

IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 4 OF 2019

(Originating from Criminal Case No. 94 of 2018 in the District Court of
Mtwara District at Mtwara)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

YASIN SELEMANI MAKOTA.....1ST RESPONDENT

SALUM HAMIS SALUM.....2ND RESPONDENT

HASSAN BARAKATI HASSAN.....3RD RESPONDENT

SEBASTIAN MOLLEL.....4TH RESPONDENT

HABIL HUZUNI SANINGA.....5TH RESPONDENT

8 January & 9 March, 2020

DYANSOBERA, J:

RULING

The five respondents herein, were acquitted by the trial District Court of Mtwara District at Mtwara in Criminal Case No.94 of 2018 in which they were facing a charge of four counts in the following pattern. All five respondents were arraigned for conspiracy to commit an offence in the first count and in the second count, they were facing a charge of breaking into a store and committing an offence. The 3rd, 4th and 5th respondents

were charged in the fourth count with neglect to prevent an offence while the 1st respondent only stood trial in the third count charged with receiving property stolen or unlawfully obtained. The appellant, the Director of Public Prosecutions, being aggrieved by the decision of the trial court has appealed to this court on the ground that the Honourable trial Magistrate grossly erred in law and fact for failure to take into consideration and properly evaluate the strong evidence adduced by the prosecution side.

On 26th August, 2019 the respondents resisted the appeal by filing not only their joint reply to the petition of appeal but also a notice of preliminary objection on the ground that:

“The appellant’s appeal is incompetent before the court, since the notice of appeal from the trial court to the High Court is defective for not properly titled

The preliminary objection was disposed of by written submissions. The respondents filed their joint submission on their own while Mr. Meshack Lyabonga, learned state attorney, submitted for the appellant, the Director of Public Prosecutions.

Arguing in support of their preliminary objection, the respondents submitted that upon their acquittal, the appellant, on 15th November, 2018 lodged the Notice of Intention to Appeal before the trial court followed by the Petition of Appeal before this Court aimed to challenge the decision or

acquittal of the respondents. The respondents are of the view that the Notice of Appeal filed by the appellant before this court is properly titled or drafted. It is argued on their part that the notice of intention to appeal is a legal document constituting an appeal in court. They contend that the appellant's appeal is incompetent before the court on the reason that the notice of appeal filed in court by the appellant is incurable (sic) defective. It is their further contention that the notice of intention to appeal being a legal document ought to comply with the provision of the law as provided for under section 378 (1) of the Criminal Procedure Act [Cap. 20 R.E.2002] in that it should be titled **In the High Court of Tanzania**, as the appellate court having jurisdiction to determine appeals from District Court or the Court of Resident Magistrate, though as a matter of practice and procedure such notice should be lodged in the subordinate court.

The respondents submit further that the appeal is not only incompetent but also premature and liable to be struck out for failure to comply with legal requirement. They cited the cases of **Director of Public Prosecutions v. Sendi Wambura and 3 Others**, Criminal Appeal No. 480 of 2016 CAT-at Bukoba (unreported) and **Farijala Shaban Hussein and another v. R.**, Criminal Appeal no. 274 of 2012 CAT-at DSM

(unreported). The respondents wound up their submission by urging this court to find that the defect is incurable and should be struck out as both the notice of appeal and the appeal are not properly before the court.

Replying to the respondents' submission, Mr. Meshack Lyabonga conceded that the gist of the respondents' preliminary objection is centred on the competence of the Notice of Appeal filed in this court on 15th November, 2018 that it was not properly titled, it having been titled "**In the District Court of Mtwara District at Mtwara**" instead of "**In the High Court of Tanzania**" as required under section 378 (1) of the Criminal Procedure Act [Cap. 20 R.E.2002].

He, nevertheless, submitted that there is not any law which provides for the requirement to title and address the Notice to the High Court. He invited this court to find clarification of this legal stand in the Criminal Case No. 274 of 2012 between **Farijala Shaban Hussein and another v. R.**, Criminal Appeal no. 274 of 2012.

According to him, the ruling of their Lordships was delivered on 25th October, 2018. The period of six months from that date ended on 24th April, 2019. He argued that in this case, the appellant lodged his notice of appeal on 15th November, 2018 which is within six months since it was less than one month from the date of the Court of Appeal's ruling. In his view, the notice of intention to appeal was properly filed as it was within six months set by the Court of Appeal. Learned state attorney emphasising that the decision of the Court being a precedent, he urged this court to comply with it. In support of this argument, learned state attorney relied

on the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1988] TLR 148.

There is no dispute that the impugned notice of intention to appeal was filed by the appellant on 15th November, 2019 as evidenced in the Petition of Appeal. It was made under section 371 (1) (a) of the Criminal Procedure Act. According to the preliminary objection and arguments presented in support and in opposition, two issues arise for determination.

First, whether the notice of appeal was not properly filed in this court rendered the appeal incompetent and untenable and, if the answer is in the affirmative, whether the improper filing was saved by the decision of the Court of Appeal in the case of **Farijala Shaban Hussein and another v. R.** (supra).

As far as the first issue is concerned, the law under which the notice of intention to appeal was filed is clear. Section 379 (1)(a) of the Criminal Procedure Act provides:

“379

(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions—

(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.

It is true that the law does not give the format in which the notice of appeal should be drafted. However, as rightly pointed out by the

respondents, the Court of Appeal came to the aid and gave directions. In the case of **Sendi Wambura and 3 othres v. R.** Criminal Appeal No. 480 of 2016 (unreported), the Court of Appeal, at page 13 of the typed judgment observed:

“Therefore, we proposed to the relevant authority that the notice of intention to appeal from subordinate court to the High Court should have a specific prescribed format and title **“In the High Court of Tanzania”** although it should be filed in the District Court as per section 379 (1) (a) of the CPA. This should also be the case for notice of appeal lodged under section 361 (1) of CPA by other appellants”.

The record is clear that the notice of appeal which was titled “In the District Court of Bukoba”. The Court of Appeal found that the notice of appeal was not properly titled and hence defective and consequently nullified the proceedings and judgment that was made by the High Court.

Like was the case in **Sendi Wambura’s** case, the notice of intention to appeal filed by the appellant in this case is titled **“In the District Court of Mtwara District at Mtwara”**. I accept the respondents’ argument that the notice of appeal filed by the appellant which is the subject matter of this ruling was defective.

Since the notice of intention to appeal under section 379 (1) (a) of the Criminal Procedure Act as amended by section 31 (i) of the National Prosecutions Service Act institutes the appeal, the notice of intention to appeal titled **“In the District Court of Mtwara at Mtwara”** is incurably

defective. This renders the appeal itself defective as well. That disposes the first issue.

With respect to the second issue, Mr. Meshack Lyabonga, learned state attorney explained that the notice of intention to appeal was properly filed as it was within six months set by the Court of Appeal as a grace period in the case of **Farijala Shaban Hussein and Another versus R.** the respondents, on the other hand, contended that the Court of Appeal in the latter case of **Farijala Shaban Hussein and Another versus R** did not overrule its former decision in the **Sendi Wambura's case** which set the format of the title to the notice of intention of appeal and directed the relevant authority to prepare the notice of appeal in the prescribed format.

I have had an opportunity of going through the two decisions of the Court of Appeal that is the **DPP versus Sendi Wambura and 3 others** (supra) and **Farijala Shaban Hussein and Another versus R.** (supra). In **Sendi Wambura's** case, the Court of Appeal wanted to satisfy itself on the competence of the appeal in relation to the validity of the appellant's notice of appeal from the District Court to the High Court. The issue was the way the Notice of Appeal was titled, that is "**in the District Court of Bukoba**". While one side argued that the Notice of Appeal was properly titled, reliance being placed on section 379 (1) (a) of the Criminal Procedure Act which empowers the Director of Public Prosecutions to file

his Notice of Intention to Appeal before the subordinate court, the other side argued that the law was silent on how the Notice of Intention to Appeal from the Subordinate court to the High Court should be, the argument was that the Section 379 (1) (a) read together with S. 378 of CPA did not provide on how the Notice of Appeal should be, that is no format was prescribed and that the case of **Mwesige Godgrey** talked about where the Notice of Appeal is supposed to be filed and not how it is to be titled or formatted. The contention was that the Notice of Appeal which instituted the appeal at the High Court was defective and hence there was no appeal to the High Court. In a rejoinder by Mr. Malima, it was submitted that the Registry clerk of the District Court had no power to sign the notice of appeal of the High Court that is why it had to be titled in the District Court. He agreed that there was no format but urged the court to give proper interpretation as to how the notice of appeal from the subordinate court to the High Court should be titled in order to go away with that controversy.

The Court of Appeal found that there was an apparent omission on how the notice of intention to appeal from the subordinate court to the High Court should be titled or formatted. The Court considered the provisions of sections 378 (1) and 379 (1) (a) of the Criminal Procedure Act. The Court of Appeal posed the question whether the omission was deliberate or accidental. In its opinion, it found that there was an obvious lacuna or omission or ambiguity. The Court of Appeal held that the purposes of issuing a Notice of Appeal is to inform the trial court that the aggrieved party intends to appeal against its decision. Further that, in the

said notice of appeal, the Director of Public Prosecutions intended to appeal against the decision of the trial District Court. That it was not proper for the notice of intention of appeal to be titled again in the District Court. The Court of Appeal proposed to the relevant authority that the notice of intention of appeal from the subordinate court to the High Court should have a specific prescribed format and title " In the High Court of Tanzania" although it should be filed in the District Court as per section 379 (1) (a) of the CPA. The Court of Appeal also directed that this should be the case for notice of appeal lodged under section 361 (1) of the CPA by other appellants.

The case of **Farijala Shaban Hussein and Another versus R**, Criminal Appeal No. 274 of 2912 was, in my humble but considered view, complementing what had been previously stated in the case of **Sendi Wambura**. This is vivid from pp. 15 and 16 of the typed judgment where it was observed that:

*"What is more, it seems to us that the provisions of section 361 (1) (a) of the CPA are slightly but materially at variance with those of section 379 (1) of the CPA in that, unlike the latter provisions which stipulates that a notice of intention to appeal institutes an appeal by the DPP, the legislature did not deem it appropriate to make a similar stipulation with respect to the former provisions. To this end, we entirely subscribe to Mr. Magafu's advice that the two provisions are not quite in pari materia and, to that extent, we agree with him that the observation in the **DPP v. Sendi Wambura** to the effect that*

the prescribed format applies to section 361 (1) (a) as well, was, at best, obiter dictum.

The Court of Appeal further observed that:

"In this regard, Mr. Pande invited us to embark on our own construction of section 361 (1) (a) to which we are properly seized and make provision for the format of the notice of appeal. We entirely agree, more particularly, given the reality that parliament did not specifically prescribe the format to be taken by a written notice of intention to appeal. We are indeed, alive to truism that often times, either deliberately or inadvertently, Parliament enacts provisions generally or with a vague wording with a view for the courts to fill in the gaps in the course of its construction".

It also further observed that:

"On our part we are of the settled view that this controversy need not detain us. Having prescribed the title: In the High Court of Tanzania with respect to the notice under section 379 (1) (a) in the referred case of DPP versus Sendi Wambura, for purposes 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"

The Court further observed, "We should, however, hasten to point out that the prescriptions 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".

There is no dispute and I need not cite any authority on the proposition that the decision of the Court of Appeal is the law.

As learned state attorney would agree with me, the prescriptions made on 25.10.2018 by the Court of Appeal in the cited case were not new to the Director of Public Prosecutions on 15.11.2018 when he filed the Notice of Intention to Appeal. Likewise, observing the Court of Appeal directions given in **Sendi Wambura's** case was a legal requirement at the

time when the DPP drafted and filed the Notice of Intention to Appeal. It cannot be safely argued that the DPP's mistakes amounted the "**realities on the ground**".

The Director of Public Prosecutions who was aware of that decision in **Sendi Wambura's** case, was duty bound to abide by it when preparing and drafting the notice of appeal, the subject of this ruling. The decision in **Sendi Wambura's** case whose facts are similar to those of the present matter is binding and this court must abide by it as conceded to by the learned state attorney when he cited the case of **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** (supra).

Having so observed, I find that it was not proper to title the Notice of Intention of Appeal the name of the Court whose decision is intended to be appealed against.

Consequently, the preliminary objection is upheld and the appeal which is incurably defective for having been instituted by a defective notice of intention of appeal is struck out.

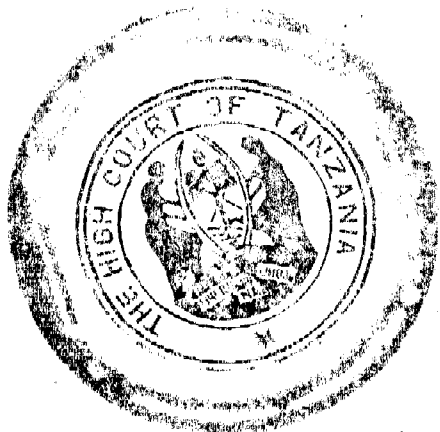


W. P. Dyansobera

JUDGE

9.3.2020

Dated and delivered at Mtwara this 9th day of March, 2020 in the presence of Mr. Paul Kimweri, learned senior state attorney for the appellant and in the presence of the five respondents.



A handwritten signature in black ink, appearing to read "W. P. Dyansobera".

W. P. Dyansobera

JUDGE

9.3.2020