

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY  
AT MOSHI**

**CRIMINAL APPEAL NO. 39678 OF 2023**

*(Appeal from the decision of the District Court of Moshi at Moshi dated  
6<sup>th</sup> day of December 2023 in Preliminary Inquiry no. 21 of 2023)*

**THE DIRECTOR OF PUBLIC PROSECUTION ..... APPELLANT**

**VERSUS**

**DENIS GAUDENCE SHIRIMA ..... RESPONDENT**

**JUDGMENT**

15<sup>th</sup> & 20<sup>th</sup> December, 2023

**A.P.KILIMI, J.:**

The respondent hereinabove had a case in this court, wherein he was charged for the offence of Murder contrary to section 196 and 197 of the Penal Code in Criminal Session no.1 of 2022. When said case was at the hearing stage before this court on 17<sup>th</sup> November 2023, the Director of Public Prosecutor " DPP" prayed to withdraw the case by entering a Nolle Prosecution under section 91(1) of Criminal Procedure Act Cap 20 R.E.2022 "CPA". This court granted the prayer and discharged the respondent, but allowed the prosecution to use section 91(3) of CPA and stated that the prosecution shall not be barred from re-institute as it shall deem fit.

It was on 24/11/2023 the prosecution re-instituted the said case by filing a Preliminary Inquiry "hereinafter P.I." number 000038074 of 2023 at Moshi District Court. On 5/12/2023 when the said P.I. proceeding went for hearing before the District Court, the same was objected by the respondent who had the legal service of Mr. Alfred Sindato learned counsel. Upon considering submissions of each party in respect to the objection, the trial court proceeded to uphold the objection and reasoned that, the matter was wrongly instituted before it because it has already disposed off the matter by committing respondent to the High Court, it cannot create another committal proceeding on the same charge arising from the same facts unless , otherwise directed by the High Court.

Aggrieved by the above decision, the appellant has resorted to step into this court with one ground of appeal which is to the effect that; the trial Magistrate erred in law and fact when ruled that the Republic wrongly instituted the Preriminary Inquiry No. 000038074 of 2023 before the District Court of Moshi followed by the Nolle Prosequi in Criminal Session case no. 1 of 2022

When this appeal came before me for hearing, the appellant was represented by Ms. Edith Msenga assisted by Mr. Frenk Wambura both

learned State Attorneys, whereas the respondent appeared represented by Mr. Alfred Sindato learned advocate.

In his response to this appeal, Mr. Sindato prompted that the notice of Appeal is defective, having grasped this concern, I find conveniently not to go into the merit of this appeal instead, to determine first this concern raised in respect to the notice of appeal filed in this court.

Mr. Sindato in such respect, argued that this appeal is not competent to this court because it was brought under defective notice of Appeal for not stating the proper title of the court, he further said the title cited is the Court of Appeal of Tanzania and it was lodged in the District Court of Moshi on 8/12/2023. Therefore, the counsel argued since the notice filed is defective there is no competent appeal in this court and prayed the appeal be dismissed for want of jurisdiction. To support his position he referred the case of **Farijala Shaban Hussein and Another vs. Republic** Criminal Appeal no. 274 of 2012 CAT at Dar-es-Salaam, **Luklo Uhahula vs. Republic** Criminal Appeal No. 402 of 2013 and **Zablon Masuleba @ Kambaye vs. Republic** DC Criminal Appeal No. 11 of 2022 ( both unreported).

Ms. Msenga responding in respect to title of the Notice of Appeal, she conceded that it was an error done, but she contended the same to be a clerical error as they intended to file an appeal at High Court of Moshi as per other documents came with the said notice. Therefore she prayed the same to be determined under the overriding objective principle and proceed to determine the appeal on its merit. Also the learned State Attorney added that, if this court deem fit to struck out the said defective notice, she prayed the same be so with the leave to file.

It is apparent the heading of the Notice filed in this court, is titled the Court of Appeal instead of the High Court of Tanzania. According to section 379(1) (a) of CPA which govern institution of Appeal by DPP provides that :-

*"379.(1) Subject to subsection (2), no appeal under section 378 **shall be entertained unless** the Director of Public Prosecutions or a person acting under his instructions-*

*(a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes to appeal and the **notice of appeal shall institute the appeal.**"*

[ Emphasis added]

In view of the provision above, it is mandatory to file a notice of appeal and the law insist that it is the notice of appeal which shall institute the appeal, thus, I am settled the jurisdiction of this court to entertain an appeal is instigated by the Notice of Appeal as per law above.

Having the above in my mind, the issue before me is whether the notice filed by the DPP in this court was competent.

It is a trite 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 (see the case of **DPP vs. Mawazo Saliboko @ Shagi and Others (2023)** TZCA 118 (TANZLII) wherein the court referred with approval its earlier cases of **DPP vs. Sendi Wambura and 3 others**, Criminal Appeal No. 480 of 2016 and **Farijala Shabani Husein and Another vs. Republic**, Criminal Appeal No. 274 of 2012 (both unreported).

In the case of **DPP vs. Mawazo Saliboko @ Shagi and Others** (supra), the court highlighted that its earlier decisions of the court cited above aim to ensure consistency certainty on the nature and mode of notices

of intention to appeal filed in the High Court against the decision of subordinate courts, be it by the PPP or Prison inmates.

In this matter at hand, I have scanned the notice of appeal filed on 8<sup>th</sup> December, 2023, as said above it titled IN THE COURT OF APPEAL OF TANZANIA, but I took time to scan the details on the said notice, it is written made under section 379(1) (a) of the CPA. In my opinion, this act of the DPP referring the above section, means was appealing to the High Court and not the Court of Appeal, where the notice directed to the court of Appeal is made under rule 68(1) of Tanzania Court of Appeal Rules, 2009 GN. No. 368 of 2009. This has caused me to believe the DPP aimed to appeal in this court and not the Court of Appeal.

But as said above, the above cases of the Court of Appeal have provided for a stance which this court is bound to it. Therefore, I may say the hands of this court is closed to decide otherwise under the doctrine of *stare decisis*.

Mr. Sindato prayed this court to discharge the respondent, while Ms. Msenga prayed the same if deem fit, be struck out with the leave to refile.

I have considered the nature of the defective notice, as said above the intention of the DPP to file the appeal in this court, was apparent by the provision of the law used. In that regard I find appropriate this is a matter should not be stopped to be brought again in this court.

In the circumstances, I hereby struck out this appeal with the leave to refile. It is so ordered.

**DATED** at **MOSHI** this day of 20<sup>th</sup> December, 2023.



X

JUDGE  
Signed by: A. P. KILIMI

**Court:** - The Judgment delivered today on 20<sup>th</sup> day of December, 2023 in the presence of Mr. Ramadhan Kajembe, learned State Attorney and Mr. Alfred Sindato learned Advocate for appellant, also appellant present.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**20/12/2023**

**Court:** - Right of appeal explained.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**20/12/2023**