

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

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

CRIMINAL APPEAL NO. 335 OF 2014

MOHAMED ALLY..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Mlay, J.)

**dated the 23rd day of April, 2007
in**

H.C. Criminal Appeal No. 43 of 2006

.....

RULING OF THE COURT

12th & 2nd September, 2020

KITUSI, J.A.:

The appellant Mohamed Ally participated in hearing through video link services connected to Ukonga Prison. The respondent Republic was represented by Ms. Deborah Mcharo and Ms. Ellen Masululi, both learned State Attorneys. The matter is fairly old.

Back in 2003 the appellant appeared before the District Court of Morogoro to answer a charge of unnatural offence contrary to section 154 (1) of the Penal Code, [Cap 16 R.E. 2000] (the Code), it being

alleged that on 23rd of February, 2003 within Morogoro Municipality he had carnal knowledge of one Innocent Deodat against the order of nature.

At the end of the trial, the District Court convicted the appellant with that offence and sentenced him to a jail term of 30 years. His first appeal to the High Court disposed of on 23rd April, 2007 was unsuccessful. The appellant appeals hereto against that conviction and sentence, and he was ready to argue the merit, if not for an issue we raised *suo mottu* at the outset.

We drew the attention of the appellant and that of the learned State Attorneys to the Notice of Appeal that was lodged by the appellant. Cognizant of Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which provides that it is the Notice of Appeal which institutes an appeal, we wanted them to address us on whether there is a proper Notice before us. We were disturbed by the fact that the notice of appeal indicates that the appellant is challenging a conviction for rape.

The unrepresented appellant acknowledged the fact the Notice of Appeal cites rape contrary to section 130 (1) (2) (e) and 131 (1) of the Code, as the offence with which he had been convicted. He however confirmed that he was charged with and convicted of Unnatural Offence under section 154 (1) of the Code.

In addressing this point Ms. Mcharo stated that she had also taken note of the defect earlier, and she demonstrated this in her submissions. The learned State Attorney submitted that the Notice in question offends Rule 68 (2) of the Rules which requires it to state the nature of the conviction or acquittal. She cited the case of **Shabani Abbasi v. Republic**, Criminal Appeal No. 274 of 2013 (unreported) where we struck out the appeal because the Notice of Appeal purported to challenge a conviction for robbery with violence while the appellant had been convicted of Armed Robbery. The learned State Attorney implored us to follow our established position and strike out this appeal.

So, the question for our immediate determination is whether this Notice which cites rape, a completely different offence from that of

unnatural offence, can institute this appeal. In considering the above issue, we find it appropriate in the first place to make it clear that we are aware of the provisions of sub rule (8) of Rule 68 which was introduced in the Rules vide GN No. 344 of 2018 and it is to the following effect:

"(8) Notwithstanding the preceding provisions of this rule, where the notice of appeal deviates from the prescribed form, the Court may, on application by the appellant or on its own motion, order its amendment."

Considering the time this matter has stood pending, we seriously toyed with the idea of ordering an amendment in terms of the above sub rule, but we eventually ruled against it. This is because we can only order an amendment where the deviation on the notice of appeal relates to the form. In our understanding of the term form as relates to a notice of appeal, it does not include its substance such as the nature of the offence with which a prospective appellant was charged with. The Black's Law Dictionary, 9th Edition defines 'form' as:

"1. The outer shape or structure of something as distinguished from its substance or matter".

The notice of appeal under our discussion is false in the nature of the offence charged which is the very substance not merely the form, and thus we cannot invoke sub rule (8) of Rule 68 of the Rules. The case of **Shaban Abbas v. Republic** (Supra) cited to us by Ms. Mcharo was decided before the coming into being of sub Rule (8) of rule 68, therefore it cannot squarely apply in this case. Our conclusion therefore, is that the notice of appeal in this case is defective because it has cited an irrelevant content which cannot be amended by invoking sub rule (8) of Rule 68 of the Rules. Neither do we consider this infraction as one that can be dealt with under the overriding objective principle recently introduced vide section 3A of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019].-This is because as we have repeatedly cautioned, that principle is not to be applied blindly at the expense of established rules of procedure. See for instance, the case of **Mondoros Village Counsel and 2 Others v. Tanzania Breweries Ltd & 4 Others**, Civil Appeal No. 66 of 2017 (unreported).

It is also worth emphasizing that although in Civil Cases there is a provision of Rule 83 (7) of the Rules, similar to Rule 68 (8) of the Rules, the position may be slightly different in civil cases for the obvious reason that a notice of appeal does not institute a civil appeal. Consequently, it is our conclusion that there is no proper notice of appeal, which renders the appeal incompetent and we accordingly strike it out. The appellant may lodge a fresh notice of appeal subject to limitation.

Order accordingly.

DATED at DAR ES SALAAM this 31st day of August, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 2nd day of September, 2020 in the presence of the appellant in person - linked via video conference from Ukonga and Ms. Joyce Nyumayo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL