

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

CRIMINAL APPEAL NO.182 OF 2019

(Arising from Criminal Case No. 354 of 2018 in the Resident Magistrate
Court of Geita)

THE DIRECTOR OF PUBLIC PROSECUTION APPELLANT

VERSUS

1. MASHAKA S/O THOMAS

2. SOSPETER S/O KABUTI

3. ELIAS S/O KANOTI

4. PAULO S/O THEOGENI @ BUGUMA

} **RESPONDENTS**

RULING

Last order: 02.03.2020

Judgment Date: 09.03.2020

A.Z.MGEYEKWA, J

The applicant filed a petition of an appeal being dissatisfied by the Judgment and Order of the Court delivered on 10.09.2019 in Criminal Case No. 354 of 2018.

Before, hearing the learned counsel for the respondent filed Preliminary Objection. The preliminary objection is as hereunder:-

- 1. The appeal has been instituted by a stranger who was not a party to the original case.*
- 2. The Notice of appeal from a trial court to the High Court is defective for not properly titled.*

The hearing was done by way of written submission whereas; the applicant filed the written submission as early as 20th February, 2020 and the respondent filed a reply as early as 27th February, 2020 and a rejoinder was filed on 02nd March, 2020.

In support of the Objections, the learned counsel for the respondent opted to abandon the 1st point of objection and argued the 2nd point of objection. Submitting for the 2nd point of objection, Mr. Mteweale stated that the Notice of Appeal from the trial court to the High Court is defective for not properly titled, he went on stating that the law provides clearly the proper formant if a notice of intention to appeal and the appropriate place of filing the notice of appeal. Mr. Mteweale referred the instant application and stated that the Notice of Appeal filed before this court the appellant on 13th September, 2019 is titled " IN THE RESIDENT MAGISTRATE COURT OF GEITA AT GEITA" the same contravenes the present position of the law of the country. Mr. Mteweale fortified his submission by referring this court to section 378 and 379 and stated that section 379 states clearly the notice should be filed to

the subordinate court within thirty days from the date of judgment or court order. He further submitted that the recent position of Court of Appeal decided that a notice of intention to appeal from subordinate court to the High Court 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. Mr. Mteweale fortified his position by referring this court to the case of DPP v Sendi Wambura and 3 other Criminal Appeal No. 480 of 2016 and the case of **Farijala Shaban Husein v R** Criminal Appeal 274 of 2012. He added that the court made a positive conclusion that from the moment title of the notice of appeal should be titled in the name of the appellate court, where the appeal will be held which is the HIGH COURT if the appeal goes to the High Court but otherwise the notice will be filed in the subordinate court as per section 379 (1) (a).

Submitting further Mr. Mtwele argued that in accordance to section 379 (1) (a) of the CPA expressly states that the notice of appeal shall institute the appeal, he said this implies that if the notice of appeal does not meet the required criteria or if the same is defective then it will not meet the intended purpose of initiating the appeal.

In conclusion, he stated that as the notice of appeal presented by the appellant before this court is titled " IN THE RESIDENT MAGISTRATE COURT OF GEITA AT GEITA" the same contravenes the current position of provisions of the laws hence the whole appeal appears to be a nullity.

Responding, The learned State Attorney submitted that the preliminary objection is baseless because it is based on procedural law. To support his argument he referred this court to the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributor Ltd. The learned State Attorney went on submitting that the notice of intention to appeal was filed "In the Resident Magistrates' Court of Geita at Geita" whereas he stated that guided by the cited cases of Farjala Shaban Hussein (supra) and The Director of Public Prosecution v Sendi Wambura and others (supra) he invited this court to revoke section 387 of the Criminal Procedure Act, Cap. 20 [2019].

The learned State Attorney went on submitting that the notice of intention to appeal is properly filed and this court has regional jurisdiction. He added that the error found in the notice of intention to appeal does not occasion failure to justice. he urged this court to overrule the objection and proceed with hearing the appeal.

In his rejoinder, Mr. Mtwele reiterated his submission in chief and went on submitting that the overriding principles are not designated to blindly disregard the rules of procedure that are couched in mandatory terms and added that the notice of appeal cannot be described as technicalities of procedure instead the notice of appeal is a matter of substances because without proper notice there is no appeal at all. The learned counsel for the respondents continued to submit that the notice of appeal is a special and important document used to initiate a process of appeal and if it is defective it means there is no appeal at all.

Therefore since the appellant failed to lodge a notice of appeal which is proper it means there is no appeal at all.

After a thorough perusal of the point of preliminary objection along with the submissions of the learned counsel for the respondent, I will address the question of ***whether the objections are meritorious.***

I have opted to start with the second point of objection, that the Notice of Appeal from the trial court to the High Court is defective. I had to go through the court records and found that the Notice of Appeal was filed before the Resident Magistrate Court on 13th September, 2019 and for clarity, I reproduce the title hereunder:-

IN THE RESIDENT MAGISTRATE COURT RESIDENT MAGISTRATE
COURT OF GEITA AT GEITA
CRIMINAL APPEAL NO. ... 2019

(Arising from Criminal Case No. 354 of 2018)

THE REPUBLIC APPELLANT

VERSUS

1. MASHAKA S/O THOMAS

2. SOSPETER S/O KABUTI

3. ELIAS S/O KANOTI

4. PAULO S/O THEOGENI @ BUGUMA

..... RESPONDENTS

NOTICE OF APPEAL

It is clear and undisputed that the Notice of Appeal was titled in the Resident Magistrate Court instead of in the High Court. In the case of **DPP v Sendi Wambura & 13 others** Criminal Appeal No. 480 of 2016, the Court of Appeal observed that a Notice of Appeal which is not entitled In the High Court is fatal defective. Similarly, in the case of **Farijala Shaban Husein v R** Criminal Appeal 274 of 2012, the Court of Appeal held that:-

" The Notice of Appeal should have a specific format of title, all appeal filed to the High Court to bear the following title IN THE HIGH COURT OF TANZANIA..."

The Court of Appeal went further by setting an operative date of 6 months after the ruling, the ruling was delivered on 30th day of April, 2019 and the appellant filed his application on 13th day of September, 2019 approximately four months later. Failure to file the Notice of Appeal in a proper court renders the Notice of Appeal as good as nothing. In the case of **Masebo Nyakingi v R** Criminal Appeal No. 221 of 2012, it was held that:-

" It is the notice of appeal that which institutes an appeal, so in the absence of valid notice of appeal an appeal becomes incompetent."

The same was observed in the case of **Shadrack Kuhaha v R** Criminal Appeal No.24 of 2013 the Court of Appeal and Alex Wilfred v R Criminal Appeal No.390 of 2013 (unreported).

With due respect this court cannot invoke section 387 of the Criminal Procedure Act the same is inapplicable in this situation for the reason that this is not a sentence nor an order instead it is a Notice of Appeal, the same imitate a process of appeal thus it is a fundamental document that institutes an appeal.

As rightly submitted by the learned counsel for the respondents that in accordance to section 379 (2) (a) of the Criminal Procedure Act, Cap.20, Notice of Appeal is supposed to be filed within 30 days from the date of judgment or order and lodge his petition of appeal within 40 days from the date of the sentence.

In the end result, this appeal is, accordingly, struck out for incompetence subject to the law of limitation. The learned Advocate has already raised an objection that there is an omission of section 379 (1) (a) of the CPA that the Notice of Appeal does not meet the requirement of the law the same cannot initiate an appeal since the Notice of Appeal was not lodged before the competent court. The same was observed in the case of **Mande Yohana and another v R** Criminal Appeal No. 68 of 2014 the application as struck out for failure to file a proper Notice of Appeal **subject to the law**. In the case at hand the limitation time has already lapsed, the Resident Magistrate delivered its judgment on

10.09.2019 and the appellant did not file a Notice of Appeal before the High Court of Tanzania to-date.

In view of the aforesaid shortfalls, I agree with the learned counsel for the respondent that the notice of appeal is defective. therefore there is no valid notice of appeal since there is no competent appeal that I can proceed to be determined on merits. In the absence of a valid notice, the purported appeal is incompetent and I hereby dismiss the appeal without costs.

Order accordingly.

Dated at Mwanza this date 10th day of March, 2020.


A.Z.MGEYEKWA
JUDGE
10.03.2020

Ruling delivered on 10th day of March, 2020 in the presence of the appellant and the learned counsel for the respondent.




A.Z.MGEYEKWA
JUDGE
10.03.2020