

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

<b>Case Title:</b> <i>Fillemon Josef Hamukwaya v The State</i>	<b>Case No:</b> HC-NLD-CRI-APP-CAL-2021/00026
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga, J et Honourable Mr Justice Kesslau J	<b>Heard on:</b> 17 November 2023 <b>Delivered on:</b> 19 January 2024
<b>Neutral citation:</b> <i>Hamukwaya v S</i> (HC-NLD-CRI-APP-CAL-2021/00026) [2024] NAHCNLD 05 (19 January 2024)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The Respondent's point <i>in limine</i> regarding the Appellant's failure to comply with Rule 118(6) is dismissed.</li><li>2. The Respondent's point <i>in limine</i> regarding the Appellant's introduction of a new ground of appeal is upheld.</li><li>3. The Respondent's point <i>in limine</i> regarding the Appellant's grounds of appeal not being clear and specific is dismissed.</li><li>4. The Respondent's points <i>in limine</i> regarding the late filing of the notice of appeal and amended notice of appeal are upheld and the applications for condonation are refused.</li></ol>	

5. The appeal is struck from the roll and considered finalized.

**Reasons for decision:**

KESSLAU J (SALIONGA J concurring)

Introduction

[1] The appellant, who was legally represented, was convicted in the Tsumeb Regional Court on a charge of contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape. On 1 February 2017 he was sentenced to 17 years' imprisonment. This appeal lies against sentence only.

[2] The sentence was meted down on 1 February 2017 with the appellant filing his notice of appeal on 9 June 2017 thus clearly out of time. An application for the condonation of the late filing was filed simultaneously.

[3] The appellant's initial grounds of appeal which were drafted by a co-inmate were all directed at the Magistrate's failure of not considering the mitigating factors placed before court. Since then the accused obtained legal representation and an amended notice of appeal was filed with an accompanying application for condonation.

[4] The appellants' grounds of appeal as per the amended notice of appeal can be summarized as follows:

- The learned Magistrate misdirected himself, alternatively erred in law or fact when, during sentencing ignored the personal circumstances presented during mitigation.
- The learned Magistrate misdirected himself, alternatively erred in law or fact when in sentencing over emphasized the interest of society and passed a sentence that was so harsh and disturbingly inappropriate that it induces a sense of shock.
- The learned Magistrate misdirected himself, alternatively erred in law or fact when in sentencing failed to take into consideration the period of pre-trial incarceration of

the appellant.

[5] The respondent raised various points *in limine* which will now be determined in the order they appear in the paragraphs below.

Points *in limine*

[6] The Respondent's first point *in limine* that will be determined was that counsel for the Appellant failed to comply with Rule 118(6) to file their heads of argument 15 days prior to the date of hearing and once filed did not file an application for condonation simultaneously but only filed such application for condonation after realising from the heads filed by the Respondent that this point was raised. The error by the counsel for the appellant resulted in the respondent's heads of argument being filed out of time for which the respondent equally request condonation. The late filing was in essence as a result of the Appellant's failure to keep to the Rules of Court. Counsel for the Appellant lays the blame for the late filing on additional duties he had to carry out in Windhoek at the time and on a secretary who calculated the days erroneously.

[7] It was said in *S v Malama-Kean*<sup>1</sup> that, whenever the blame is on an error or oversight caused by a legal representative or his employee, exceptional circumstances need to be present to allow the failure to be regarded as 'good cause' in order for a court to grant condonation.

[8] The background to this appeal is that the appellant filed his notice of appeal as lay-man on 9 June 2017. Since then it appears that he had an uphill battle to get his documents in order and to obtain counsel from Legal Aid. After Legal Aid was granted an amended notice of appeal was filed which was followed by more delays from various parties after which the initial appointed counsel for the Appellant withdrew. The appellant then had to wait a considerable period for Legal Aid to appoint replacement counsel. Striking the matter from the roll on this point will cause substantial prejudice to the

---

<sup>1</sup> *S v Malama-Kean* 2002 NR 11

Appellant who was for the most part not responsible for these delays. The late filing did not substantially prejudice the Respondent. Without condoning this behaviour the first point in limine is dismissed and condonation is granted for the late filing of heads of argument for both parties.

[9] The Respondent's second point *in limine* that will be determined was the fact that a new ground of appeal was raised in the Respondent's Heads of argument. The particular point is condemnation for the Magistrate for not explaining the penalty clause of the Combating of Rape Act and in particular 'substantial and compelling circumstances' before sentencing and additionally failing to find such circumstances present to impose a lesser sentence.

[10] It is settled law that it is not allowed to introduce new grounds of appeal at such a late stage of proceedings without filing an amended notice of appeal. The Magistrate had no opportunity to reply to this new ground and furthermore the notice served to inform the Respondent of the case it was required to meet; to crystallise the issues and to inform the Court of Appeal of such issues.<sup>2</sup> This objection to the introduction of a new ground is valid and the second point *in limine* is upheld. Therefore the new ground raised will not form part of this appeal.

[11] The Respondent's third point *in limine* that will be determined was that the initial notice of appeal failed to comply with Rule 67(1) of the Magistrates' Court Rules in that the notice of appeal was vague and not clear and specific as required. It was submitted that the matter should be struck from the roll in that the amended notice of appeal cannot amend something that did not exist in the first place. Respondent submitted that 'once a nullity, it remains a nullity and cannot be resurrected or revived, neither by condonation of the non-compliance nor by amendment of the defective notice.'<sup>3</sup>

[12] The initial notice of appeal, unlike the circumstances in the *Kakololo* matter (supra), did contain grounds of appeal criticizing in essence the same points that was

<sup>2</sup> *S v PV 2016* (1) NR 77 (HC); *S v Kakololo* 2004 NR 7 (HC)

<sup>3</sup> *S v Kakololo* (supra) at 9 D-E

redrafted into the amended notice of appeal. I find that these grounds were clear enough for the Magistrate to provide his reasons for sentencing and for the Respondent to understand which parts of the judgment on sentence are attacked. The third point *in limine* is there for dismissed.

[13] The Respondent's fourth point *in limine* that will be determined was that considering that both the initial notice of appeal and amended notice of appeal were filed outside the 14 days as required it failed to meet the requirements for condonation.

[14] In considering the application for the condonation of the late filing, the requirements are twofold. It consists firstly in deciding on the reasonableness of the explanation for the late filing and secondly the prospects of success on the merits. The circumstances of each case should be taken into account and to grant or refuse condonation falls entirely within the discretion of the Court.<sup>4</sup>

#### The Appellant's reason for late filing

[15] The appellant's reason for the late filing is a detailed account of him being transferred between different holding cells and correctional facilities following his sentence. As an illiterate person he needed assistance for the drafting of his documents and could only manage to find assistance from a co-inmate upon his arrival at the last Correctional Facility. Thereafter further delays were caused by his application for Legal Aid where after an amended notice of appeal could be filed. It appears on face value to be a detailed and reasonable explanation and will be accepted. We will therefore proceed to consider the second leg being the prospects of success.

#### Prospects of success

[16] The first ground of appeal is that the Magistrate ignored the personal circumstances of the accused during sentencing.

<sup>4</sup> *S v Nakapela and Another* 1997 NR 184 (HC) p185 par G-H

[17] The personal circumstances of the appellant was placed on record before sentence by his then legal representative and was considered by the Magistrate during sentencing. The first ground is without merit and therefor has no prospects of success on appeal.

[18] The second ground of appeal is that the Magistrate in sentencing over emphasized the interest of society and passed a sentence that was so harsh and disturbingly inappropriate that it induces a sense of shock.

[19] It is well settled in our law that punishment falls predominately within the ambit and discretion of the court and may only be interfered with on appeal when is it evident that the sentencing court did not exercise its discretion judiciously in that the sentence is either vitiated by an irregularity or misdirection, or that it is disturbingly inappropriate and induces a sense of shock. Furthermore a court of appeal would be generally reluctant to erode the trial Court's discretion which could undermine the administration of justice.<sup>5</sup>

[20] From the record of proceedings in the court *a quo* it is clear that the Magistrate was alive to all the factors which must be taken into account at the stage of sentencing. There is nothing showing that the court *a quo* misdirected itself either on the facts or the law, or that an irregularity occurred. The court *a quo*, in referring to the prevalence of the raping of young children, was entitled to emphasise any of the sentencing factors or objectives of punishment at the expense of the others.<sup>6</sup>

[21] The facts of this matter is that the appellant who was 22 years old at the time was convicted of raping a 9 year old child. When considering the principle of uniformity<sup>7</sup> in sentencing in similar cases, this court finds that the sentence was not shockingly inappropriate.<sup>8</sup> The second ground is without merit and therefor has no prospects of

<sup>5</sup> *S v Tjiho* 1991 NR 361 (HC)

<sup>6</sup> *S v Van Wyk* 1993 NR 426 SC

<sup>7</sup> *S v Hawaeb and Another* (CA 38-2010) [2012] NAHC 46 (29 February 2012)

<sup>8</sup> *S v Haufiku* (SA 6-2021) [2023] NASC (21 July 2023); *S v Kaanjuka* 2005 NR 201 (HC); *S v Libongani* 2015 (2) NR 555 (SC)

success on appeal.

[22] The last ground of appeal is that the Magistrate in sentencing failed to take into consideration the period of pre-trial incarceration of the appellant.

[23] After reading the record of proceedings in the court *a quo* it is clear that the Magistrate considered the three years that the appellant spent in custody whilst awaiting the finalization of the trial. This does not necessarily requires that the Magistrate should consider it in the context of a mathematical calculation but rather one of the factors that is normally considered. It cannot be said that there is merit in this point and equally does not have prospects of success on appeal.

[24] In the result and after consideration of the above, the following orders are made:

1. The Respondent's point *in limine* regarding the Appellant's failure to comply with Rule 118(6) is dismissed.
2. The Respondent's point *in limine* regarding the Appellant's introduction of a new ground of appeal is upheld.
3. The Respondent's point *in limine* regarding the Appellant's grounds of appeal not being clear and specific is dismissed.
4. The Respondent's points *in limine* regarding the late filing of the notice of appeal and amended notice of appeal are upheld and the applications for condonation are refused.
5. The appeal is struck from the roll and considered finalized.

Judge(s) signature:	Comments:
KESSLAU J	None
SALIONGA J	None

<b>Counsel:</b>	
<b>APPELLANT</b>	<b>RESPONDENT</b>
S O Edegware On instructions of the Directorate of Legal Aid	S F Petrus Of the Office of the Prosecutor-General, Oshakati