

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 51 OF 2021

PATRICK VALENTINO NALYSIS @ EDWINE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Being an appeal from the decision of the Resident Magistrate's Court of
Morogoro at Morogoro (Hon. I.A. Msacky (RM)))

dated the 18th day of October, 2021

in

Criminal Case No. 77 of 2017

JUDGMENT

Date of Last Order: 21/02/2022 &
Date of Judgment: 15/03/2022

S.M. KALUNDE, J.:

The appellant, PATRICK VALENTINO NALYSIS @ EDWINE, was jointly charged before the Resident Magistrate's Court of Morogoro at Morogoro (henceforth "the trial Court") together with Lucas Nalysis Valentino, Hekima Kwezi Lufulani and Agaba Mushumbusi Lufulani, with six counts. In the first count they were charged with the offence of conspiracy to commit an offence contrary to section 384 of the



Penal Code, Cap. 16 R.E. 2002. They were also jointly charged with five (5) counts of obtaining money by false pretences contrary to section 302 of the Penal Code. Lucas Nalysis Valentino and the appellant were both convicted as charged and sentenced to serve three years imprisonment for each count. The appellant was convicted and sentenced in *absentia*. The sentence was to run concurrently. On the other hand, the trial court made a finding that the prosecution failed to link Hekima Kwezi Lufulani and Agaba Mushumbusi Lufulani with the offences alleged to have been committed. They were eventually acquitted under section 235(2) of the CPA.

Only the appellant was aggrieved by the trial court and hence the present appeal. At the hearing of the appeal before me, the appellant was being represented by learned advocate **Mr. Aloyce Komba** whereas **Mr. Edgar Bantulaki** learned State Attorney represented the respondent, Republic.

At the very outset and before consideration of the grounds of appeal, Mr. Bantulaki raised a point of law to the effect that the



Notice of Appeal moving the Court in the present appeal was defective making the entire appeal incompetent.

Elaborating on the point, Mr. Bantulaki referred the Court at page 1 of the Notice of Appeal appended to the Petition of Appeal. The learned State Attorney submitted that it was clear on the face of records that the proceedings dated 02nd July, 2020 show that the presiding magistrate was **Hon. Kalegeya, (RM)** and not **Hon. B. Lihamwike (RM)** as indicated by the appellant in the Notice of Appeal. According to him this defect on its own, was sufficient to make the Notice of Appeal defective and hence making the appeal incompetent.

Mr. Bantulaki was not done, he supplemented that whereas the Notice intended to challenge the decision dated 02nd July, 2020, the Petition of Appeal and Additional Grounds of Appeal were intended to challenge the decision delivered by **Hon. I.A. Msacky (RM)** on 18th October, 2018. He submitted that, having been convicted and sentenced in *absentia* on 18th October, 2018, the appellant was apprehended and arraigned before the trial court in terms of section

226(2) of the CPA. In the proceedings under section 226(2) the trial court did not alter or vary the findings or decision delivered on 18th October, 2018. In his view, the appellant ought to have sought to challenge the decision dated 18th October, 2018 instead of the proceedings dated 02nd July, 2020. Mr. Bantulaki reasoned that failure of the Notice of Appeal to mention the decision dated 18th October, 2018 makes the Notice defective.

On the way forward, Mr. Bantulaki could not mince words. He was of the considered view that the only remedy available is for the Notice to be struck out. The counsel was hesitant to press for a dismissal order. He argued that, once the Notice is struck out the remaining appeal becomes incompetent and susceptible to be struck out.

For his part, Mr. Komba was quick to admit that the records dated 02nd July, 2020 were clear that the reigning magistrate on the day was **Hon. Kalegeya, (RM)** and not **Hon. B. Lihamwike (RM)** as indicated in the Notice of Appeal filed on 06th July, 2020. He also agreed that it was not proper for the Notice of Appeal to refer to



proceedings dated 02nd July, 2020 instead of 18th October, 2018. The counsel admitted that the Notice failed to address the precise decision sought to be challenged. In essence the counsel conceded to the point of law raised by Mr. Bantulaki. On the way forward, the counsel advised the Court to strike out the appeal and not dismiss it as the parties have not been heard.

In order to appreciate the gist of the contention raised by Mr. Bantulaki, I find it apposite to reproduce the substance of the Notice of Appeal lodged by the appellant on 06th July, 2020 and appended to the Petition of Appeal. The Notice read:

"NOTICE OF APPEAL
(Made Under Section 361(1) (a) of the
Criminal Procedure Act, Cap. 20 R.E
2019)

TAKE NOTICE THAT I, PATRICK VALENTINO NALYSIS @ EDWINE – the Appellant referred herein intends to appeal to the High Court of (T) at D' Salaam against the decision of **Hon. B. Lihamwike – RM** given on 2nd day of July, 2020 whereby the appellant was convicted for the offences of **1st Count: Conspiracy to commit an Offence**



C/S 384 of the Penal Code Cap. 16 R.E 2002; 2nd, 3^d, 4th, 5th, & 6th Count of Obtaining money by false Pretences C/S 302 of the Penal Code Cap. 16 R.E 2002.

Thereafter I was sentenced of serve three (03) years imprisonment in All six counts respectively, the sentences were ordered to run concurrently. The Appeal is against both conviction and sentence. The appellant intends to be present at the hearing of this appeal.

The address of the service of the appellant is:-

R/O OFFICER INCHARGE,

REMAND PRISON,

BOX 106,

MOROGORO

Mob: 0689 304 939

Dated at Morogoro this 6th Day of July 2020.

Sgd.

Appellant

Reading the above excerpt, one hardly need a telescopic observation to note, as rightly submitted by Mr. Bantulaki, that the decision sought to be challenged in the Notice were those dated 02nd July, 2020 in a duplicate file which were conducted in accordance with section 226(2) of the CPA instead of the proceedings dated 18th October, 2018 which convicted and sentenced the appellant in

absentia. There is also no dispute that the petition of appeal as well as the additional grounds of appeal filed to this Court on 08th December, 2021 both make reference to the decision delivered by **Hon. I.A. Msacky (RM)** on 18th October, 2018. I have painstakingly perused the records of appeal. I have found no notice of appeal filed against the decision of **Hon. I.A. Msacky (RM)** on 18th October, 2018. The only available notice relates to the proceedings dated 02nd July, 2020, which, as I have indicated above, did not, substantively, convict or sentence the appellant. I can, thus, safely conclude that there is no relationship between the notice of appeal and the petition of appeal as what decision is being challenged in the present in the present appeal.

Even assuming without deciding here that the appellant has a right of appeal against the decision dated 02nd July, 2020, the petition of appeal does not reflect the said decision, instead all the grounds raised in the petition of appeal relate to the decision dated 18th October, 2018.

There is no gainsaying that the purported notice of appeal did not confer the requisite jurisdiction to this Court to hear and determine the appeal in relation to proceedings dated 18th October, 2018 which convicted and sentenced the appellant. All these glaring defects and omissions render this purported appeal patently incompetent. With that extrapolation, I wholly subscribe to the reasoning advanced by the learned State Attorney that the Notice of Appeal dated 06th July, 2020 is defective.

On the way forward, I hasten to entirely and respectfully agree with both counsels that the only remedy available is to have the appeal struck out. I am supported in this view by the Court of Appeal decision in the case of **Leóns Silayo Ngalai vs. Hon. Justine Alfred Salakana**, Civil Appeal No. 38 of 1996, cited in **Petro Nyasa & 2 Others vs. Simon Domela & 3 Others**, Civil Appeal No. 29 of 2011 the Court of Appeal (**Kimaro, J.A.**) held that:

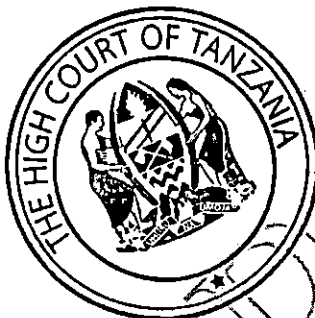
"An incompetent appeal amounts to no appeal... Under such circumstances what the court does is to strike out the purported appeal off the register."



All said and done, I hasten to state that the articulated irregularities and pointed deficiencies in the notice of appeal and petition of appeal renders the appeal incompetent. It ought, therefore, to be struck out. In fine, the incompetent appeal is hereby struck out.

Order accordingly.

DATED at DAR ES SALAAM this 15th day of MARCH, 2022.



S.M. KALUNDE

JUDGE