IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 340 OF 2019

THE DPP ..... APPELLANT

VERSUS

1. **FIDELIS ALBERT MAYOMBO**
2. **OTHMAN SIMON MAGEHEMA** .....**RESPONDENTS**
3. **PONTIAN BONIFACE MUTEGEYA**
4. **NDAMUNGU BAKARI NDAMUNGU**

(Appeal from the decision of the High Court of Tanzania, at Mtwara)

(Dyansobera, J.)

dated the 3rd day of April, 2019
in
Criminal Appeal No. 34 of 2018

.....

JUDGMENT OF THE COURT

25th & 31st May, 2021

LEVIRA, J.A.:

The appellant, the Director of Public Prosecutions (the DPP) was aggrieved by the decision of the High Court in Criminal Appeal No. 34 of 2018 in which decision, the appellant's appeal was dismissed for being instituted by a defective notice of intention to appeal. The appellant has now nocked the doors of this Court with intention to challenge that decision of the High Court on a sole ground that:-

"The High Court Judge erred grossly both in law and fact by holding that the notice of appeal was incurably defective for not been (sic) properly titled, without considering that when the said notice of appeal was filed the law regarding how to title the notice of appeal was not yet established."

To appreciate the factual setting giving rise to the current appeal, we find it apposite to narrate albeit briefly the background. In the District Court of Newala District at Newala the respondents were arraigned and charged with five counts in Economic Criminal Case No. 1 of 2012. The **first** and **fifth** counts were against all the respondents where they were charged with 'Conspiracy' and 'Occasioning Loss to a Specified Authority' respectively. The **second** count was 'Abuse of Office' and it was against the 1st, 3rd and 4th respondents; the **third** and **fourth** counts were, 'Use of Document Intended to Mislead Principal' and it was charged against the 1st respondent only. Upon a full trial, the trial court found all the respondents not guilty of all the counts they were charged with and thus acquitted them accordingly.

The DPP was aggrieved by the decision of the trial court and therefore challenged it in the High Court of Tanzania at Mtwara vide

Criminal Appeal No. 34 of 2018. However, the said appeal was not determined on merits by the High Court following a preliminary objection raised by the respondents to the effect that, the appeal was incompetent for being instituted by a defective notice of intention to appeal. As it is required by the law, the High Court first determined the preliminary objection raised by the respondents. In its Ruling delivered on 3rd April, 2019, the High Court made a finding that the appellant's notice of intention to appeal was defective. Therefore, it sustained the preliminary objection and consequently dismissed the appeal. The appellant was aggrieved as intimated above and hence the current appeal.

At the hearing of this appeal, the appellant was represented by Mr. Paul Kimweri, learned Senior State Attorney, whereas, the respondents were represented by Mr. Dennis Msafiri assisted by Mr. Makaki Masatu, both learned advocates.

Submitting in support of the appeal, Mr. Kimweri argued that the High Court Judge erred when he based his decision on the case of the **Director of Public Prosecutions v. Sendi Wambura and 3 Others**, Criminal Appeal No. 480 of 2016 (unreported) (hereinafter referred to as **Sendi Wambura's case**) which provided for the format on how the

notice of intention to appeal should be titled to dismiss the appellant's appeal for being instituted by a defective notice of appeal. Mr. Kimweri argued further that, before the decision of the Court in **Sendi Wambura's case,** sections 361 and 379 of the Criminal Procedure Act Cap. 20 R.E. 2019 (the CPA) were silent on how the notice of intention to appeal should be titled. He went on stating that the notice of intention to appeal subject of the current appeal appearing at page 263 of the record of appeal was filed on **12th April, 2017** before the decision of the Court in **Sendi Wambura** which was delivered on **28th August, 2018**. In that premise, Mr. Kimweri contended that, it was wrong for the High Court Judge to rely on that decision to punish the appellant's notice of intention to appeal which at the time of filing, there was no guidance on how it should have been titled. He cited section 15 of the Interpretation of Laws Act, Cap 1 R.E. 2019 arguing that the law should not operate retrospectively and equally so, the law in **Sendi Wambura's case** which prescribes categorically that the notice of intention to appeal should be titled '*In the High Court of Tanzania*' although the notice is filed in the District Court.

It was Mr. Kimweri's further argument that, since the appellant lodged the notice of intention to appeal before the law on how the said

notice should be titled came into existence, the appellant's notice of intention to appeal was properly titled. For that reason, he said, it was wrong for the High Court Judge to dismiss the appellant's appeal on account that the notice of intention to appeal was defective due to what he referred to as a wrong title. According to him, the High Court Judge ought to have proceeded to hear the appeal on merits because the notice of intention to appeal was correctly titled. He thus prayed for the Court to nullify the ruling of the High Court and set aside the consequential order thereof and order the High Court to proceed with the hearing of the appeal on merits.

In reply, Mr. Msafiri submitted that this appeal is baseless because the appellant's appeal from the District Court to the High Court was made under section 379 of the CPA which was the basis of the decision of the Court in **Sendi Wambura's case**. In that case, he said, the Court stated categorically the format and title of the notice of intention to appeal to be "**In the High Court of Tanzania**," although the same is filed in the District Court. He went further distinguishing the decisions of the Court in **Sendi Wambura** and **Farijala Shabani Hussein and Another v. Republic**, Criminal Appeal No. 274 of 2012 (unreported) (hereinafter referred to as **Farijala's case**) as he stated that, the later

case is dealing with section 361 of the CPA in which a notice of intention to appeal does not institute an appeal unlike section 379 (1) of the CPA discussed in the former case, where the notice of intention to appeal institutes an appeal. He went on stating that, the case of **Farijala** provided for six months grace period of validity of the notices of intention to appeal filed under section 361 of the CPA and not section 379 of the same Act. As a result, he said, the current case could not be covered under the said grace period of six months provided in **Farijala's case**, in other words he was saying that the decision in the **Farijala's case** is not applicable in the current case. He emphasised that the position of appeals by the DPP is stated in the case of **Sendi Wambura** and not in **Farijala's case.**

Regarding section 15 of the Interpretation of Laws Act cited by the counsel for the appellant, Mr. Msafiri said that, the same is invalid in the current case because it talks about the written laws, that is, Acts, legislation and subsidiary legislation which is not the case herein. It was his argument that the decision of the Court is on a procedural matter and therefore it has retrospective effect. In the same vein, he argued that the decision of the Court in **Sendi Wambura's case** has retrospective effect because it does not fall under section 15 of the

Interpretation of the Laws Act. He went on stating that in **Sendi Wambura's case** the Court struck out the defective notice of intention to appeal which was filed even before that decision. Therefore, he urged us to find that the appellant's notice of intention to appeal was defective as per the finding of the High Court. However, he had a different view regarding the consequential order of the High Court in the case at hand. According to him, the High Court Judge ought to have struck out the appeal instead of dismissing it because by dismissing the same, it entails that the matter was heard on merits while it was not the case herein. Therefore, he urged us to strike out the appeal in lieu of the dismissal order.

In rejoinder, Mr. Kimweri reiterated his submission in chief and insisted that the decision of the Court in **Sendi Wambura's case** was delivered after the appellant had already lodged the notice of intention to appeal, so it is not valid in the current case. He also insisted that, in terms of section 15 of the Interpretation of the Laws Act, case law also falls under that provision and thus, the decision in **Sendi Wambura** cannot be applied retrospectively in the current case.

Finally, he submitted that the High Court was not justified to dismiss the appellant's appeal and neither could it strike it out as

suggested by Mr. Msafiri because, the notice of intention to appeal was properly titled and filed. He thus urged us to allow the appeal.

We have dispassionately considered the rival arguments by the learned counsel for the parties, the record of appeal and the ground of appeal presented by the appellant. The main issue calling for our determination is whether the notice of intention to appeal lodged by the appellant in the District Court of Newala was valid. As a starting point, we would like to appreciate the fact that before the decisions of the Court in **Sendi Wambura** and **Farijala** cases, there was lacuna in both sections 361 and 379 of the CPA on how the notice of intention to appeal should be titled. As we have intimated above, when the notice of intention to appeal under consideration was filed, the decision of the Court in **Sendi Wambura** was yet to be delivered. The law as it was provided under section 379 (1) (a) of the CPA was as follows: -

> *"(1) Subject to subsection (2) no appeal under section 378 shall be entertained unless the Director of Public Prosecutions.*
>
> *(a) Has given* ***notice of his intention to appeal to the subordinated court within thirty days*** *of*

the acquittal, finding, sentence or orders against which he wishes to appeal." [Emphasis added].

As it can be seen from the above quoted provision, apart from directing on where the notice of intention to appeal is to be lodged and the time, the law did not prescribe on how the said notice should look like or titled. The guideline to that effect was provided by the decision of the Court in **Sendi Wambura's case,** a fact which is not disputed by the counsel for both sides. However, what is in dispute between the parties herein is whether or not the decision of the Court in the said case of **Sendi Wambura** has a retrospective effect. While the counsel for the appellant argued that the same has no retrospective effect and therefore the High Court Judge erred to rely on it to dismiss the appellant's appeal, on the other hand, the counsel for the respondents insisted that, the same had retrospective effect and thus the High Court Judge was justified to find that the appellant's notice of intention to appeal was defective and it ought to have been struck out instead of being dismissed.

We agree with the contentions by the counsel for both sides that indeed, there was a lacuna in law on how the notice of intention to appeal was supposed to be titled. This means that when the appellant

lodged the notice of intention to appeal on **12th April, 2017,** no format of title was in place that could guide an intending appellant on how the same should have been titled. The jurisprudence which set the guideline on how to title notices of intention to appeal was developed from the decision of the Court in **Sendi Wambura's case** which was delivered on **28th August, 2018**; in which decision, the Court borrowed a leaf from Rule 68(7) of the Tanzania Court of Appeal Rules 2009 (the Rules) which states categorically that, a notice of appeal shall be substantially in the Form B in the First Schedule wherein the notice of Appeal from the High Court to the Court is titled *"In the Court of Appeal of Tanzania"* and proposed at page 10 of the said decision as follows:-

> *"Therefore, we propose to the relevant authority that the notice of intention to appeal from subordinate Court to 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."*

Having so suggested, the Court went on to find that the notice of intention to appeal from the District Court to the High Court in that case was defective. Therefore, it nullified the proceedings and the judgment

of the High Court. The jurisprudence developed further when the Court was dealing with an akin scenario in the case of **Farijala** where section 361 of the CPA which deals with appeals from trial subordinate courts was under consideration.

The said provision provides as follows:-

> *"Section 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 added].

At page 14 of the said decision, the Court made an observation as follows:-

> *"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."*** [Emphasis added].

Having observed as it appears above, the Court went on to adopt the format suggested in the case of **Sendi Wambura** and held that, the notice of intention to appeal under section 361(1) (a) of the CPA should, accordingly be titled ***"In the High Court of Tanzania."*** Different from the case of **Sendi Wambara**, in ***Farijala's* case,** the Court considered the fact that the appellant's notice of intention to appeal was filed before that requirement of titling the notice as demonstrated above. Therefore, it ordered that the prescribed title should become operative six months from the date of delivery of that ruling, that was, on 30th October, 2018.

It can be gleaned from what we have endeavoured to discuss above that, the appellant's notice of intention to appeal in the current appeal was filed before the development of the law on how the title of the notice of intention to appeal should appear. However, it is our considered observation that when the impugned decision of the High Court was delivered on **3rd April, 2019** both decisions of the Court in ***Sendi Wambura*** and ***Farijala*** cases were in existence. We take note that, the High Court relied on the decision of ***Sendi Wambura's case*** and proceeded to dismiss the appellant's appeal.

However, our close reading of the said decision shows that, having found that the notice of intention to appeal was defective, the Court proceeded to nullify the proceedings and judgment of the High Court. There was no order of either striking out the notice or dismissing the appeal. In the circumstance, we are unable to accept the invitation by Mr. Msafiri that we should rely on that decision and find that the High Court ought to have struck out the appeal instead of dismissing it. We are as well equally unable to agree with Mr. Kimweri that in the circumstances of the current appeal, we should allow the appeal and order the High Court to proceed with the hearing of the appeal with no more for the appellant's notice of intention to appeal was and is still valid. We shall give a reason. We think, the appellant's notice of intention to appeal was valid by the time it was lodged because section 379(1) of the CPA did not provide for the format of title. However, when the High Court was delivering its decision on preliminary objection against the said notice, the law had already been settled on how the notice of intention to appeal should be titled. Therefore, it ought to have directed the appellant to amend the said notice of intention to appeal for it to be in line with the correct position, but that was not the case.

For the reasons stated above, we allow the appeal, nullify the ruling of the High Court and set aside the order dismissing the appeal. To put the record proper, we order the appellant to amend the notice of intention to appeal within 30 days from the date of this decision and thereafter, the High Court should proceed with the hearing of the appeal on merits.

DATED at **MTWARA** this 28th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 31st day of May, 2021 in the presence of Mr. Abdulrahaman Mshamu, learned Senior State Attorney for the Appellant/Republic and in the presence of the respondents in person is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL