

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MASSATI, J.A. MWARIJA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 274 OF 2013

SHABANI ABBASI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**[Appeal from the decision of the High Court of Tanzania
at Dar es Salaam.]**

(Utamwa, J.)

Dated 22nd day of July, 2013

In

Criminal Appeal No. 74 of 2012

RULING OF THE COURT

29th February, 2016 & 6th May, 2019

MWARIJA, J.A.:

The appellant, Shabani Abbasi and another person, Ally Seif (hereinafter "the 2nd accused") were charged in the Resident Magistrate's Court of Temeke with the offence of Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] (hereinafter "the Penal Code"). It was alleged that on 3/1/2011 during night time at Toboa Tobo area in Mtoni Mtongani area within Temeke municipality, Dar es Salaam region, they stole one motorcycle make SANLG registration No. T. 387 BGD (the motorcycle) value at TZS

1,750,000.00, the property of one Majaliwa Mohamed and immediately before and after such stealing, they threatened the said owner with a machete in order to obtain and retain the motorcycle.

Both the appellant and the 2nd accused denied the offence. After a full trial, the trial court found that the prosecution had failed to prove the offence of armed robbery. The learned trial Principal Resident Magistrate was however, satisfied that the adduced evidence had proved the offence of robbery with violence beyond reasonable doubt. She therefore found them guilty of that lesser offence and proceeded to convict and sentence them to fifteen (15) years imprisonment.

Aggrieved by conviction and sentence, the appellant and the 2nd accused appealed to the High Court. In its decision, the High Court (Utamwa, J.) found that the prosecution had failed to prove the case against the 2nd accused. His conviction was thus quashed and the sentence imposed on him was set aside. On the other hand, the High Court found that the offence of armed robbery was sufficiently proved against the appellant. The learned first appellate judge thus altered the finding of the trial court and convicted the appellant of the offence of armed robbery. The sentence imposed on the appellant was consequently enhanced to thirty (30) years imprisonment. The appellant was further dissatisfied hence this second appeal.

At the hearing of the appeal on 29/2/2016, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Ms. Helen Mushi, learned Senior State Attorney assisted by Ms. Silvia Mitanto, learned State Attorney.

Before the appeal could proceed to hearing, Ms. Mushi raised a preliminary point of law challenging the competence of the appeal. She contended that the notice of appeal is defective for the appellant's failure to comply with Rule 68 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The gravamen of her contention is the statement by the appellant on the nature of the conviction against which he preferred the appeal. She submitted that, whereas in the decision of the High Court, the appellant was convicted of the offence of armed robbery contrary to section 287A of the Penal Code as charged in the trial court, it is stated in the notice of appeal that the appellant was convicted of the offence of robbery with violence. Ms. Mushi argued that the defect is fatal having the effect of rendering the appeal incompetent. She thus prayed for an order striking out the appeal with leave to the appellant to re-institute it if he would wish to do so.

In response to the submission made by the learned Senior State Attorney, the appellant conceded that the High Court convicted him of the offence of armed robbery not robbery with violence as shown in the

notice of appeal. On the effect of the irregularity, the appellant who, as stated above, did not have the services of a counsel, did not have any useful reply to make. He left the matter to the Court to determine it as it would deem appropriate.

As pointed out above, this matter was heard on 29/2/2016. We think therefore that, before we proceed to consider the point of law raised by the respondent, we are enjoined to state the situation which has caused the delay in handing down the ruling on the matter. After having heard the parties, two out of the three copies of the records of appeal were apparently returned to the registry of the Court and an entry was made in the Criminal Appeals Register that the appeal had been "decided". The purported outcome was also recorded in the 4th copy of the record of appeal (the registry's copy) to the effect that the appeal had been struck out. The copy of the record which was available showed however, that the Court had reserved the ruling to a date to be notified to the parties.

As a result of that unfortunate situation, in order to avoid the possibility of making a conflicting decision on the matter, it was necessary to get the two copies of the records of appeal which were returned to the registry so as to ascertain the real status of the appeal. Unfortunately however, the records could not be immediately traced.

When the same were later belatedly retrieved, it transpired that the entry in the register was wrongly made because the decision on the preliminary point of law was reserved as borne out by the proceedings of the panel in all the three copies of the records of appeal.

That said, we now turn to consider the point of law raised by Ms. Mushi. The appellant conceded that in his notice of appeal, he indicated that he is appealing against the decision of the High Court in which he was convicted of the offence of "robbery with violence". As stated above, that is the offence with which he was convicted by the trial court. The High Court convicted him of the offence of armed robbery contrary to S. 287A of the Penal Code. He ought therefore, to have indicated so in his notice of appeal as required under the mandatory provisions of Rule 68 (2) of the Rules. Rule 68 (1) and (2) of the Rules provides as follows:-

"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.

(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***, and shall contain a full and sufficient address at which any notice 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.]

The effect of a failure by an appellant to comply with the provisions of Rule 68 (2) of the Rules is to make the notice incurably defective and since under sub-rule (1) of Rule 68 of the Rules, it is the notice which institutes an appeal, the consequence is to render the appeal incompetent. There is abundant authority to that effect. In the case of **Nyali v. The Republic**, Criminal Appeal No. 115 of 2018 (unreported), for example, the Court stated as follows:-

"... a notice of appeal which does not indicate the nature of conviction ... cannot be said to have effectively instituted an appeal."

Similarly, in the case of **Mkome Nyang'ombe v. The Republic**, Criminal Appeal No. 50 of 2014 (unreported) in which the appellant had failed to indicate *inter alia*, the nature of the conviction against which he was appealing, the Court observed as follows: -

*"Failure by the appellant to comply with Rule 68 (2) of the Court of Appeal Rules, rendered the notice of appeal defective – See the cases of **Shadrack Kuhala versus Republic**, Criminal Appeal No. 24 of 2013, **Tano John versus Republic**, Criminal Appeal No. 61 of 2014, **Peter Shangwe versus Republic**, Criminal Appeal No. 354 of 2008 and **Mwanya Ally Dadi versus Republic**, Criminal Appeal No. 105 of 2013 (all unreported)."*

The Court then proceed to hold as follows on the effect of such non-compliance:-

"We are in agreement with Miss Mwandanya that the Notice of Appeal is incurably defective. Since a Notice of Appeal institutes an appeal in this Court, the appeal before us is incompetent as it has no leg to stand on. It is accordingly struck out."

In view of the trite position of the law as demonstrated above, there is no gainsaying that the appeal is incompetent for the appellant's failure to comply with the provisions of Rule 68 (2) of the Rules. In the event, the appeal is hereby struck out. The appellant is at liberty to re-institute it subject to the law of limitation.

DATED at DAR ES SALAAM this 25th day of April, 2019.

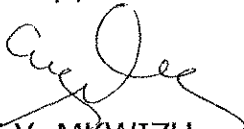


S. A. MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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


E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL