

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 8 OF 2022

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

MAWAZO SALIBOKO@ SHAGI.....1ST RESPONDENT
JUMANNE NSHIMBA@ LUBIBI NINDILO.....2ND RESPONDENT
MASALI CHILU.....3RD RESPONDENT
EDWARD BUNELA@ NURU.....4TH RESPONDENT
SHABANI MOHAMED AMOUR.....5TH RESPONDENT
JOHN PASCHAL CHARLES NDAKI.....6TH RESPONDENT
PIUS WILLIAM MABULA @ KULWA.....7TH RESPONDENT
KULWA MAKOLE MABULA.....8TH RESPONDENT
ALOYCE PETER ZINDOLO.....9TH RESPONDENT
DAVID CHARLES NDAKI.....10TH RESPONDENT
TEDDY GABRIEL KIMARIO.....11TH RESPONDENT
FRANK SELEMANI KABUCHE.....12TH RESPONDENT
AGNES NSHIMBA.....13TH RESPONDENT
MAKONO MAGANYALA KANIKI.....14TH RESPONDENT
MARKO NDOSELA MWANAGANDILA.....15TH RESPONDENT
GEOFREY IGNATUS KAPALATA.....16TH RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania, (District Registry)
at Tabora

(Amour, J.)

dated the 5th November, 2021

in

DC. Criminal Appeal No. 190 of 2016

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JUDGMENT OF THE COURT

14th & 17th March, 2023

MUGASHA, J.A.:

In the District Court of Nzega at Nzega, the respondents were either jointly and separately charged with several offences to wit: four counts of

conspiracy to commit an offence c/s 348; armed robbery c/s 287A; and receiving stolen property or unlawfully obtained c/s 311 all of the Penal Code Cap 16 R.E 2022; 13 counts of money laundering c/s 3 (j), 112(b) (c) (d) (e) and 13 (a) of the Anti-Money Laundering Act, No 12 of 2006. It was alleged by the prosecution that, the respondents together with unknown persons conspired and did steal six and a half bars of gold weighing 10,880 grams valued at TZS. 4,093,534,137.00 the property of RESOLUTE (T); a shotgun No. R65684 the property of ARMOUR GROUP. Immediately before and after the said stealing they used actual violence by shooting and injuring security guards in order to obtain or retain the stolen items. It was further alleged that subsequent to the said armed robbery, the stolen items were sold and proceeds thereto changed hands which necessitated the respondents to be charged with offences of receiving and obtaining stolen property and money laundering.

Three respondents were acquitted on a Ruling of no case to answer whereas after a full trial, Jumanne Nshima @ Lubibi Nindilo, Masali Chilumbe and Kulwa Makole Mabula, the 2nd, 3rd and 8th respondents respectively, were acquitted and the 1st, 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents were convicted as charged for the offences of conspiracy and armed robbery and sentenced to serve two years' imprisonment for the first count and thirty years for the second count.

Undaunted, the Director of Public Prosecutions (the DPP) lodged a notice of intention to appeal to the High Court against the decision of the subordinate court. The respective notice was lodged in the trial court. Subsequently, the appellant filed a Petition of Appeal in the High Court. When the appeal was called for hearing before the High Court it was confronted with preliminary objection on among others the following:

"That, the Notice of Appeal is defective for [it is titled] "the Nzega District Court" instead of "the High Court of Tabora at Tabora".

On account of the stated defect, it was argued that, such notice cannot institute an appeal. Having declined to invoke the overriding objective principle on ground that it could pre-empt the preliminary point of objection raised, the learned Judge sustained it and proceeded to strike out the entire appeal.

It is against the said backdrop that the DPP has come to this Court challenging the decision of the High Court. In the Memorandum of Appeal, the sole ground of complaint is as hereunder:

*"That, the first appellate Court erred in law by striking out the appeal lodged by the appellant, for the reasons that the notice of appeal dated 21st December, 2015 did not meet the requirement of titling the notice set by the Court in **DPP VS. Sendi***

***Wambura and 3 others, Criminal Appeal No. 30
of 2016".***

The appeal was confronted with a preliminary point of objection raised by the 1st respondent to the effect that the appeal is not competent because the DPP is barred to invoke such remedy against the impugned Ruling of the High Court. However, the preliminary objection was abandoned and so marked.

At the hearing in appearance for the DPP was Ms. Mwamini Yorum Fyeregete, learned Senior State Attorney accompanied by Ms. Lucy Enock Kyusa and Mr. Merito Boniface, both learned State Attorneys for the 15th respondent was Deya Outa, learned advocate whereas the 1st, 4th, 5th, 6th, 7th, 9th, 11th, 12th and 13th respondents appeared in person.

The 2nd, 3rd, 11th and 16th respondents did not enter appearance though served vide publication in Mwananchi Newspaper dated 1/3/2023, and thus, the hearing had to proceed in their absence as per the dictates of Rule 80 (6) of the Tanzania Court of Appeal, 2009 (the Rules). As for the 13th respondent who is reported to be dead as per certificate of death No. 1199209 A, the appeal abates in terms of Rule 78 (1) of the Rules.

In the sole ground of appeal, the DPP is faulting the High Court which struck out the appeal on ground that the notice of appeal was wrongly titled:

“In the District Court of Tabora, instead of in the High Court of Tanzania, at Tabora”.

It was submitted by Ms. Fyeregete that the appeal was wrongly struck out because since its notice was lodged on 21/12/2015 prior to determination of the cases of **Sendi Wambura and 3 Others vs. Republic**, Criminal Appeal No. 480 of 2016 and **Farijala Shabani Hussein and Another vs. Republic**, Criminal Appeal No. 274 of 2012. (both unreported). It was pointed out that, while the case of **Sendi Wambura’s** (supra) decided in 2018 introduced the titling of the notice of appeal to the High Court to bear words: “In the High Court of Tanzania”, the case of **Farijala Shabani** (supra) decided on 30/10/2018 which besides, emphasizing on the mode of titling the notice of appeal in accordance with what the Court said in **Sendi Wambura** (supra), it gave a grace period of 6 months for the compliance.

Thus, it was Ms. Fyeregete’s argument that since the DPP’s notice of appeal was already before the High Court when the requirement of proper titling came into force, it was not proper for the trial judge to strike out the appeal for want of a proper notice. On that account, she implored on the Court to allow the appeal, set aside the Ruling of the High Court and allow the appellant to pursue its appeal before the High Court.

On the other hand, Mr. Outa, forcefully opposed the appeal arguing that the cases cited by the learned Senior State Attorney cannot salvage the

appeal. On this, he submitted that, the case of **Farijala Shabani** (supra) is not applicable in the circumstances of the present matter as it dealt with modality of lodging a notice of appeal to the High Court under the provisions of section 361(1) (a) of the Criminal Procedure Act [CAP 20 R.E 2022] (the CPA) which is not relevant to the DPP's appeal whose notice of appeal to the High Court is governed by section 379 (1) (a) of the CPA. He further argued that, since the mode of DPP's notice of appeal to the High Court was conclusively determined by the Court in the case of **Sendi Wambura** (supra), in the present case, the DPP was obliged to seek and obtain leave to amend the notice of appeal before it was confronted with a preliminary objection. In this regard, Mr. Outa urged us to dismiss the appeal and uphold the decision of the High Court which held that the respective appeal was not competent.

After a careful consideration of the submission of the learned counsel for the parties and the record before us, the issue for our determination is whether the DPP's appeal was competent before the High Court. It is not in dispute that the DPP's appeals to the High Court are governed by section 379 (1) of the CPA whereby it is the notice of appeal which institutes the appeal. However, the mode and place of filing appeals to the High Court be it by the DPP or prison inmates, has been a subject of Court's decisions in the cases of **Republic vs. Mwesige Geoffrey Tito Bushahu and 4 others vs.**

Republic, Criminal Appeal No 355 of 2014 (unreported). **DPP vs. Sendi Wambura and 4 Others** (supra) and **Farijala Shabani Hussein and Another vs. the Republic** (supra).

In the said decisions, the Court was all out to ensure consistency certainty on the nature and mode of notices of intention to appeal filed in the High Court against the decisions of the trial subordinate courts be it by the DPP or prison inmates. In the light of the said cases, subsequent to the cases of **Sendi Wambura and Farijala Shabani Hussein**, which were decided in 2018, it is now settled law that any notice of intention to appeal to the High Court must be titled, 'in the High Court of Tanzania' and then filed at the trial subordinate courts. In this regard, it really taxed our mind if what was introduced in the cited cases adversely impacted on a notice of intention to appeal which was already filed prior to the introduction of the stated requirements and in particular, the DPP's notice of appeal lodged way back in 2015. On this, with respect, we decline to follow Mr. Outa's line of argument that such cases should be subjected to amendment so as to comply with the new format or else be struck out.

We are fortified in that regard, because it would be unfair and absurd to subject the notice of intention to appeal lodged in 2015, to the requirement which was not in place at the time of lodging the respective notice. This stance is supported with what transpired in the case of **Farijala**

Shabani (supra) whereby, besides introducing the new mode of the notice of appeal which was to become operational after six months, it as well, considered pending appeals before the High Court whose notices of appeal were not in conformity with the new requirements having said:

*"...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.**"*

[Emphasis supplied]

It is our considered view that although in the case of **Farijala Shabani (supra)** the Court dealt with a notice of intention to appeal under section 361 (1) (a) of the CPA, that position is applicable with equal force in the present case. It is glaring in the bolded expression above that, a notice of intention to appeal to the High Court against a decision of the trial subordinate court filed prior to the requirements introduced in the cases of

Sendi Wambura (supra) and **Farijala Shabani** (supra) should not be adjudged incompetent for non-compliance of the requirements which were not in place at the time of filing such notices.

Thus, given that, in this matter the DPP's appeal was lodged way back in 2015, it is not bound by the mode of titling the notice as propounded in **Sendi's** case and as such, we are constrained to find and deem that the notice of intention to appeal by the appellant was competently so filed and equally was the appeal. On that account we find the appeal merited and it is allowed. Consequently, we remit the case file to the High Court for the expedite hearing of the appeal.

DATED at TABORA this 16th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 17th day of March, 2023 in presence of 1st, 4th, 5th, 6th, 7th, 9th, 10th, 12th, 13th and 16th Appellants in person and Mr. Godfrey Kalaka counsel for the of 15th Appellant, in the absence of 2nd, 3rd, 8th, 13th and 14th Appellants and Ms. Hannarose Kasambala, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL