

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO 387 OF 2017

REVEREND ERNEST K. MREMA..... APPELLANT

VERSUS

ALEX MREMA.....1ST RESPONDENT

GEOFREY MREMA.....2ND RESPONDENT

GILBERT WILSON.....3RD RESPONDENT

ELIBARIKI WILSON.....4TH RESPONDENT

ELIZAMINI PAUL MREMA.....5TH RESPONDENT

HILDA ALEX.....6TH RESPONDENT

FLORA ALEX.....7TH RESPONDENT

**(Appeal from Ruling of the High Court of Tanzania
at Moshi)**

(Fikirini, J.)

Dated the 20th day of April, 2016

in

Misc. Criminal Appeal No. 1 of 2016

RULING OF THE COURT

9th & 11th February, 2022

MUGASHA, J.A.:

Before the Resident Magistrates' Court of Moshi at Moshi vide in Misc. Criminal Application No.1 of 2016, the appellant filed an application seeking leave to proceed against the respondents by way of private prosecution on

a claim that the respondents had wrongfully taken possession of land which was entrusted to another person by the judgment of the Primary Court. The application was accompanied by the affidavit of Reverend Ernest Mrema, who is the appellant herein. The application was confronted with a preliminary objection on a point of law raised by the respondents challenging its competence of the application on ground that, it was accompanied by a defective affidavit because the *jurat* of attestation lacked signature of the deponent. The preliminary objection was sustained and as a result, the application was struck out in a Ruling which was delivered on 17.08.2016

Undaunted, the appellant unsuccessfully appealed to the High Court which dismissed the appeal having upheld a preliminary objection which was raised by the respondents that the appeal is time barred. Still dissatisfied, the appellant has resorted to this Court seeking to impugn the decision of the High Court. In the Memorandum of Appeal, the appellant has raised three grounds of complaint which we have opted not to reproduce for reasons to be apparent in due course.

When the appeal was called for hearing the parties appeared in person, unrepresented. On our part, we wanted to satisfy ourselves on the propriety or otherwise of the appeal before the High Court having gathered that it was

not preceded by a notice of appeal as required under section 361 (1) (a) of the Criminal Procedure Act CAP 20 R.E. 2019 (the CPA).

Upon taking the floor, the appellant contended that, the notice of appeal remained at the offices of his advocate who passed on and as such, it was not filed in court. Upon a brief dialogue with the Court, he conceded that in the absence of such notice of appeal, the appeal was not properly before the High Court. On the part of the respondents, being lay persons had nothing useful to add on the matter relating to a point of law and they simply acceded to what was submitted by the appellant. That being the case, the issue for our deliberation is whether or not the appeal before the High Court was tenable.

We begin with the position of the law. Criminal appeals to the High Court which originate from the Resident Magistrates' Courts are regulated by Part X of the CPA which prescribes among other things, the manner and limitation periods in which such appeals may be pursued in terms of the dictates of section 361 (1) (a) of the CPA which stipulates as follows:

*"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 within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and

(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order,

save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.”

[Emphasis supplied]

It is glaring that the cited provision imposes mandatory requirements that an appeal from the Resident Magistrates' Court to the High Court must be preceded by a notice of appeal to be lodged not later than ten days from the date of the finding, sentence or order sought to be appealed against. In addition, the High Court is barred to entertain and determine a criminal appeal from the Resident Magistrates' Court which is not preceded by the

notice of appeal or else the appeal will be vitiated. Faced with akin situation in the case of **NTINYABAGIRA F. KUTELEZA @ ROBERT MWAMI VS REPUBLIC**, Criminal Appeal No. 161 of 2006 (unreported), the Court held that:

"Failure to give written notice of appeal within ten days, deprives the High Court power to entertain the appeal."

[See also: **MUSTAFA RAJABU AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 104 of 2015, **SAMSON MARCO AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 446 of 2016 and **ALLY RAMADHANI SHEKINDO AND SADICK SAID @ ATHUMANI VS REPUBLIC**, Criminal Appeal No. 532 of 2016 (all unreported).]

In yet another case of **SALIMU ALPHAN VS REPUBLIC**, Criminal Appeal No. 547 of 2016 (unreported), the Court stated the consequences of the High Court in determining a criminal appeal which is not preceded by a notice of appeal having held:

"In the same breath, since in the instant appeal the appellant did not lodge a notice of appeal before lodging his appeal to the High Court, we are

constrained to agree with the contention of the learned State Attorney that, the first appellate Court in entertaining the appeal, embarked on a nullity, and as such, the said proceedings cannot be left to stand.....”

In the case under scrutiny, page 24 of the record of appeal shows that the impugned Ruling of the Resident Magistrates’ Court was delivered on 28/7/2016 and the appeal to the High Court was filed on 12/10/2016. However, the appeal was not preceded by a notice of appeal as conceded by the appellant and on our part, we could not land on one even after searching for it in the original record of the appeal before the Court.

In the absence of the notice of appeal required by law, the appeal before the High Court was not tenable and it ought to have been struck and the High Court did not have jurisdiction to entertain and determine the purported appeal. With respect, the learned High Court Judge wrongly assumed jurisdiction to determine the purported Misc. Criminal Appeal No. 1 of 2016 and as such, embarked on a nullity. Therefore, the proceedings and the Ruling of the High Court cannot be spared.

In view of what we have endeavoured to explain in order to cure the omission, we invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] we quash the entire proceedings, Ruling and subsequent orders in respect of Misc. Criminal Appeal No. 1 of 2016. If the appellant still so wishes to pursue his appeal to challenge the decision of the Resident Magistrates' Court, he may commence the process in accordance with the law. It is so ordered.

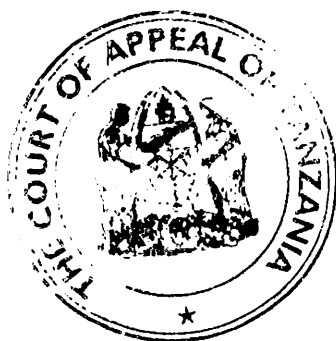
DATED at **ARUSHA** this 10th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered this 11th day of February, 2022 in the presence of Appellant in person unrepresented and Respondents in person unrepresented, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL