

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA

DC. CRIMINAL APPEAL NO. 13 OF 2022

*(Originating from Criminal Case No. 35 of 2016 before the District Court
of Tunduru at Tunduru)*

SOPHIA D/O MOHAMED NAHAMA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 30/05/2022

Date of Ruling: 10/06/2022

MLYAMBINA, J.

The Respondent through representation of Ms. Tulibake Juntwa, learned Senior State Attorney has raised a preliminary objection on point that the notice of intention to appeal is incurably defective in form.

Submitting in chief, Ms. Tulibake Juntwa, asserted that the tittle in the said notice read" Resident *Magistrate in charge in the District Court of Tunduru*". Worse still, the notice of intention to appeal is in a letter format. As such, it violates the mandatory requirement of law

enunciated in the case of **DPP v. Sendi Wambura and Others**, Criminal Appeal No 480 of 2016 Court of Appeal of Tanzania at Bukoba (unreported) at page 12 and 13. Ms. Tulibakwe clarified that the tittle in a notice of intention to appeal before this Court should read: "In the High Court of Tanzania at Songea".

Ms. Tulibakwe submitted that in **Sendi's case** (*supra*), the Court mainly dealt with bail. For that reason, the Court did not strike out the defective notice of intention to appeal rather it ordered amendment. She asserted further that a notice of intention to appeal forms part of the proceedings because it initiates an appeal. Ms. Tulibakwe added that the principle of overriding objective can not be invoked to violate the mandatory provision of law. Lastly, she prayed this Court to strike out the notice of intention to appeal for being defective.

Mr. Wilson Ogunde, had no much to chip in when submitting in response to his opponent views. He notably conceded to the fact that basing on decision in **Sendi's case** (*supra*) their notice of intention to appeal is defective in form. Nevertheless, he contended that the same is curable by Court with an amendment order vide the renowned principle

of overriding objective. To back up that argument, he referred this Court to the case of the **DPP v. Fidelis Albert Mayombo** Criminal Appeal No.340 of 2019, Court of Appeal of Tanzania at Mtwara (unreported) together with **Sendi's case** (supra) by stating that both decisions therein reflects power of the Court to issue an order of amendment for notice which is defective in form. Eventually, he requested this Court to grant them amendment of the notice.

In rejoinder, Ms. Tulibake Juntwa opined that the controversial notice of intention to appeal evaluated by Court in case of **Fidelis Albert Mayombo** (supra) was valid because it was filed before the decision in **Sendi's case** (supra). She firmly maintained that a notice of intention to appeal at hand is purely in a letter form, thus it is incurably defective.

Having circumnavigated through the arguments of both sides, this Court is of view that, at the quest of this ruling, is a need to restate the extent, if not the justification of application of the principle of overriding objective in law. The reason being that the adjustment on the law regarding format of a notice to initiate a criminal appeal was vivid and

quite clearly stated in the cases of **Sendi Wambura** (*supra*), and **Fidelis Mayombo** (*supra*) as referred herein by both Counsel. Without further ado, as precisely conceded by the Appellant's Counsel, the notice of intention to appeal is incurably defective.

Turning to the merits or otherwise of the preliminary objection, the Respondent Counsel insisted that such defect is curable under the umbrella of the principle of overriding objective. Senior Counsel Ogunde termed it as a technicality of which Courts should incline towards disregarding it. This Court is of the findings that the principle of overriding objective instructs Courts to determine cases justly whilst dispensing away technicalities.

Nevertheless, it is the finding of this Court, that the same principle cannot be invoked to disregard a requisite condition of a procedural law that touches the root of the case. Reference can be made to the case of **Mondorosi Village Council v. Tanzania Breweries Limited**, Civil Appeal No. 66 of 2017 where the Court of Appeal of Tanzania while sitting at Arusha (unreported) explained the rationale of introducing the principle under *section 3 of the Appellate Jurisdiction Act [Cap 141 R.E.*

2002] as amended by the *Written Laws (Miscellaneous Amendments) (No.3) Act No. 8 of 2018* by quoting the Bill amending Act to the effect that:

The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms ...

Thus, it can generally be derived that the principle of overriding objective is reserved in certain circumstances. The position on the law governing criminal appeals before this Court, at present, is to the effect that; an Appellant must within 10 days lodge a notice of intention to appeal (see *section 361 (1)(a) of CPA [Cap 20 R.E 2019]*). Additionally, the format of the said notice should resemble the one depicted in **Sendi Wambura's** case (*supra*).

Further, in terms of *section 361(1)(b) of the Criminal Procedure Act (supra)*, the appeal should be made within 45 days period after the date of finding, order or sentence. It is worth to note that the same procedure is mandatory. It is not optional.

Reverting to the status of the present appeal, the Court is in concurrence with Respondent Counsel that a notice of intention to appeal being a document that initiates the appeal, forms part of the proceedings of the same. Therefore, once it comprises an anomaly, the competence of the appeal (the whole petition of appeal) becomes dubious.

I have also noted that in **Fidelis Mayombo** case and **Sendi Wambura** case there was yet a prescribed format regarding the notice as such it could not be just for the Court to allow retrospective application of the law.

In spite of the foregoing, this Court is cautious that proceeding to dismiss the appeal will not augur with sound administration of justice on account of the following reasons: *First*, Appellant would have been rejected from exercising his constitutional right (right to appeal as stated under *Article 13(6) of the Constitution of Tanzania of 1997 as amended from time to time*. *Secondly*, a dismissal order may lead to paradox on the appeal rights of the Appellant. *Thirdly*, it could probably give a false

impression that this Court is not bound by the doctrine of *stare decisis* (i.e cases with similar scenario and facts are to be dealt similarly).

However, as alluded by Ms. Tulibakwe and not been disputed by Mr. Ogunde, it is the notice which commences the appeal. As such, the omission to properly title the notice of intention to appeal touches the jurisdiction of the Court. On that premise, any jurisdictional issue cannot fall in the category of procedural technicalities. Invoking the overriding objective principle cannot salvage the instant appeal because the notice of intention to appeal is directed to the trial Court. Such defects goes to the root of the appeal.

The argument by Mr. Ogunde that a defective notice of intention to appeal is curable as per the case of **Fidelis Mayombo** (*supra*) is not proper. As submitted by Ms. Tulibakwe, the Court of Appeal of Tanzania in the case of **Fidelis Mayombo** (*supra*) allowed the appeal and amendment of the notice of intention to appeal because the said notice was filed before the existence of the law on how the notice of intention to appeal should be titled. But the instant objected notice of intention to

appeal was filed in sheer violation of the already settled position of the law.

From the reasons adduced above, the Court cannot succumb to the temptation offered by Mr. Ogunde of invoking the overriding objective principle. The Appellant cannot amend the incurable defective notice of intention to appeal. Acceding to Mr. Ogunde's prayer, will amount to offend the clear position of the law which treats the defects found in the notice of intention to appeal as incurable.

In the upshot, I sustain the point of preliminary objection raised by Ms. Tulibakwe, learned Senior State Attorney and proceed to strike out the appeal for being incompetent before the Court.



Y. J. MLYAMBINA

JUDGE

10/06/2022

Ruling delivered and dated 10th day of June, 2022 in the presence of the Appellant and Senior learned State Attorney Tumaini Ngiluka for the Respondent. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

10/06/2022

A handwritten signature in blue ink, consisting of a series of loops and a final horizontal stroke.