IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 143 OF 2017

(Originating from D/Court of Kiteto Cr. Case No. 146 of 2017

ABDALLAH A. TALL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

12/10/2018 & 2/11/2018

MZUNA, J.:

The appellant named above was charged before the District Court of Kiteto at Kibaya with two counts; The first count was Unlawfully produce of Prohibited plants c/s 11 (1) (d) of the Drug control and enforcement Act, Act No. 5 of 2015; The second count was Unlawfully possession of Prohibited plants contrary to section 11 (1) (d) of the Drugs control and enforcement Act No. 5 of 2015.

It was alleged in the first count that, at about 11.00Hrs at Irkiushibor Village within Kiteto District in Manyara Region was found in unlawfully

produce of 0.5 KG of prohibited plants Catha Edulis commonly known as Mirungi. While in the second count, it was alleged that on 11th day of August 2017 at about 11.00hrs at Irkiushibor village within Kiteto District in Manyara Region was found in unlawfully produce of 0.5 KG of prohibited plants Catha Edulis commonly known as Mirungi.

The appellant was convicted on the second count on his own plea of guilty and sentenced to serve 30 years imprisonment. The Prosecutor opted to withdraw the first count.

Aggrieved with the proceedings and judgment of the District Court of Kiteto at Kibaya (E.D. MASSAWE, Esq, RM) filed appeal to this court basing on the following grounds;

1. *That, the trial Magistrate misdirected himself in law and in fact by convicting the appellant upon plea of guilty which was equivocal and full of ambiguities.*
2. *That the trial Magistrate erred in law and in fact by not fully evaluating the facts adduced before him hence rendering a wrong conviction and sentence.*
3. *That the trial Magistrate erred in law and in fact by not finding that the alleged Mirungi was not tendered as exhibit.*
4. *That the prosecution failed to tender the certificate of seizure of the alleged drugs/Mirungi.*

In this matter the appellant appeared in person and unrepresented while the respondent/Republic was represented by Mr. Kwagilwa learned State Attorney. Before commencement of the hearing, the Republic filed a notice of preliminary objection to the effect that:-

"The notice is defective for indicating improper name of a trial Magistrate."

During hearing of the preliminary objection, Mr. Kagilwa, the learned State Attorney submitted that section 361 (1) of the Criminal Procedure Act, Cap 20 RE 2002 provides a mandatory requirement that no appeal shall be heard unless Notice has been filed within 10 days. He went further stating that, the Notice of appeal filed show is against Hon. D/C Magistrate while the judgment was delivered by Iddi Masawe RM. Thus, the Notice is defective because it mentions a different name. He invited this court to the decision of the Court of Appeal in the case of **Peter Shangwe vs. The Republic**, Criminal Appeal No. 354/2008 (unreported) where the court found that bearing wrong case number and a wrong name of the Judge who heard the case, the errors rendered the Notice of Appeal to be incompetent. He therefore urged this court to struck out the appeal due to incompetent Notice of Appeal.

The appellant being a layperson told this court that he does not understand and left to the court to decide. However, he prayed for the court to consider that he has been in remand for a long time. He also prayed to be given a chance, to do corrections.

In his rejoinder submission, the learned Sate Attorney insisted that the appeal should be struck out because the law does not allow such an amendment.

I will start by referring to section 361 (1) of the Criminal Procedure Act (supra) which provides that;

> *"Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-*
>
> *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*
>
> *(b) has lodged his petition of appeal within forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded."*

The above referred section, only provides the time limit to give notice of intention to appeal. It is silent on what information or particulars should be contained in the Notice of Appeal, unlike the Court of Appeal Rules, 2009 which provides clearly the particulars that should be provided in the Notice of Appeal. The Court of Appeal in the case of **The Director of Public Prosecutions vs. Sendi Wambura**, Criminal Appeal No. 480 of 2016 (unreported) encountered a similar situation where the DPP intended to file appeal to the High Court against the decision of the subordinate court. The issue was the way the notice of appeal was titled; *"In the District Court of Bukoba"* instead of *"In the High Court of Tanzania"*. In the course of discussion, the Court of Appeal stated that;

> *"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, 2007 in G.N 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)".*

Rule 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.*

(2) Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal, and shall contain a full and sufficient address at which any notices or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 17, shall be signed by the appellant of his advocate.

(3) Where two or more persons have been jointly tried and any two or more of them desire to appeal to the Court, they may at their option lodge separate notices or a joint notice of appeal, and where a joint notice of appeal is lodged, it may include, in addition to the grounds peculiar to one or more of them.

(4) Where an appeal lies only on a certificate that a point of law is involved or with leave, it shall not be necessary to obtain that certificate or leave before lodging the notice of appeal.

(5) Where a notice of appeal is signed by or on behalf of an appellant who is in prison, it shall include a statement that the appellant intends or does not intend, as the case may be, to appear at the hearing of his appeal.

(6) Where a notice of appeal is signed by an advocate, he shall add after his signature the words "Retained only to prepare this notice'; "Retained to appear at the hearing of the appeal' or "Assigned to appear at the hearing of the appeal", as the case may be.

(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.***"

While Rule 68 (1) – (7) (above quoted), provides particular information about how a Notice of Appeal should look like or what it should contain as shown above; section 361 (1) of the CPA is silent. A notice of Appeal is considered defective if it does not comply with the requirement of the law. In our case, section 361 (1) (supra) does not provide any other requirement apart from the limitation, that the notice of intention to appeal shall be given within 10 days unlike Form B to the Schedule of the Court Rules that requires the appellant to disclose the number of the case he/she is appealing against, the date of conviction, the name of the judge who convicted and imposed the sentence or acquittal and the sentence passed.

With due respect to the learned counsel, since the law guiding Notice of Appeal to the High Court from subordinate court does not provide a requirement that the Notice of Appeal should indicate the name of the

Magistrate who convicted the appellant and imposed sentence, I find that errors on the name of the Magistrate in the Notice of Appeal is not fatal and does not go to the root of the case as long as name of the parties, case number and name of the subordinate court are correct. I proceed to find that the case of **Peter Shangwe vs. The Republic** (supra) cited by the learned State Attorney is distinguishable to the case at hand because in that case the applicable law which is Court of Appeal Rules provides a requirement that a Notice of Appeal shall contain case number and name of the Judge while in our case the law is silent.

Based on what I have demonstrated above, I therefore overrule the raised preliminary objection.

Order accordingly.

HIGH COURT OF TANZANIA

M. G. MZUNA,

JUDGE. 2/11/2018