

C. F. WILHELM JANTZEN, by and through his Agent, W. FRITZ, Appellant, v. FRANK N. WILLIAMS, Appellee.

MOTION TO DISMISS APPEAL FROM CIRCUIT COURT OF FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued December 11, 1934. Decided December 21, 1934.

1. This Court has the privilege of settling the procedure of subordinate courts.
2. The notice of appeal should be directed to the sheriff of the county, commanding him to notify appellee of the completion of the appeal, and summoning him to appear and defend.
3. Said notice should be personally served upon the appellee; but in the event appellee is without the hailiwick of the sheriff, or is otherwise inaccessible, the service upon one who has been, and continues to be, an attorney of record will be sufficient.
4. The neglect of the Clerk to include in the copy of the records a receipted bill of costs is not ground for dismissal of the appeal; but for a mandate for diminution of records.

On motion to dismiss, on jurisdictional grounds, an appeal from a judgment for defendant in an action for damages for breach of contract, *motion dismissed* and appeal directed to be heard on merits.

*Barclay & Barclay* for appellant. *Abayomi Karnga* for appellee.

MR. JUSTICE DOSSEN delivered the opinion of the Court.

This case comes up to this Court for review upon a bill of exceptions from the Circuit Court of the First Judicial Circuit, Montserrado County. At the call of the case in this Court counsel for appellee submitted for the consideration of the Court a motion to dismiss the appeal, which reads as follows, to wit:

"1. Because appellee alleges that up to the filing of this motion the said appellant has neglected to

summon appellee to appear in this court as the law directs.

“2. And also because there is no notice of appeal, nor bill of costs filed in the records in this case in keeping with law; wherefore the appellee prays and moves this Honourable Court to dismiss the said appeal and rule appellants to all costs. And this the appellee is ready to prove.”

According to the Act of 1894 it is imperative upon the appellant in cases appealed to this Court to have appellee notified of the completion of the appeal, and for what term of Court, and summoned then and there to appear and answer. Said notice to appellee places him under the jurisdiction of this Court, and an omission to have such notice issued and served is fatal to the appeal. Appellee's contention, however, is not that appellee had not been notified of the filing of the appeal, but that up to the filing of appellee's motion the notice had not been served upon himself, and that the service upon his counsel, as appellant alleged had been done, was not sufficient. The records show that on the 14th day of August, 1934, the clerk of the trial court addressed the following letter to appellee's attorneys:

“C. F. Wilhelm Jantzen, by and through their agent W. Fritz, plaintiff, versus Frank N. Williams, defendant, Action of Damages for breach of contract.

“To Counsellors A. Karnga and C. H. Taylor, of Counsel for defendant, Greeting: Please take legal notice that on this 14th day of August A.D. 1934 C. F. Wilhelm Jantzen by and through their agent W. Fritz, appellants in the above entitled cause, have on said date aforesaid completed their appeal to the Honourable Supreme Court of Liberia at its November term A.D. 1934, etc.”

Inasmuch as the gentlemen to whom said notice was addressed were attorneys to the record throughout the

trial, and at least one of them has appeared here to continue the defense of appellee, it is our opinion that the spirit of the law has been carried out.

Nevertheless, inasmuch as ours is the privilege of settling the procedure of all subordinate courts, we desire to point out that the procedure heretofore followed does not appear to us to be in all respects in accordance with the spirit of the law. Hence from and after cases docketed for this session of the Court, it is our opinion that all notices of appeal shall be directed to the sheriff of the court from which the appeal is taken instead of to the appellee, and by said sheriff served upon the appellee whenever he is within reach. If, however, the appellee is not within the bailiwick of the said sheriff, upon a proper endorsement to said effect by the sheriff, the notice may be served upon any attorney to the record for appellee provided no notice of change of said attorney shall have been made a matter of record in the trial court.

By inspection of the records filed, it appears that the bill of costs was paid, but that the clerk of the trial court inadvertently omitted to send up in the records a receipt for same. Further, the motion avers that no bill of costs was filed in the records, not that the costs of the lower court had not been paid; which omission to include a copy of said bill of costs in the records is not sufficient in law to warrant the dismissal of the appeal. Had appellants neglected to pay the costs of the trial court, and the records supported same, the Court would have been compelled to take judicial notice of said omission and dismiss the appeal; but the facts of this case amount to a diminution of records, and upon application to send the missing documents the omission will be cured and the appeal should be heard. Appellants finding that the clerk of the trial court had omitted to transmit the records in full, have applied to this Court for a mandamus to compel him so to do, which has been granted, and the