

5
THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA
CRIMINAL APPEAL NOS. 112 & 91 OF 2018
(CORAM: MUSOKE, CHEBORION, MADRAMA, JJA)

UGANDA APPELLANT

10
VERSUS

1. HON. ENG. ABRAHAM JAMES BYANDALA
2. ENG. BERUNADO SSEBUGGA KIMEZE
3. JOE SSEMUGOOMA
4. MARVIN BARYARUHA
15 5. APOLLO SENKEETO
6. MUGOTE ISAAC
7. WILBERFORCE SENJAKORESPONDENTS

(Appeal from the Judgment of Hon. Justice Lawrence Gidudu of the High Court, Anti - Corruption Division at Kololo delivered on 29th August 2018 in
20 Criminal Case No. 12 of 2015)

RULING OF COURT

This interlocutory ruling arises from an appeal from the decision of Justice
Lawrence Gidudu of the High Court Anti - Corruption Division in Criminal
25 Session Case No. 12 of 2015 in which the first Respondent was acquitted of
2 counts of Abuse of Office contrary to section 11(1) of the Anti - Corruption
Act No 6 of 2009 and Disobedience of lawful Orders contrary to section 35(c)
of the Inspectorate of Government Act, 2002. The second Respondent was
acquitted of 3 counts of Abuse of Office contrary to section 11(1) of the Anti
30 - Corruption Act and Causing Financial Loss contrary to section 20 of the
Anti - Corruption Act. The third Respondent was acquitted of Causing
Financial Loss contrary to section 20 of the Anti - Corruption Act but
convicted of Abuse of Office contrary to section 11(1) of the Anti - Corruption
Act and Corruption contrary to section 2(i) of the Anti - Corruption Act. The
35 fourth Respondent was acquitted of Causing Financial Loss contrary to
section 20 of the Anti - Corruption Act and Abuse of Office contrary to

5 section 11(1) of the Anti – Corruption Act. The fifth Respondent was convicted
of theft of UGX 24, 790, 823, 522/= contrary to section 254(1) and 261 of the
Penal Code Act, 6 counts of Uttering False documents contrary to section
10 351 and 347 of the Penal Code Act, and obtaining the execution of a
Securities by False Pretences contrary to section 306 of the Penal Code Act.
He was acquitted of Conspiracy to Defraud contrary to section 309 of the
Penal Code Act. The sixth Respondent was acquitted of charges of
Conspiracy to Defraud contrary to section 309 of the Penal Code Act and
abetting the offence of Causing Financial Loss contrary to section 52(c) of
the Anti- Corruption Act. The seventh Respondent was convicted of
15 Corruption contrary to section 2(i) of the Anti – Corruption Act. In summary,
the 1, 2, 4 and 6 Respondents were acquitted and set free while the 3, 5 and
7 Respondents were convicted.

The 3, 5 and 7 Respondents appealed against their respective convictions
and sentences in Criminal Appeal No. 91 of 2018 while the Appellant
20 appealed against the acquittals of the 1, 2, 4 and 6 Respondents in this
appeal.

When the appeals came up for hearing, the 1st, 2nd, 4th and 6 respondents
objected to the appeal of the appellant and this ruling is in respect of that
objection.

25 **Representations**

At the hearing of the appeal, the Appellant was represented by learned
counsel Brenda Kimbugwe, the Manager Prosecutions Inspectorate of
Government and learned counsel Thomas Okot, Senior Inspectorate Officer
with the Inspectorate of Government. The first Respondent was represented
30 by learned counsel Allan Seruliika and learned counsel Robert Matovu, the
second Respondent by learned counsel Ivan Engoru, the third Respondent
by learned counsel William Were, the fourth Respondent by learned counsel
David AF Mpanga and learned counsel Dickens Kagarura. The fifth
Respondent by learned counsel Peter Mulira, the sixth Respondent by
35 learned counsel Norah Kaggwa and the seventh Respondent by learned
counsel Jimmy Muyanja.

5 **Preliminary Point of law**

When this matter came up for hearing on 28th September 2021, learned counsel for the Appellant prayed that this appeal be consolidated with Criminal Appeal No. 91 of 2018 under rule 62 of the Judicature (Court of Appeal Rules) Directions since both appeals arise from the same judgment of Justice Lawrence Gidudu of the High Court Anti – Corruption Division. She also prayed that the matter be adjourned because the Respondents were not in court.

On the other hand, learned counsel Mr. David AF Mpanga for the fourth Respondent objected to the consolidation of the appeals on the grounds that the appeal is incompetent. He submitted that the first, second, fourth, and sixth respondents were acquitted, while the third, fifth, and seventh respondents, who are the Appellants in Criminal Appeal No. 91 of 2018, were convicted and are on bail. Further, counsel submitted that according to rule 73(3) of the Rules of this Court, the 1st 2nd, 4th, and 6th Respondents were not required to appear at the hearing of the appeal because they were not on bail unlike the 3rd, 5th, and 7th Respondents.

Secondly, counsel contended that the record of proceedings and notice of appeal were not served on the 1, 2, 4, and 6 Respondents thereby rendering the appeal incompetent.

25 In rejoinder, learned counsel for the Appellant submitted that the Notice of Appeal was served on the 2nd Respondent. She further submitted that the Registrar has the mandate to serve the record of appeal under rule 65 of the Rules of this Court.

Learned counsel for the sixth Respondent submitted that the Notice of Appeal does not bear the addresses for service of the Respondents. She contended that, while rule 61 of the Rules of this Court requires the Registrar to serve the Notice of Appeal on the Respondents, rule 61(2) of the Rules of this Court requires the Appellant to notify the Court of the Respondents' addresses for service. Counsel contended that because the Appellant failed to perform this duty, the Registrar was unable to serve the

5 Record of Appeal on the Respondents.

Learned counsel for the Appellant conceded that the Appellant did not include the Respondents' addresses in the notice of appeal, but reiterated that the Respondents had been served the memorandum of appeal and Appellant's written submissions, and that some of the Respondents had
10 filed written submissions in reply.

Consideration of the Preliminary Point of Law

Learned counsel David Mpanga for the 4th Respondent contended that this appeal is incompetent because the Respondents were not served with the record of proceedings and Notice of Appeal. Learned counsel Ivan Engoru
15 for the 2nd Respondent associated himself with the submissions of counsel David Mpanga. He submitted that since there was no service of the record of appeal which forms the basis for drawing the memorandum of appeal, the purported memorandum of appeal is without consequence and there is no appeal to adjourn or consolidate. Furthermore, while adopting the
20 submissions of counsel David Mpanga, counsel Peter Mulira for the 5th Respondent, submitted that since the Respondents were not served with the record of appeal, it could not be said that there is an appeal against the judgment of the lower court and therefore the question of consolidation of this appeal with Criminal Appeal No. 91 of 2018 would not arise.

25 Clearly, the submissions of the appellant's arise from provisions of the Judicature (Court of Appeal Rules) Directions and particularly the fact that the notice of appeal filed by the appellant through the office of the Inspectorate of Government does not include an address for service of the respondents though it indicates that it is to be served on all the respondents
30 and the Registrar High Court Anti-Corruption Division. Rule 63 of the rules of this court provides that on the receipt of the notice of appeal, the registrar of the High Court shall immediately send a copy of the notice to the registrar of the Court of Appeal and one to the respondent named in it. Further, rule 61 (2) provides that:

35 (2) Where the Director of Public Prosecutions gives notice of appeal in the event

5 of an accused person being acquitted by the High Court, at the time the decision is given, the accused person shall give his or her address for service on him or her of the notice of hearing of the appeal; or, if the Director of Public Prosecutions gives notice of appeal in writing within 14 days after the decision, the director shall notify the court of the address of the accused person for service of the notice
10 of appeal upon him or her, and notice of the date of hearing, which notices shall be substantially in the forms prescribed in respect of appeals against conviction.

Though it cannot be discerned from the notice of appeal whether the director give notice of appeal at the time the decision is given, it is clear from the notice itself that the decision was delivered on 29th of August 2018
15 and the notice of appeal is dated 11th September 2018 and filed on court record on the same day meaning that it was a notice of appeal in writing which was to be given within 14 days after the decision. Rule 60 (1) provides that a notice in writing shall be lodged in six copies with the registrar within 14 days after the date of the decision. From rule 61 (1) of the rules of this
20 court, where the director of public prosecution gives notice of appeal, it is governed by rule 60 (1) and (2) of the rules of this court. It follows that the requirements of the law are that the notice shall state shortly the nature of the finding against which it is desired to appeal and the address at which documents connected with the appeal may be served on the appellant or
25 appellants. This has to be read together with the rule 61 (2) of the rules of this court which provides that where the director of public prosecution gives notice of appeal in writing within 14 days, the director shall notify the court of the address of the accused persons for service of the notice of appeal upon him or her and the notice of the date of hearing. Rule 59 (6)
30 provides that the notice of appeal shall be substantially in Form B in the First Schedule of the rules of this court.

The said form only provides for the address for service of the appellant. On the other hand, it is the duty of the Directorate of Public prosecutions under rule 61 (2) to notify the court of the address of the accused person for
35 service of the notices of appeal upon him or her and also for services of the notice of hearing.

We have carefully considered the requirements of the law together with the

5 fact that it is the duty of the registrar of the High Court to send a notice to
the registrar of this court and to the respondents. To resolve this objection,
the respondents who appeared in court through counsel rely on the formal
defect in the notice of appeal for not giving the address for service of the
10 respondents though it purports to name all the respondents who are named
in the title to the proceedings. There was therefore a formal defect which
could have saddled the High Court from serving the notice of appeal and
record of appeal on the respondents. The first question is whether this
would render the appeal incompetent. Secondly the notice of appeal, does
15 not, on the face of it, state shortly the nature of the acquittal and finding
against which it is desired to appeal in terms of rule 60 (2) (a) of the Rules
of this court. Again, the second question is whether this renders the appeal
incompetent.

This Court dealt with the question of competence of a criminal appeal in its
recent decision in **Ssenteza Mohammed v Uganda Criminal Appeal No. 150**
20 **of 2018**. The Appellant in that case did not file a memorandum of appeal.
While resolving the question as to whether the appeal was competent, this
court held at page 3 that;

Under section 28 of the Criminal Procedure Code Act, cap 116, every appeal shall
be commenced by notice in writing signed by the appellant or an advocate on his
25 or her behalf. In this case the appellant lodged a notice of appeal indicating that
he intended to appeal against the whole judgment of the High Court. It shows that
the decision of the High Court was delivered on 24th October 2018 and notice of
appeal was received in the registry of the Court of Appeal on 7th November 2018.
This was within 14 days from the date of the decision.

30 This Court ruled that there was an appeal pending before it as the Appellant
had lodged a notice of appeal within the prescribed time.

Section 28 of the Criminal Procedure Code Act, cap 116 provides that
criminal appeals shall be commenced by a notice of appeal. We reproduce
it here for emphasis.

35 28. Notice of appeal.

(1) Every appeal shall be commenced by a notice in writing which shall be signed

5 by the Appellant or an advocate on his or her behalf, and shall be lodged with the Registrar within fourteen days of the date of judgment or order from which the appeal is preferred.

(2) Every notice of appeal shall state shortly the effect of the judgment or order appealed against and shall_

10 (a) contain a full and sufficient address at which any notices or documents connected with the appeal may be served on the Appellant or his or her advocate; and

(b) except where subsection (3) applies, state the general grounds upon which the appeal is preferred.

15 Section 28 (2) (b) of the Criminal Procedure Code Act, cap 116 provides *inter alia* that every notice of appeal shall state shortly the effect of the judgment appealed against and shall except where subsection (3) applies, state the grounds upon which the appeal is preferred. Subsection (3) provides that:

20 (3) If the appellant or an advocate on his behalf indicates at the time of filing a notice of appeal that he or she wishes to peruse the judgement or order appealed against before formulating the grounds of appeal, he or she shall be provided with a copy of the judgment or order, free of charge, and the grounds of appeal shall be lodged with the registrar within 14 days of the date of service on him or her of the copy of the judgment or order.

25 In the notice of appeal, the DPP who can be taken to be the Inspectorate of Government indicated in the notice of appeal that they wish to peruse the proceedings and judgment of the trial court before filing the memorandum of appeal and thereby applied for the same. In other words, there was no requirement for the DPP to state the grounds upon which the appeal would
30 be preferred in the notice of appeal as they opted to formulate the grounds of appeal upon receipt of the proceedings and judgment of the trial court. It follows that the only defect is the failure to provide for the particulars of the address of the respondents upon which the record of appeal and the notice of appeal may be served. The purpose of providing for the address
35 for service of the respondents is to ensure that the court is able to serve them with the requisite documents for the appeal inclusive of the hearing notices.

5 In the circumstances of this appeal, we are dealing with a situation where
the respondents addresses for service were not included in the notice of
appeal, but are represented by counsel and are deemed to have appeared
in court. The prejudice caused by not having notified the court of the address
for service was rectified by counsel appearing in court. In other words, the
10 appeal is not defective merely because addresses for service of the
respondents were not included in the notice of appeal. An appeal is
commenced by notice of appeal under section 28 of the Criminal Procedure
Code Act.

In **Masaba Herbert v Uganda, Criminal Application No. 172 of 2019**, this Court
15 elaborated on the application of Section 28 of the Criminal Procedure Code
Act. In that case, the Applicant, Masaba Herbert, was tried and convicted
along with two others by the Chief Magistrates Court of Mukono for abuse
of office, theft and causing financial loss. He jointly appealed to the High
Court Mukono which upheld the conviction and enhanced the sentence. On
20 a second appeal to this Court, the Applicant did not file a memorandum of
appeal but instead wrote a letter to this Court indicating that he associated
himself with and adopted the memorandum of appeal and written
arguments of his co - Appellant. In that case, learned counsel for the
Respondent opposed the application for reinstatement of the Applicants
25 appeal on the grounds that the Appellant had not appealed because an
appeal must be commenced by lodging a memorandum of appeal pursuant
the Rules of this Court. However, there was a notice of appeal indicating
that all three convicted persons, including the Applicant, had appealed to
this Court. The main issue before the Court was whether the Applicant had
30 appealed. This court held that rule 66 of the Rules of this Court which
provides for the filing of a memorandum of appeal is not mandatory but
directory because in rule 67, an advocate assigned to represent the
Appellant may lodge a supplementary memorandum of appeal. Taking into
account the preamble of the Criminal Procedure Code Act Cap 116, which
35 states that the Criminal Procedure Code Act is an Act to make provision for
the procedure to be followed in criminal cases, this Court held that the
intention of the Legislature in section 28 of the Criminal Procedure Code

5 Act was to enable intending Appellants to commence an appeal by notice in writing which may as well be a notice of appeal. Further, this Court held that the Criminal Procedure Code Act, being an Act of Parliament, overrides the Rules of this Court where there is any conflict or inconsistency with it. This Court also referred to section 18(4) & (5) of the Interpretation Act cap 10 3 which provides that every statutory instrument which is inconsistent with any provision of the Act under which the instrument was made shall be void to the extent of the inconsistency; and any act done under a statutory instrument shall be deemed to be done in pursuance of the Act conferring power to make the Instrument. In the premises, this Court ruled that the 15 provisions of the Criminal Procedure Code Act supersede the provisions of the Rules of this Court and allow an appeal to be commenced by notice of appeal within 14 days of the decision appealed against.

In the present appeal, the Appellant lodged a Notice of Appeal on 11th September 2018 against the decision of the High Court delivered on 29th 20 August 2018. The Appellant was well within the 14 days prescribed by section 28 of the Criminal Procedure Code Act and rule 60 of the Rules of this Court. In the premises, this Court finds that there is an appeal pending before this court which was commenced by a notice of appeal lodged by the Appellant on 11th September 2018.

25 Further, learned counsel for the Respondents contend that the appeal is incompetent for want of service of the record of appeal. We have duly considered the matter.

Rule 60 of the Rules of this Court which applies in noncapital cases provides that:

30 60. Notice of appeal in noncapital cases.

(1) in the case of an offence where the death sentence has not been passed, or which does not attract the death sentence, the accused may give notice informally at the time the decision is given that the accused person desires to appeal against the conviction and sentence, or only the sentence, or by notice in writing which 35 shall be lodged in six copies with the registrar within fourteen days after the date of the decision.

- 5 (2) The notice of appeal shall _
- (a) state shortly the nature of the conviction and finding against which it is desired to appeal; and
 - (b) contain the address at which documents connected with the appeal may be served on the appellant or appellants and shall be in six copies.
- 10 (3) Rule 59(2), (3), (4), (5) and (6) of these Rules shall apply to appeals under this rule.

Rule 61 of the Rules of this Court applies to appeals from acquittals like the present appeal. The rule provides as follows;

61. Notice of appeal from acquittals.

- 15 (1) Apart from the third appeal to the court being final, whenever the court acquits or confirms the acquittal of an accused person, the Director of Public Prosecutions, as empowered by the Judicature Act, may give notice of appeal as provided by rule 60(1) and (2) of these Rules.
- 20 (2) Where the Director of Public Prosecutions gives notice of appeal in the event of an accused person being acquitted by the High Court, at the time that the decision is given, the accused person shall give his or her address for a service on him or her of the notice of hearing of the appeal; or, if the Director of Public Prosecutions gives notice of appeal in writing within fourteen days after the decision, the director shall notify the court of the address of the accused person
- 25 for service of the notice of appeal upon him or her, and the notice of the date of hearing, which notices shall be substantially in the forms prescribed in respect of appeals against conviction.
- 30 (3) The accused shall, as soon as possible, be informed that if he or she does not attend the hearing of the appeal, the appeal will be heard in his or her absence and that he or she may be liable to be arrested if the appeal of the Director of Public Prosecutions is successful.
- (4) Sub rules (1), (2) and (3) of this rule shall apply to the case where the court confirms or orders the acquittal of an accused person and the Director of Public Prosecutions gives notice of appeal to the Supreme Court.

35 The essence of rules 60 and 61, of the rules of this court are that in appeals from acquittals, the Director of Public Prosecutions may lodge a notice of appeal in writing within fourteen days of the decision appealed against and

5 notify the court of the address of the accused person for purposes of service of the notice of appeal and the notice of the date of hearing.

The Notice of appeal lodged by the Appellant does not disclose the addresses for service of the Respondents as stipulated in the rules. And the question is whether this procedural defect substantially affected the appeal
10 as to render it incompetent.

Learned counsel for the Appellant submitted that according to rule 65 of the Rules of this Court, the mandate to serve the record of appeal lies with the Registrar. She conceded that the Respondents were not served with the record of appeal because it was voluminous and she undertook to follow up
15 the matter with the Registrar. Counsel further contended that the Respondents should have liaised with the Registrar of this court to obtain copies of the record of appeal.

Rule 65 of the Rules of this Court provides for service and transmission of the record of appeal. It states as follows;

20 65. Service and transmission of record of appeal, exhibits, etc.

(1) As soon as the record of appeal has been prepared, the registrar of the High Court shall cause a copy to be served on the appellant and a copy on the respondent and shall send four copies to the registrar.

(2) The registrar of the High Court shall at the same time send to the registrar the original record of proceedings in the High Court and the original documentary exhibits in the High Court, other than any of great bulk, but shall not send any exhibits other than documentary ones, unless requested to do so by the registrar.
25

(3) The registrar of the High Court shall ensure, so far as practicable, that all other exhibits are available for inspection by the court at the hearing of the appeal.
30

It is apparent from rule 61(2) and rule 65(1) that it is the duty of the registrar of the High Court to serve the notice of appeal and record of appeal. The Registrar, however, could not have served the record of appeal or proceedings on the Respondents in the absence of a notice of address of
35 the Respondents which is supposed to be furnished by the Appellant

5 pursuant to rule 61(2) of the Rules of this Court. The Court cannot fault the Registrar for failing to carry out his or her mandate prescribed by rule 65 of the Rules of this Court.

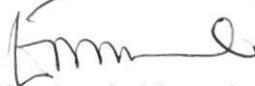
We find that while the appeal is not incompetent, it cannot proceed without the record of appeal. We find no merit in the preliminary objection to the appeal. We direct that the record of appeal be served on the respondents. Secondly, concerning the application for consolidation of appeals, rule 62 (1) of the Rules of this court provides that:

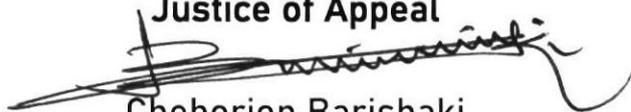
15 Where two or more appeals are brought from convictions, acquittals or sentences passed at the same trial, they shall, unless the court otherwise orders, be consolidated and shall proceed as one appeal.

It is a requirement of the rules that the appeals have to be consolidated because they are from convictions and acquittals or sentences passed at the same trial. It is only when the court otherwise orders that they may not be consolidated.

20 In the premises, the application to consolidate this appeal with Criminal Appeal No. 91 of 2018 is granted. An order is issued consolidating Criminal Appeal No 112 of 2018 with Criminal Appeal No 91 of 2018. Further, this appeal shall be adjourned pending the service on the respondents of the record of appeal.

25 Dated at Kampala the ^{28th}~~28~~ day of June 2022


Elizabeth Musoke
Justice of Appeal

30 
Cheborion Barishaki
Justice of Appeal


Christopher Madrama
Justice of Appeal