

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**DC CRIMINAL APPEAL NO. 10 OF 2022**

*(Originating from the District Court of Tunduru at Tunduru in Criminal Case No. 37 of 2016)*

**NEHEMIA TOGOLANI @KIONDO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

**Date of last order:** 30/05/2022

**Date of Ruling:** 10/06/2022

**MLYAMBINA, J.**

The main issues for determination before the Court are: *One, whether the notice of intention to appeal filed by the Appellant is incurably defective for not stating the proper title of the Court in which the appeal is to be heard. Two, whether the Court should allow amendment of a defective notice of intention to appeal by invoking the provision of section 3A and 3B of the Appellate Jurisdiction Act Cap. 141 as amended by the Written Laws Misc. Amendment Act No. 3 of 2018 to salvage the appeal.*

At the date scheduled for the hearing, the Appellant was represented by Mr. Wilson Ogunde, learned Advocate while the

Respondent enjoyed the service of Mr. Hebel Kihaka, learned Senior State Attorney. While submitting, Mr. Kihaka conceded to be served with the notice of intention to appeal from the Appellant and he told this Court that, after he perused the notice of intention to appeal, he discovered that the said notice is incurably defective for failure to indicate the title of the Court where the appeal is to be heard. Mr. Kihaka narrated that the Appellant was charged, convicted and sentenced on 7<sup>th</sup> January, 2022. Being dissatisfied with the decision of the trial Court, the Appellant lodged notice of the intention to appeal on the same date. The said notice was directed to the Resident Magistrate In-charge of Tunduru District Court. Such notice is incompetent in law as it lacks title of the High Court where the appeal will be heard.

Mr. Kihaka submitted further that; under *section 361(1)(a) of Criminal Procedure Act* as referred in the case of **Farijala Shaban Hussein and Another v. Republic**, Criminal Appeal No. 274 of 2012, Court of Appeal of Tanzania at Dar es Salaam (unreported), the Court while referring to the case of **Director of Public Prosecutions v. Sendi Wambura and 3 Others**, Criminal Appeal No. 480 of 2016 at Bukoba (unreported), the Court held that; Notice of Appeal initiates Appeal. The Court went further to state that, since the case of **Sendi Wambura**

(*supra*) had given a position that the notice of intention to appeal must read "The High Court of Tanzania" but be filed in the trial Court.

Mr. Kihaka was of view that the requirement provided in **the case of Farijala Shaban Hussein** (*supra*) is mandatory and failure to comply with it renders the appeal incompetent. The only available remedy is to struck out such notice of intention to appeal. If the Appellant is still interested, he can commence the appeal process by filing a proper Notice of Appeal. Also, he supported his submission with the case of **Director of Public Prosecutions v. Yasin Selemani Makota**, Criminal Appeal No. 4 of 2019 High Court of Tanzania at Mtwara, where the Court insisted the position reached in the case of **Sendi Wambura** (*supra*). The Court having found that the notice of intention to appeal was defective, it held the appeal was incompetent. It is in light of the above, Mr. Kihaka maintained that the notice of intention to appeal in this matter is defective and it ought to be struck out.

Mr. Kihaka was aware of the existence of the provision of *section 3A and 3B of the Appellate Jurisdiction Act Cap. 141* as amended by the *Written Laws Misc. Amendment Act No. 3 of 2018* which introduced overriding objective principle. However, He was of firm view that such



provision was not intended to violate the mandatory provisions of the law. For this appeal, the Notice must have the title which is, "In the High Court of Tanzania." Mr. Kihaka was of the opinion that the defects of the notice initiating this Appeal is incurable. The only available remedy is to struck out the Notice. Since it is the notice of intention to appeal which initiates the Appeal and having struck out the notice of intention to appeal, the Appeal will be rendered incompetent. He prayed their preliminary objection be upheld, the Notice of Appeal and the Appeal be struck out.

In response to the point of preliminary objection raised by Mr. Kihaka, Counsel Ogunde for the Appellant started by reminding the Court that, before the decision in the case of **Sendi Wambura and Others** (*supra*), there was no specific format on the Notice of Appeal. So, the position on format of Notice was stated in that case.

Mr. Ogunde averred that, despite of such position, the Court of Appeal of Tanzania quashed the proceedings and Judgement of the High Court. The Court did not strike out the Notice of Appeal. According to Mr. Ogunde, in the case of **Farijala Shaban Hussein and Another** (*supra*), the issue of Title in the notice of intention to appeal was discussed and the Court was satisfied that the notice of intention to

appeal was not defective for improper title. The notice was improper for not naming the second Appellant. The circumstances in both cases of **Sendi Wambura** (*supra*) and that of **Farijala** (*supra*) were taken into consideration in the case of **Director of Public Prosecutions v. Fidelis Albert Mayombo and 3 Others**, Criminal Appeal No. 340 of 2019, the Court of Appeal of Tanzania at Mtwara (unreported). The Court of Appeal discussed on whether the Court struck out the notice of intention to appeal. In its decision, the Court of Appeal held that the decision in the case of **Sendi Wambura** (*supra*) did not strike out the Notice of Appeal.

Mr. Ogunde averred further that the issue in this case is whether a defective Notice of Appeal is curable by amendment. It was Mr. Ogunde submission that the Notice of Appeal which appears to be defective, it can be amended in the light of **Fidelis Mayombo and 3 Others** (*supra*). Thus, if a defective notice of appeal is incurable, the Court of Appeal could not have ordered amendment for lack of jurisdiction.

The decision of **Fidelis Mayombo** (*supra*) is of 31<sup>st</sup> May, 2021 as compared to the decisions of **Sendi Wambura and Farijala** (*supra*). A defective Notice of Appeal is curable as per the case of **Director of Public Prosecutions v. Fidelis Mayombo** (*supra*). It was the view of

Mr. Ogunde that the essence of introducing overriding objective is to allow amendment rather than to stick on technicalities. Mr. Ogunde insisted that the defects in the Noticed dated 07/01/2022 is curable by amendment. He prayed the Appellant be ordered to amend his Notice of Appeal so that the appeal can be heard on merit.

In his brief rejoinder, Mr. Kihaka submitted that a defective notice of intention to appeal cannot be amended. It was Mr. Kihaka's firm view that the cited case of **Fidelis Mayombo** (*supra*) is distinguishable to this case. At page 12, it stated that the case was filed before the current position. That is why the Notice of Appeal was not struck out. Since the Notice of Appeal in the present appeal was filed after the position of the law, the Notice before the Court is defective because it was filed on 07/01/2022 while the Appellant was aware of the position of titling "In the High Court."

Mr. Kihaka maintained that the overriding objective was not introduced to defeat the mandatory provision of the law. Even in the case of **Farijala** (*supra*) the content of notice was clear but the Title was defective. That is why the Court of Appeal struck out the Notice of Appeal. Mr Kihaka reiterated the prayer made in his submission in chief.



Having carefully considered the submissions from the counsel for the parties, the Court has found as rightly argued by the counsel for the Appellant that the issue to be dealt with in this matter is whether the defect found in a notice of intention to appeal dated on 07/01/2022 is curable. Before answering the issue, I find it necessary to extract the provision of *section 361 (1) (a) of the Criminal Procedure Act, Cap 20 [R. E. 2019]* which provides for the requirement of a notice of intention to appeal:

*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.*

Being guided by the provision of the law quoted above, it is clear that the law requires whoever wants to appeal from any finding, sentence or order to the higher Court has to give a notice to the trial Court within ten or three days from the date of the said decision depending on the nature of the offence. The law does not expressly

state how that notice has to be given either orally or in written. How does that notice has to be look alike? the provision is silent on that.

There are many decisions of the Court in which the provision of *section 362 (1) (a) of the Criminal Procedure Act (supra)* has been interpreted. In the case of **Sendi Wambura and Others** (*supra*), the Court stated that; the notice of intention to appeal to the High Court though it has to be filed before the trial Court but the tittle has to reflect to where the appeal is headed to, thus 'IN THE HIGH COURT OF TANZANIA'. This was reiterated in the case of **Farijala Shaban Hussein** (*supra*), where the Court insisted that:

*For the purpose of enhancing consistency and certainty in the procedural requirements, we are minded to adopt the format which was prescribed therein and, as such, a written notice of intention to appeal under section 361 (1) (a) should, accordingly be titled: "In the High Court of Tanzania."*

Also, in the latest case of **Fidelis Albert Mayombo and 3 Others** (*supra*) allowed the appeal and nullified the decision of the High Court only because the said notice was filed before the law on how the Notice of Appeal should be titled. From the record the notice of intention



to appeal before the Court was filed after the law on how the Notice of Appeal should be titled was already settled. Therefore, this case is distinguishable from the matter at hand as it was submitted by Mr. Kihaka. To the contrary, the Court could have dismissed the appeal.

There is no dispute that the notice of intention to appeal filed by the counsel for the Appellant is defective. The issue is whether, the remedy thereof is to amend the said notice or to strike out the same.

Irrefutably, this Court finds that the overriding objective principle re-stated under *section 3A and 3B of the Appellate Jurisdiction Act Cap. 141* as amended by the *Written Laws Misc. Amendment Act No. 3 of 2018* aims at avoiding technicalities in Court to operate at the detriment of substantive justice. More so, for heaven's sake, it is improper to punish innocent party whose advocate files his notice to the proper Court but with a defective notice of intention to appeal.

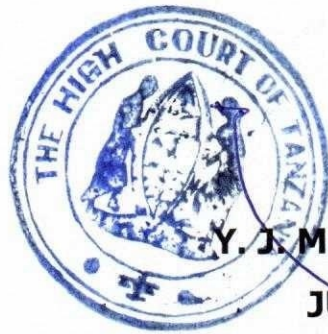
However, as alluded by Mr. Kihaka and not been disputed by Mr. Ogunde, it is the notice which commences the appeal. As such, the omission to properly title the notice of intention to appeal touches the jurisdiction of the Court. On that premise, any jurisdictional issue cannot fall in the category of 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 Mr. Kihaka, the Court of Appeal of Tanzania in the case of **Fidelis Mayombo** (*supra*) allowed the appeal and allowed 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 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 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.

The above said and done, I sustain the point of preliminary objection raised by Mr. Kihaka, 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 10<sup>th</sup> 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**