IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 274 OF 2012

FARIJALA SHABANI HUSSEIN AND ANOTHER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

dated the 21st day of September, 2012
in
Criminal Appeal No. 97B of 2011

.....

RULING OF THE COURT

1st & 30th October, 2018

MUSSA, J.A.:

In the Resident Magistrate's court of Dar es Salaam, at Kisutu, the appellants stood arraigned for eight counts. More particularly, the offences charged were conspiracy to commit an offence, contrary to section 384 of the Penal Code (first count); Obtaining registration by false pretences, as against the first appellant alone, contrary to section 309 of the Penal Code (second count); Forgery, contrary to sections 333, 335(d) (iii) and 337 of the penal code (third count); Forgery, contrary to sections 333,335 (a) and 337 of the Penal Code (fourth count); Uttering false documents, as against

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the second appellant alone, contrary to section 342 of the Penal Code (fifth count); uttering false documents, contrary to section 342 of the penal code (sixth count), stealing contrary to sections 258 and 265 of the Penal Code (Seventh count) and; Obtaining credit by false pretences (eighth count). The latter count was preferred in the alternative to the seventh count.

The appellants refuted the charge, whereupon the prosecution lined up nine witnesses and seventeen documentary exhibits in support of its case. The appellants gave affirmed testimony and put in evidence two documentary exhibits.

On the whole of the evidence, a panel comprising of three Magistrates [Kinemela PRM, Bampikya PRM and Mugeta SRM (as he then was)] found the appellants not guilty of the first count and, accordingly, acquitted them. As regards the seventh count, the panel refrained from making any finding on it but, instead, determined the alternative eighth count to which the appellants were found guilty, convicted and each was sentenced to three years imprisonment. In addition, the presiding panel also convicted the appellants of the third, fourth and sixth counts to which they were, respectively, each sentenced to five years imprisonment (third and fourth count) and three years imprisonment (sixth count).

With respect to the second and fifth counts to which the appellants stood individually arraigned, the first and second appellants were found guilty, convicted and, respectively, sentenced to three and two years imprisonment.

The appellants were dissatisfied and preferred an appeal to the High Court which found no cause to vary the verdict of the trial court and the appeal was, accordingly, dismissed in its entirety (Kaduri, J.)

Still discontented, the appellants are presently at odds with the verdict of the first appellate court upon seven points of grievance. In response, the respondent has greeted the appeal with a notice of preliminary objection which is couched thus:-

> *"The Notice of appeal from trial court (sic) to the High Court is defective for not properly (sic) titled."*

When the appeal was placed before us for hearing, the appellants were represented by Mr. Majura Magafu, learned Advocate whereas the respondent Republic had the services of a consortium of three learned Principal State Attorneys, namely, Mr. Joseph Pande, Mr. Tumaini Kweka and Ms. Pendo Makondo who were assisted by Mr. Peter Maugo, learned State Attorney.

Mr. Kweka who commenced the respondent's arguments in support of the preliminary objection, brought to our attention the impugned Notice which goes thus:-

"IN THE RESIDENT MAGISTRATE COURT OF DAR ES SALAAM
AT KISUTU

(In the matter of an Intended appeal.)

CRIMINAL CASE NO. 1101 OF 2008

1. FARIJALA SHABANI HUSSEIN..... APPELLANT
2. RAJABU SHABANI MARANDA

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of ..... by Hon.....

Dated on ..... in Criminal Case No. .....)

NOTECE OF APPEAL

TAKE NOTICE that, named above appellants intends to appeal to the High Court of (T) at D'Salaam against the decision of the Honourable S. Kinamela, F. Bampikya & Ev. Mgeta given on 23rd day of day May Whereby the appellant was convicted of 3rd – 4th cts Forgery c/s 333 335 (d) (iii) and 337 of the penal code 5th – 6th uttering false documents c/s 242 8th ct. Obtaining credit by false pretence c/s 342 of the penal code and was sentenced to 5 yers imprisonment.

The appeal is against both conviction and sentence. The appellant intends to be present at the hearing of the appeal.

The address of the service of the appellant is:-

C/O officer in charge,
Ukonga Central Prison,
P.O.BOX 9091,
DAR ES SALAAM.
Dated at D'Salaam this 24th day of May, 2011

Appellant's Signature Appellan'ts Signature Appellant's Signature

Handed over to the Officer Incharge Ukonga Central Prison Dar es Salaam for u/s 363 of the CPA, cap 20(RE:2002) this 24th day of May, 2011

".....
Officer Incharge Ukonga Central Prison (DSM)

Lodged in the RMS KISUTU Court Registry Officer at D'SALAAM This 27 Day of May 2011

".....
Court Clerk

COPY TO. The registrar High Court of (T) Dar es Salaam – For information."

Addressing us on the issue of contention, Mr. Kweka submitted that the impugned notice is improperly titled:- **"IN THE RESIDENT MAGISTRATES COURT OF DAR ES SALAAM, AT KISUTU."** the more so as the same was destined to challenge the decision of the trial court in the High Court. More appropriately, he said, the notice of appeal should have been titled: **"IN THE HIGH COURT OF TANZANIA..."** The learned Principal State Attorney conceded though that the provisions of section 361(1) (a) of the Criminal Procedure Act, Chapter 20 of the Revised Edition 2002 of the laws (CPA) are silent as to how a notice of intention to appeal from the decision of a subordinate court should be titled or formatted. He, nevertheless, sought to rely on the unreported decision of this Court in

Criminal Appeal No. 480 of 2016 - **The Director of Public Prosecutions v. Sendi Wambura and Three others** to buttress his suggestion as to how the notice of appeal from a subordinate court to the High Court should be titled or formatted.

It is noteworthy that, in the referred decision, the Court had to grapple with the issue as to how the notice of intention to appeal by the DPP under section 379 (1)(a) of the CPA should be titled. More particularly, in that case, the appellant DPP sought to impugn the decision of the high Court relating to bail. At the hearing of the appeal before the Court, a question arose as to the validity of the notice of appeal from the subordinate court to the High Court which, incidentally, was titled: "**In the District Court...**" Having heard the contending arguments from either side and, drawing inspiration from Rule 68 of the Court of Appeal Rules, 2009 (the Rules) the Court observed:-

> *"Therefore, we propose to the relevant authority that the notice of intention to appeal from subordinate court to the High Court should have a specific prescribed format and title "**In the High Court of Tanzania**" although it should be filed in the District Court as per section 379(1) (a) of the*

CPA. This should also be the case for notice of appeal lodged under section 361(1) of the CPA by other appellants."

In the final event, the Court invoked its revisional jurisdiction and nullified the decision of the High Court on account of the impugned notice of intention to appeal from the District Court to the High Court which was adjudged defective.

To sum up his submissions, Mr. Kweka sought to capitalize on a portion of the decision in **DPP v. Sendi Wambura** (*Supra*) where the Court observed. "*This should also be the case for notice of appeal lodged under section 361(1) of the CPA by other appellants.*" Culling from the observation, the learned Principal State Attorney submitted that a notice of intention to appeal under section 361(1) (a) just as well ought to be titled: "**In the High Court of Tanzania**". To that extent, he concluded, inasmuch as the impugned notice was wrongly titled, the High Court was, as a result, not properly seized with the appeal. Putting it differently, according to him, even the appeal before us would be misconceived being grounded upon incompetent High Court proceedings. Mr. Kweka then finally urged us to nullify the entire proceedings and judgment of the High

Court and, that being the position, the decision of the subordinate court stands unassailed.

The preliminary point of objection was strenuously resisted by Mr. Majura Magafu. To begin with, the learned counsel for the appellants took the position that the observation in **DPP v. Sendi Wambura** to the effect that the suggested mode of titling the notice of intention to appeal equally applies to section 361(1) (a) of the CPA was only advisory to the authorities concerned and, to the extent that the issue before the Court involved section 379(1) (a) and not section 361(1) (a) the observation was, at best, *obiter dictum*.

Furthermore, Mr. Magafu added, the provisions of sections 361(1) (a) and 379(1)(a) of the CPA are materially different. For one, he said, whereas in terms of section 361(1) (a) the requirement is for the desiring appellant to give the notice of intention to appeal within ten days from the date of the decision, under section 379 (1) (a) the requirement is for the DPP to give such notice within thirty days of the decision sought to be impugned. For another, he added, in the wake of the amendment comprised in section 31 of the National Prosecution service Act, No. 27 of

2008, a notice of intention to appeal under section 379 (1) (a) of the CPA institutes an appeal.

In sum, the learned counsel for the appellants similarly conceded that aside from the dictum of the court in **DPP v. Sendi Wambura** there is, hitherto, neither a legislative provision nor a judicial pronouncement which lays down the particular format of a notice of intention to appeal under section 361(1) (a) of the CPA. He distinguished the decision of the Court in the unreported Criminal Appeal No. 359 of 2014 – **Republic v. Mwesige Geofrey and Another.** That case, he said, exclusively dealt with the issue as to the place of filing a notice of intention to appeal under section 361 (1) (a) as distinguished from its format. Mr. Majura was finally of the view that the preliminary point of objection is invalid and urged us to overrule it. Should we be minded to make provision for the format of a notice of intention to appeal under the provision, he cautioned, we should similarly make provision as to the time when the prescribed format should become operative.

In a brief rejoinder, Mr. Pande submitted that should we be minded to accept Mr. Magafu's suggestion that the Court's observation in **DPP v. Sendi Wambura** with respect to section 361 (1) (a) of the CPA was

obiter dictum, we should go further and intervene in our right and adopt the prescribed format, if anything, for purposes of enhancing consistency and certainly in procedural requirements.

Having heard the learned rival arguments with respect to the preliminary point of objection, we interjected two issues pertaining to the appeal presented before us and invited the comments of the learned minds from either side. The first issue related to the Notice of Appeal which appears at page 494 of the record. In the Notice, the appellants are named as: "**FARIJALA SHABANI HUSSEIN AND ANOTHER.**"

The second issue was with respect to the memorandum of appeal. It is common ground that the record of appeal was certified by the Registrar of the High Court on the 31st May, 2018 and the same was endorsed upon Receipt by the Court on the 10th July, 2018. And yet, the memorandum of appeal was lodged a good deal later on the 26th September, 2006. Our concern was whether or not the memorandum of appeal was lodged belatedly contrary to the specific stipulation of Rule 72 (1) of the Rules which requires an appellant to lodge the memorandum of appeal within twenty one days after service on him of the record of appeal.

Upon our invitation, Ms. Makondo expressed at once that the Notice of Appeal is incurably defective for improperly naming the second appellant: "**AND ANOTHER**" in lieu of his name. The learned Principal State Attorney submitted that to the extent that the appeal at hand is joint, the misnaming vitiated the entire Notice as well as the appeal itself which stands to be struck out.

As regards the second issue, Ms. Makondo was similarly of the view that the appeal stands to be dismissed under Rule 75 (5) of the Rules on account that the memorandum of appeal was filed well beyond the twenty one days prescribed by Rule 72 (1) of the Rules.

Responding to the first issue of our concern, Mr. Magafu conceded that, indeed, the Notice of Appeal did not refer to the second appellant by name. Nevertheless, the learned counsel for the appellant was quick to rejoin that the misdescription is innocuous, the more so as the second appellant is securely named in both the memorandum and the record of appeal.

On the second issue, Mr. Magafu submitted that, upon preparation, the record of appeal could not be served on the appellants through the prison officers on account of the fact that the appellants were no longer in

prison custody. He was personally served with the record of appeal a good deal later and, accordingly, filed the memorandum of appeal on the 26th September, 2018. When we pressed him to disclose the date when he was served with the record of appeal, Mr. Magafu was prevaricative and could not recall the exact date. Admittedly, there is no evidence of service and we, ourselves, could discern from the record as to when, exactly, the learned counsel for the appellants was served with the record of appeal.

Addressing now the preliminary point of objection raised by the respondent, we deem it apposite to begin by extracting the relevant section 361 (1)(a) of the CPA which makes provision for the giving of a notice of intention to appeal:-

> *"361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant:-*
> (a) *has given notice of his intention to appeal* ***to the trial subordinate court*** *within ten days from the date of the finding, sentence of corporal punishment only, within three days of the date of such sentence.* [Emphasis supplied.]

We think it is apt to pause here and observe that the bolded expression **"... to the trial subordinate court..."** was read into the

provision by the Court in **Republic Vs. Mwesige Godfrey and Another** (*supra*).

It is, perhaps, pertinent if we should also extract section 379(1) (a) of the CPA which makes provision for a corresponding notice of intention to appeal by the DPP as follows:-

> *"379 (1) subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of public Prosecutions* ***or a person acting under his instructions:-***
>
> *(a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal finding, sentence or order against which he wishes to appeal* ***and the notice of appeal shall institute the appeal."***
>
> [Emphasis supplied]

The bolded expressions **"... or a person acting under his instructions ..."** and "... **and the notice of appeal shall institute the appeal ..."** were added into the provision by the already referred Act No. 27 of 2008.

Culling from the provisions of section 361(1)(a), in particular, it is plain that the law does not make any prescription of the format in which the notice of intention to appeal should be. Thus, in for instance, the unreported Criminal Appeal No. 476 of 2007 – **Kassana Shabani and Another v. The Republic,** the Court made the following observation:-

> *" It ought to be appreciated that under section 361(1)(a) of the Act the intended appellant is required to "give" or declare his intention and not to "file" or lodge a notice of intention to appeal within ten days. Such notice may be oral or in writing".*

A corresponding observation was later made in another unreported Criminal Appeal No. 262 of 2009- **Mtani Alfred v. The Republic**:-

> *"Unlike Rule 68(2) of the Court of Appeal Rules, 2009 which requires an intending appellant to lodge a written notice of appeal, the provisions of section 361(1)(a) of the Act do not have such a requirement. An intending appellant is not required to lodge a written notice of appeal. An oral notice of intention to appeal given to the trial court or the prison officer on admission into prison would normally suffice."*

To sum up from the foregoing, a notice of intention to appeal under section 361(1)(a) of the CPA may either be in writing or it may merely be in nature of an oral instruction by the desirous appellant given to the trial court or the prison officer upon, respectively, his conviction or admission into prison.

What is more, it seems to us that the provisions of section 361(1) (a) of the CPA are slightly but materially at variance with those of section 379(1) of the CPA in that, unlike the latter provisions which stipulates that a notice of intention to appeal institutes an appeal by the DPP, the legislature did not deem it appropriate to make a similar stipulation with respect to the former provisions. To this end, we entirely subscribe to Mr. Magafu's advice that the two provisions are not quite *in pari materia* and, to that extent, we agree with him that the observation in **DPP v Sendi Wambura** to the effect that the prescribed format applies to section 361 (1) (a) as well was, at best, *obiter dictum.*

In this regard, Mr. Pande invited us to embark on our own construction of section 361(1) (a) to which we are properly seized and make provision for the format of the notice of appeal. We entirely agree, more particularly, given the reality that parliament did not specifically

prescribe the format to be taken by a written notice of intention to appeal. We are indeed, alive to truism that often times, either deliberately or inadvertently, Parliament enacts provisions generally or with a vague wording with a view for the courts to fill in the gaps in the course of its construction.

As can be clearly discerned from the learned rival arguments from either side, the pith of the controversy here lies not in the ambiguity of the provisions of section 361(1)(a) of the CPA as such, rather, it is aroused by the apparent omission by the legislature to prescribe the format to be taken by a written notice of intention to appeal. Whereas the respondent takes the position that such notice should be titled: "**In the High Court of Tanzania**," Mr. Magafu for the appellants is adamant that the notice should be titled as it presently is, that is, in the subordinate court.

On our part, we are of the settled view that this controversy need not unnecessarily detain us. Having prescribed the title: **In the High Court of Tanzania** with respect to the notice under section 379(1) (a) in the referred case of **DPP Vs. Sendi Wambura**, for the purposes of enhancing consistency and certainty in the procedural requirements, we are minded to adopt the format which was prescribed therein and, as such, a written

notice of intention to appeal under section 361(1)(a) should, accordingly be titled: "**In the High Court of Tanzania.**"

We should, however, hasten to point out that the prescription we have just made is quite new and was obviously not a requirement at the time when the appellants filed their written notice of intention to appeal. Being aware of the realities on the ground we order that the prescribed title should become operative six months from the date of the delivery of this ruling. That being the position, we are constrained to find and deem that the notice of intention to appeal by the appellants was competently so filed and the preliminary point of objection is, accordingly, overruled given the stance of the law as it then stood.

It is now opportune for us to consider and determine the two issues of concern which we raised *suo motu*. We propose to start with the second issue relating to the memorandum of appeal which we find easily disposable.

As we have hinted upon, it cannot be ascertained from the record of appeal as to when the same was served upon the appellants or their advocate. From our reading of Rule 72(1) and (5) of the Rules the dismissal of an appeal on the ground of a belated lodging of the

memorandum of appeal is conditional upon the service, on an appellant, of the record of appeal. In the absence of proof of the exact date when the appellants or their advocate were served with the record of appeal, the provisions of Rule 72 (1) of the Rules cannot be taken into play. But, it seems to us that in this appeal, the bone of contention lies with the first issue which relates to the Notice of Appeal. Rule 68 (1) of the Rules provides thus:-

> *"**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 supplied].

The Notice of Appeal at hand does not cite the second appellant by name, to which ailment Ms. Makondo submitted, in effect, that the Notice is invalid and, for that matter, the appeal itself has been rendered incompetent. We have already indicated the extent to which Mr. Magafu downplayed the defect.

On our part, we have given specific regard to the requirements of the Rule from which we deduce that the Notice of Appeal should have cited the second appellant by name, failure of which it cannot be said that the Notice of Appeal validly instituted a joint appeal. The Notice of Appeal is, so to speak, incurably defective and, in the result, the appeal has been rendered incompetent and, accordingly, the same is struck out. The appellants are at liberty to commence the process of a fresh Notice of Appeal in accordance with the law. It is so ordered.

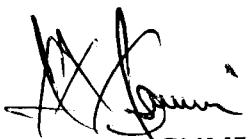
DATED at **DAR ES SALAAM** this 25 day of October, 2018

K. M. MUSSA
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.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL