

<p>CRIMINAL APPEAL NO. 217 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.</p>	<p>ALEX THOMAS Vs. REPUBLIC (Appeal from the Judgment of the High Court of Tanzania at Moshi)- Criminal Appeal No. 82 of 1998- Mchome, J.</p>	<p>Fatal defects in the appeal appears in the record-</p> <p>Notice of appeal was not signed- Rule 61 (2) of the Court of Appeal Rules, 1979, the Court Rules, requires that a notice of appeal has to be signed by the appellant or his advocate-</p> <p>Failure by an appellant to sign a notice of appeal- is a fatal defect which renders the appeal incompetent. Consequently such appeal is struck out: Edson Mbogoro v OC-CID Songea District and the Attorney General, Civil Appeal No. 44 of 2004.</p> <p>Dishonesty on the part of the appellant with the connivance of High Court registry staff at Moshi:</p>
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**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 217 OF 2007

ALEX THOMAS APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Moshi)**

(Mchome, J.)

dated the 24th day of March, 2000

in

Criminal Appeal No. 82 of 1998

ORDER OF THE COURT

8 & 15 October, 2007

MROSO, J.A.:

Before the “appellant” could address the Court on the merits of his appeal Mr. Kitambwa, learned State Attorney for the respondent Republic, informed the Court that there was no competent appeal before the Court to be heard. He said that there were two fatal defects in the “appeal”, first, that what appears in the record as a notice of appeal was not signed. Rule 61 (2) of the Court of Appeal Rules, 1979, the Court Rules, requires that a notice of appeal has to be signed by the appellant or his advocate. Furthermore, this Court in the case of **Edson Mbogoro v OC-CID Songea District and the Attorney General**, Civil Appeal No. 44 of 2004 held that an unsigned notice of appeal rendered the appeal incompetent and such appeal has to be struck out.

Mr. Kitambwa then addressed the Court on what he considered to be the second fatal defect of the “appeal”. He pointed out that in a ruling of the High Court (Mwaikugile, J) dated 12th February, 2007 in which extension of time to file a notice of appeal and to lodge the

appeal, the appellant was given 45 days, time to be reckoned from 26th February, 2007, within which to lodge his intended appeal, presumably meaning the memorandum of appeal because a criminal appeal is instituted by the notice of appeal. The appellant did not comply with that order and, therefore, that the appeal which was filed beyond the 45 days which were specified by the High Court should be struck out.

When the Court reminded the learned State Attorney that the period within which a memorandum of appeal is to be filed is stipulated in Rule 65 (1) of the Court Rules, depending on when the appellant was served with the record of appeal, Mr. Kitambwa replied that even so, the memorandum of appeal by the appellant was filed out of time and that that was an additional reason why the purported appeal should be struck out.

When the appellant was called upon to respond to the submissions of the State Attorney he retorted that there was a duly signed (thumb printed) notice of appeal in his possession and wondered why everyone else, including the Court, did not have in

their records such a notice. He showed to Court a copy of a notice of appeal which was stapled on-to the front cover of his copy of the record of appeal. It had a thumb print which he said was his. Curiously, the copy of the notice of appeal on page 67 of his copy of the record of appeal was exactly like the one which also appears in our respective copies of the record of appeal. It was unsigned. We wondered why there should have been another copy of notice of appeal to be affixed onto the appellant's copy of the record of appeal, and that copy alone to have the appellant's signature. There were also some other obvious alterations on the year originally written on an equivalent copy of notice of appeal in the Court registry file. Yet the appellant insisted that we should accept his notice of appeal which he claimed had his thumb print-cum-signature.

The appellant also contended that his memorandum of appeal had been filed in time but on being confronted with the date clearly appearing on the filed memorandum of appeal, he was stuck.

Rule 61 (2) of the Rules says –

“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 14, shall be signed by the appellant or his advocate”. (Our underscoring).

The underlined words are the relevant ones in this appeal. The use of the word “shall” indicates that it is mandatory for the appellant or his advocate to sign the notice of appeal. This opinion is not being given by this Court for the first time. In a recent decision of this Court – the **Edson Mbogoro** case which Mr. Kitambwa cited to Court – it was therein held that failure by an appellant to sign a notice of appeal is a fatal defect which renders the appeal incompetent. Consequently such appeal is struck out.

One might argue that the decision to strike out an appeal because a notice of appeal, which is otherwise correct in every other respect, has not been signed by the appellant or his advocate is

drastic and possibly avoidable. The Court could grant the appellant leave to file a supplementary record which would contain a duly signed notice of appeal. The other party to the appeal could be compensated for the resulting adjournment by being awarded costs. Unfortunately, what has just been said is not an available option considering, as already mentioned, the compulsive language of Rule 61 (1) cited above. There will have to be need to tone-down the unnecessarily technical aspects of the Rules so that substantial justice is dispensed without prejudicing the basic rights of either party in a case.

In this appeal it is quite clear to us that there has been dishonesty on the part of the appellant with the connivance of High Court registry staff at Moshi. We say so because the notice of appeal which forms part of the bound record of appeal and which was lodged in the High Court Registry at Moshi on 21st February, 2007 and has a Court of Appeal date rubber stamp is not signed by the appellant either by writing or by a thumb print. However, annexed to the memorandum of appeal of the appellant which was lodged in the High Court at Moshi on 6th July, 2007 is yet another notice of appeal

which purports to have also been lodged to the Registrar, High Court at Moshi on 21st February, 2007. This particular Notice of Appeal as already mentioned has a thumb print purporting to be of the appellant. We have scrutinized this document and it is different in a number of respects from the one on page 67 of the record. It was prepared, thumb printed by the appellant, signed by the Officer Incharge, Karanga Prison, Moshi and by the District Registrar at the High Court of Moshi on a date subsequent to the one on page 67 of the record. It was meant to pass as genuine Notice of Appeal. Neither ourselves nor the learned State Attorney were hoodwinked by the trick perpetrated by the appellant and his accomplices from among the High Court staff at Moshi. It is a false document and we strike it out. Since there is no valid notice of appeal, and as an appeal is instituted by a valid notice of appeal, there is no competent appeal before the Court. The incompetent appeal is struck out.

As regards the memorandum of appeal, it is unnecessary for us to dwell on it in view of the order we just made above. The order of the High Court, Mwaikugile, J., dated 12th February, 2007 that the appeal (meaning, in the context, the memorandum of appeal) should

be filed within 45 days after the 26th February, 2007 was made because no one had brought to the attention of the Judge the provisions of Rule 65 (1) of the Rules. Under sub-rule (1) of Rule 65 an appellant is required to lodge their memorandum of appeal within 14 days after service on them of the record of appeal.

In this "appeal" the appellant informed the Court that he was served with the record of appeal on 18th June, 2007, the same date when the record was certified by the District Registrar of the High Court at Moshi. Fourteen days reckoned from 18th June, 2007 would expire on 2nd July, 2007, when the memorandum of appeal was filed on 6th July, 2007, it was four days out of time. Since no extension of time had been sought and obtained to file the memorandum of appeal out of time, the appeal would also be struck out for that reason.

DATED at ARUSHA this 15th day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR