the notice of appeal under consideration does not state the specific nature of the High Court order the appellants desired to appeal against. They attribute this to what they said to be that the appellants are appealing against the **whole ruling and order of the High Court**. Truly, the notice of appeal is to that effect. But, is this what the provisions of Rule 68(2) of the Rules require? Both counsel of the appellants are of the firm view that the notice of appeal as it is, suffices the justification being that it is

not mandatory to state the nature of the order sought to be appealed against. In supporting their contention, they have referred the Court to its decisions in the case of **Maneno Mengi Limited and Others v. Farida Said Nyamachumbe and The Registrar of Companies** (supra) and **Goodluck Kyando v. Republic** (supra). We have considered the relevance of the two decisions to the present case on the use of the word "shall" in a statutory provision. For instance, in the latter case, the Court considered the legal consequences of using the word "shall" in subsection 5 of section 3 of the then Children and Young Persons Act as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998 which put as a requirement that a child be tried and his evidence be adduced in camera and after referring to its decision in the case of **Fortunatus Masha v. William Shija and Another** [1997] T.L. R 41 where the Court construed the word "shall' as used in Rule 76(3) of the Court of Appeal Rules, 1979 and held that the use of "shall" does not in every case make the provision mandatory, the Court maintained that position but went further to state that:-

> *" We would like to point out however, that since the coming into force of the Interpretation of Laws Act, Chapter 1 on the 1st September 2004*

vide Proclamation number 312 of 2004, the law on this point may change in view of section 53(2) which provides;

(2) Where in any written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".

The import of the above observation of the Court is that the coming into force of the Interpretation of Laws Act, Cap. 1 (the ILA) on the 1st September, 2004 marked the death of the old legal position. Incidentally, the two cited cases were decided before the coming into force of the ILA. The present case was lodged on 7th August, 2018 when the ILA was in force. The two cited cases, therefore, defeated the learned counsel's own contention.

Given the above legal position, we are unable to go along with the contention by with the learned counsel for the appellants. Rule 68(2) of the Rules is couched in mandatory terms making it imperative to state the nature of the order the appellants desire to appeal against. A general statement that the appellants are appealing **"against the whole ruling and order of the said High Court"** is not what is

mandatorily contemplated under Rule 68(2) of the Rules to be a proper way of showing the nature of the order desired to be appealed against in the notice of appeal. The Rule requires the specific nature of the order the appellants desired to appeal against be stated in the notice of appeal. It matters nothing if a good number of orders are stated in the notice of appeal depending on the number of orders issued by the High Court which aggrieved the appellants.

There is no gainsaying here that the notice of appeal which purported to institute this appeal is incurably defective on account of failure to indicate the nature of the order the appellants desired to appeal against. The Court has persistently held that such defect is fatal rendering the appeal incompetent – see **Gidamudaiga Gidayaw v. Republic** (supra), **Mbuki James Kiruma v. Republic**, Criminal Appeal No. 163 of 2012 and **Mnazi Philimon v. Republic**, Criminal Appeal No 53 of 2013 (Both unreported).

As alluded to above, both counsel for the appellants also stressed that the notice of appeal substantially conforms to Form B in the First Schedule to the Rules. They argued that the conformity intended is not that of being similar or identical but in terms of content. Mr. Kadushi

was of a different view. For him, the notice of appeal is wanting for failure to state the nature of the order the appellants desired to appeal against.

Admittedly, the word '*substantially*' is not defined in the Rules. However, **the Concise Oxford Dictionary**, Tenth Edition defines the term to mean:-

1. To a great or significant extent
2. For the most part; essentially

And the word *essentially* is defined to mean:-

1. The fundamental elements
2. Things that are absolutely necessary.

It is crystal clear, from the above, that substantial conformity intended under Rule 68(7) of the Rules is of both appearance and of material contents. So, although the notice of appeal may not be that much identical to Form B, the same must be arranged in that manner and must contain all the particulars stipulated under Rule 68(2) of the Rules. This stance has been consistently observed in various Court decisions. For Instance, in the case of **Patrick Ngongi Kindanyani v.**

Republic, Criminal Appeal No. 253 of 2005 (unreported) the Court stated:

> *" And further to the notice of appeal being time barred; in terms of Rule 61(7) of the old rules [Rule 68(7) of the rules], a notice of appeal is required to conform substantially to Form "B" in the First Schedule to the Rules.* ***We have found out from the format in Form "B"' the essential details to be contained in a notice of appeal to include, inter alia, the Name of the High Court Judge, the Date of the decision and the number of the High Court case complained of.***"(Emphasis added)

Further, in the case of **Charles Simbao @ Msilikwa v. Republic**, Criminal Appeal No. 130 of 2014 (unreported), the Court said:-

> *"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 (all unreported)."* (Emphasis added)

In the case of **Exaud Nyali v. The Republic**, Criminal Appeal no. 72 of 2015 (unreported), the Court stated that:

"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 IF 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)."* (Emphasis added)

Similarly, in the case of **Mkome Nyang'ombe v. The Republic** (supra), the Court had this to say:-

> *" Rule 68(2) stipulates the particulars required to be contained in a notice of appeal, which include the nature of acquittal, conviction, sentence, order or finding against which the appellant desires to appeal."*

As can be gleaned from the above extracts the Court has always taken the phrase "substantially in Form B" to mean the appearance of the notice of appeal (format) and the contents (material particulars) thereof as being crucial in determining the propriety of the notice of appeal. For it to be proper it must be drawn, to a large extent, in that format and the material particulars stipulated under Rule 68(2) of the Rules must be shown. The need to abide to the formats of drawing various Court documents provided in the schedules to the Rules need

not be overemphasized, for, they make it easy to insure that all the requisite details are not skipped and are easily notable. It also maintains uniformity in drawing Court documents, hence easy to differentiate them.

Our close examination of the present notice of appeal reveals that it does not conform to Form B for not showing the nature of the order the appellants desired to appeal against. It therefore offends the mandatory requirements of Rule 68(2) and (7) of the Rules. We entirely agree with Mr. Kadushi that the notice of appeal is fatally defective and could not therefore institute an appeal under Rule 68(1) of the Rules. The consequences thereof are that a defective notice of appeal is invalid and cannot initiate a competent appeal. This was the word of the Court in the case of **January Makanta v. Republic.** Criminal Appeal No. 55 of 2013 (Unreported) where it was stated that:-

> *"Appellant did not file any valid Notice of Appeal to ground a competent appeal for our determination. There is no appeal before us, even though the appellant still has the opportunity after complying with law, to come back to this Court in second appeal."*

Mr. Kibatala had also urged the Court, that in case we are to find that the notice of appeal is defective, be pleased to invoke the provisions of Rule 4(2)(b) of the Rules to let, for the interest of justice, hearing of the appeal to proceed. We decline that invitation on account of the position the Court has consistently held that that Rule applies in circumstances where there is no Rule which can be invoked in a given situation – see **Uledi Hassan Abdallah v. Murji Hasnein Mohamed and Two Others**, Civil Appeal No. 2 of 2012 (unreported). In the present case the procedure governing lodgement of criminal appeals is well provided under Rule 68 of the Rules with which the appellants did not comply. We are, therefore, of the firm view that invoking Rule 4(2)(b) of the Rules, in the present situation, will amount to allowing the appellants to circumvent the clear provisions of Rule 68(2) and (7) of the Rules.

Given the above finding in respect of the notice of appeal, consideration of the prayer by Mr. Kibatala for leave to lodge a supplementary record of appeal incorporating the trial court's proceedings becomes superfluous and serves no useful purpose.

All said, since it is the notice of appeal which institutes a criminal appeal and since the notice of appeal in the present case is fatally defective, the purported appeal is rendered incompetent and therefore cannot stand. We accordingly strike it out.

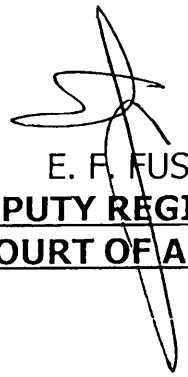
DATED at **DAR ES SALAAM** this 4th day of October, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



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