

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: LUANDA, J.A., LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 378 OF 2016

FESTO MGIMWAAPPLICANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Sameji, J.)

dated the 4th day of May, 2017

in

(DC) Criminal Appeal case No. 53 of 2015

RULING OF THE COURT

6th & 7th June, 2018

LUANDA, J.A.:

FESTO S/O MGIMWA (henceforth) the appellant, was charged in the District Court of Iringa at Iringa with two counts namely incest by male and assault causing actual bodily harm. He was found guilty in respect of the offence of incest by male and sentenced to 30 years imprisonment and ordered to pay Tshs. 500,000/- to the victim of the offence as compensation. As for the second count of assault causing actual bodily, he was acquitted.

Aggrieved by the finding and sentence of the trial District Court, he unsuccessfully appealed to the High Court of Tanzania (Iringa Registry). Still dissatisfied, he has come to this Court on appeal.

On 31/5/2018 some few days before the appeal came for hearing, the respondent/Republic through Mr. Abel Mwandalama, learned Senior State Attorney filed a notice of preliminary objection on a point of law. The objection runs as follows:

That the Notice of Appeal lodged with the Court is fatally defective for failure to state briefly the nature of the appellant's appeal and order of the appellate court thereby rendering the appeal to be incompetent.

When the appeal came for hearing on 6/6/2018, Mr. Mwandalama appeared for the respondent/Republic; whereas the appellant appeared in person unrepresented and so he fended for himself.

As usual since a preliminary objection was raised, it had to be heard first.

Mr. Mwandalama submitted that the notice of appeal does not state the nature of conviction and sentence as reflected in the record. This goes

contrary to Rule 68(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He cited the decision of the Court in **Julius s/o Mgawo VR**, Criminal Appeal No. 341 of 2014 (unreported). Since the notice of appeal is defective and the notice of appeal institutes an appeal, the appeal is incompetent before the Court. The same to be struck out, he charged.

After he had finished addressing us on the issue of notice of appeal, Mr. Mwandalama told us that page 22 of the record of appeal shows that the trial District Court after it had ruled out the appellant to have a case to answer it did not address the appellant in terms of section 231 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA). Instead it went on to take down the evidence of the appellant. Section 231 of CPA requires the trial subordinate courts (Resident and District Courts) to inform the accused person of his rights to give evidence whether on oath or not on oath or affirmation and also his right of calling his witnesses. That omission is fatal. He cited **Ally Juma @ Mpemba & Another VR**, Criminal Appeal No. 401 of 2013 (unreported). He prayed the Court to invoke Rule 4(2)(b) of the Rules and revise the same.

On the other hand the appellant told the Court that the prison authority are the ones who assist him. So, if there is any mistake spotted out he is not to be blamed. As to non complying with section 231 of the CPA he left it to the Court to decide.

The notice of appeal of the appellant reads as follows:

"IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CRIMINAL APPEAL NO

FESTO MGIMWA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa) (Hon. Madam Justice R.K. Sameji) dated on the 10th June, 2016 In Criminal Appeal No. 53 of 2015

NOTICE OF APPEAL

TAKE NOTICE that FESTO MGIMWA Appeal to the Court of Appeal of Tanzania against the decision of the Honourable Madam Justice R.K. Sameji given at Iringa on the 10th June, 2016.

Where by the appellant was convicted of incest by males contrary to section 158(1) (a) of the Penal Code [cap. 16 R.E. 2002] and sentenced to thirty (30) years imprisonment.

The appeal is against conviction and sentence

The appellant intends to be present at the hearing of the appeal

The address of service of the appellant:

*C/O OFFICER INCHARGE,
IRINGA PRISON,
P.O. BOX 364,
IRINGA*

Dated this 21st day of June, 2016

Signed appellant

(retained on to be prepared this notice/retained to appear at the hearing of the appeal/assigned to appear at the hearing of the appeal)

To: The Registrar of the High Court at lodged in the High Court of Tanzania at Iringa on the 22nd day of June, 2016

*.....
Registrar*

For Appellant who is in prison:

Date of Judgment and conviction 01/4/2015

Date of entering the Prison 1/04/2015.

Date of lodged an intention to appeal 21/6/2016

Signature of the office in charge

Name of certifying officer

in charge of the prison

Date of transmission: 21/6/2016. IRINGA PRISON"

The notice of appeal shows that the appellant intends to appeal against the decision of Hon. Madame Judge R.K. Sameji given at Iringa on 10th June, 2016 where he was convicted of incest by males contrary to section 158 (1) (a) of the Penal Code and sentenced to thirty (30) years imprisonment.

The last paragraph on page 15 of the judgment of the High Court reads:

*"Consequently and in accordance with section 127(7) of the Evidence Act together with a number of authorities from the cases cited herein **I hereby dismiss the appeal in its entirety and uphold the decision of Iringa District Court. It is so ordered.**"*

The decision of the District Court was that the appellant was convicted of incest by male and sentenced to 30 yrs imprisonment. So when the High Court dismissed the appeal in its entirety it means the decision and sentence of the District Court was left undisturbed. Thus it is taken the High Court to have handed down the decision and sentence.

It is on that basis that even Form B and Form B1 as reflected in the Schedule to the Rules maintain this position. These forms are used both in appeals from the High Court in its original jurisdiction as well as appellate jurisdiction.

In this case we have shown the nature of conviction which is the offence preferred and the sentence meted against the appellant. The case of **Julius s/o Mgawo** cited supra is distinguishable with this case. In that case the appellant intended to appeal against the decision of Mrema, J. who dismissed his appeal for being time barred. But the notice of appeal instead of indicating that he intended to appeal against that decision, the notice of appeal showed that the appellant intended to appeal against conviction on the offence of rape c/ss 130(1) and 131 (2) (a) of the Penal Code. The appellant in that case failed to state the correct nature of the order of the High Court he desired to appeal.

That said, we are not persuaded that the notice of appeal is defective. The notice of appeal is proper before the Court. The preliminary objection has no merit.

Since the notice of appeals is proper, the issue as to whether or not the trial District Court complied with section 231 of the CPA should be raised in the appeal.

Order accordingly.


DATED at **IRINGA** this 6th day of June, 2018.

B.M. LUANDA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRA
COURT OF APPEAL