

IN THE COURT OF APPEAL OF TANZANIA


AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 480 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONSAPPELLANT

VERSUS

1. SENDI WAMBURA	 RESPONDENTS
2. KASONGO OTIANG'A		
3. ELISHA ALBETUS		
4. CHARLES MARWA		

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

(Matogolo, J.)

Dated the 4th day of November, 2016

in

(HC) Criminal Appeal Case No. 13 of 2016

RULING OF THE COURT

24th & 28th August, 2018

MBAROUK, J.A.:

This appeal which was lodged by the Director of Public Prosecutions (the DPP) is based on the complaint that, the procedure of granting bail to the respondents was illegal. The

background to this complaint was that, the respondents were charged before the District Court of Bukoba at Bukoba, with four counts. The **first count** was **unlawful importation of drugs, medicine devices and poisonous cosmetics**, contrary to section 73(1) and (6) of the Tanzania Food, Drugs and Cosmetics Act No. 1 of 2003, whereas the **second count** was **dealing with prohibited drugs**, contrary to sections 82(1) & (2) and 83 (1) (a) and (b) of the Tanzania Food, Drugs and Cosmetics Act, No. 1 of 2003. The **third count** was **supplying and distributing cosmetics that contains poisonous or harmful substances**, contrary to sections 88(10) (a) and 41(6) of the Tanzania Food, Drugs and Cosmetics Act, 2003. As for the **fourth count**, the appellants were charged with **failure to pay tax**, contrary to section 105(a) and (b) of the Income Tax Act, No. 11 of 2004.

During trial, the 1st and 2nd respondents were granted bail on 21-08-2015. The 3rd and 4th respondents were added

to the charge on 3-12-2015. After the plea was taken, the advocate for the 3rd and 4th respondents prayed for bail. The prosecution did not object the prayer for bail, but their concern was on the conditions set on bail. It was the ruling dated 8-12-2015 relating to the sureties' supporting documents produced at the trial court which gave rise to the appeal before the High Court. The first appellate court's decision was in favour of the respondents, hence this appeal.

Before us, the appellant / DPP was represented by Mr. Athuman Matuma, learned Senior State Attorney while Ms. Aneth Lwiza, learned counsel appeared for the respondents.

Before the hearing of the appeal commenced, the Court wanted to satisfy itself on the competence of the appeal in relation to the validity of the appellant's notice of appeal from the trial District Court to the High Court. The issue was the way the notice of appeal was titled; it was titled "In the District

Court of Bukoba". The Court called upon the parties to address it on that issue.

In his argument Mr. Matuma, argued that the notice of appeal as seen in page 43 of the record of appeal is not defective. He said that, it was properly titled, and placed reliance on section 379 (1) (a) of the Criminal Procedure Act, Cap. 20, R.E 2002 (the CPA).

He submitted that, the notice of intention to appeal from the District Court to High Court was properly titled. He pointed out that, section 379(1) (a) of the CPA empowers the DPP to file his notice of intention to appeal before the subordinate court, therefore there is no any mischief if the said notice being titled "in the District Court". To support his proposition, he referred us to the case of the **Republic v. Mwesige Geofrey Tito Bushahu**, Criminal Appeal No. 355 of 2014, (unreported). He submitted that, it was proper to

title the notice of intention to appeal as in the District Court although the appeal is referred to the High Court.

Ms. Lwiza on her part submitted that, the law is silent specifically on how the notice of intention to appeal from the subordinate court to the High Court should be. She said that section 379(1) (a) of the CPA read together with section 378 of the CPA does not provide as to how the title of the notice of intention to appeal should be. She further submitted that, as there is no formal format prescribed, then if the notice will be in a written form it has to comply with the requirements of the written notice of appeal, and if it is oral, the intended appellant should submit his oral notice of appeal to be recorded at the trial court. She added that, the case of **Mwesige Godfrey** (supra) is distinguishable, because it talks about **where the notice of appeal is supposed to be filed and not on how it is to be titled or formatted**. She stressed that the notice found at page 43 of the record of

appeal which instituted the appeal at the High Court was defective and hence there was no appeal before the High Court. She therefore, urged us to find that the proceedings and the judgment emanating from that notice of appeal a nullity and order the case file to be remitted back at the trial court so that hearing of the case can proceed before the trial District Court.

In his rejoinder, Mr. Matuma, submitted that the registry clerk of the district court has no power to sign the notice of appeal of the High Court that is why it has to be titled in the district court. He further submitted that, it is true as pointed out by Ms. Lwiza that there is no prescribed format of the notice of intention to appeal from subordinate court to the High Court on how it should be titled, hence it is not possible as Ms. Lwiza submitted that if one intends to file a written or oral notice of intention to appeal, has to comply with the requirements to that effect. He 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.

On our part, as can be discerned from the arguments of both counsel before us, the pith of the controversy here lies not in the ambiguity of the provision of sections 378 and 379 of the CPA as such, but on the apparent omission on how the notice of intention to appeal from subordinate court to the High Court should be titled and formatted.

Section 378 (1) of the CPA provides as follows:

"378.-(1) Where the Director of Public Prosecutions is dissatisfied with an acquittal, finding, sentence or order made or passed by a subordinate court, other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act, he may appeal to the High Court."

The provisions of section 379 (1) (a) of the CPA, provide as follows: -

*"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 orders against which he wishes to appeal.***
(Emphasis added).

While it is the contention of Mr. Matuma that the notice of intention to appeal was properly titled, on the other hand Ms. Lwiza is of the view that the same was wrongly titled. The question we ask ourselves here is whether, the omission in section 379(1) (a) of the CPA of not indicating how the notice of intention to appeal from subordinate court to High Court should be, was deliberate or accidental? Again both

counsel is in disagreement. We are of the opinion that where there is an obvious lacuna or omission or ambiguity, the court has a duty to fill in the gap or clear the ambiguity. See **Karibu Textile Mills Ltd v. New Mbeya Textile Mills Ltd and Three Others**, Civil Application No. 27 of 2006 (unreported).

It is our considered view that, the purpose of issuing a notice of appeal is to inform the trial court that the aggrieved party intends to appeal against its decision. In the said notice of intention to appeal, the DPP intended to appeal against the decision of the trial District Court. It was not proper, therefore, for the notice of intention to appeal to be titled again "In the District Court". The proper practice, the appellant should have followed, to our view, was to title the notice of appeal as " In the High Court", although the same was to be filed in the District Court as required by section 379(1) (a) of the CPA.

We are increasingly of the view that, the cited case of the **Mwesiga Godfrey** (supra) is distinguishable here, as the matter before the Court in that case was the place of filing the notice of intention to appeal, while in the case at hand, the issue is how the notice of intention to appeal should be titled when an appellant intends to appeal to the High Court from subordinate court.

Our reading of sections 378 and 379 (1) (a) of the CPA, put it clear that, notice of appeal by the DPP should be filed in the subordinate court and the same should be filed within 30 days of acquittal, finding, sentence or order against which he wishes to appeal but these provisions are silent as to whether a notice of appeal should be in a written form or oral and if written how its format would be.

It is quite clear that, there is no prescribed form kept as to how the notice of intention to appeal from the subordinate court to the High Court should be titled or formatted. The law

is silent on this aspect and even the current amendments of the Criminal Procedure (Approved Forms) Notice, 2017 in GN 429 published on 13-10-2017 did not cure this mischief? Unlike the Court of Appeal Rules, 2009 which stipulates clearly as to how the notice of appeal from the High Court to the Court of Appeal should look like as per the format found in Form B in the First Schedule to the Tanzania Court of Appeal Rules, 2009 (the Rules). Rules 68 of the Rules provides as follows:-

*" 68 (1) Any person who desires to appeal to the Court shall give notice **in writing**, which shall be lodged in triplicate with the **Registrar of the High Court at the place where the decision against which it is desired to appeal was given**, within thirty days of the date of that*

*decision, and the notice of appeal
shall institute the appeal.*

68(2)...N/A

68(3)...N/A

68(4)...N/A

68(5)...N/A

68(6)...N/A

*68(7) A notice of appeal shall be
substantially in **the Form B in the
First Schedule** to these Rules and
shall be signed by or on behalf of the
appellant.” (Emphasis added)*

To bring certainty in the law, we find a purposive approach should be resorted to remove the omission, and an inspiration should be drawn from Form B of the First Schedule of the Rules as amended by Government Notice No. 362

published on 22-09-2017, whereby the notice of appeal from the High Court to the Court of Appeal is titled "In the Court of Appeal of Tanzania ...". Therefore, we propose to the relevant authority that the notice of intention to appeal from subordinate court to 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 the CPA by other appellants.

In view of the above stated circumstances, we find the notice of intention to appeal from the trial District Court to the High Court in the instant matter defective. We are therefore, constrained to invoke our revisional powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E., 2002, to nullify the proceedings and judgment made by the High Court, and further order the proceedings of this

case in the District Court to proceed as the law directs. It is so ordered.


DATED at **BUKOB**A this 27th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL