

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> State v Romalio Kadovazu and 2 Others	<b>Case No:</b> CR 80/2023
<b>High Court MD Review No:</b> 1171/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Liebenberg J et January J	<b>Delivered on:</b> 21 July 2023
<b>Neutral citation:</b> <i>S v Kadovazu</i> (CR 80/2023) [2023] NAHCMD 426 (21 July 2023)	
<b>The order:</b> The conviction and sentence of all 3 accused persons are set aside.	
<b>Reasons for order:</b>  JANUARY J (LIEBENBERG J concurring):  [1] This review matter stems from the Katutura Magistrate Court and is submitted in terms of s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).  [2] The accused persons were charged with one count of contravening s 30(1)(a) read with ss 1, 30(1)(b), 30 (1) (c), 85, 89 and 89 A of Ordinance 4 of 1975, as amended, and	

further read with s 90 and 250 of Act 51 1977; 'In that upon or about the 29<sup>th</sup> day of September 2019 and at or near farm Orumbo Sud in the District of Windhoek, the accused did wrongfully, unlawfully and intentionally hunt, huntable game to wit: 3 x Oryx valued at N\$6000 without a permit or written authority to do so, the property of or in the lawful possession of Karl Hermut Goldbeck.'

[3] The three accused persons were sentenced on 12 May 2022. The matter was then submitted for automatic review on 12 July 2022 with a record of proceedings that was incomplete. It was returned to the Magistrate with a query to submit the complete case record. It was re-submitted again without the reasons for the judgment on the conviction. The Magistrate was again queried to submit the reasons for judgment. On 30 November 2022 the Magistrate submitted the case record with an explanation that the reviewing judge must have mislooked (sic) the reasons for judgment as it was attached and that the record was complete. On perusal of the record, there was no judgment attached and yet another query had to be sent with the incomplete record to the Magistrate. The record of proceedings was finally received for automatic review on 20 February 2023 with an apology.

[4] Although certified and despite the queries to submit a complete record, it still does not comply with the codified instructions as it is partly bound with staples, which is not allowed as pink office tape is prescribed. The typed annexure to the charge is incomplete, and differs from the complete annexure of the charge in the original record of proceedings. The date is reflected as 'on or about 30 September 2019' with the value of the Oryx indicated as N\$8000 while in the original typed annexure, the date is 29<sup>th</sup> September 2019 with a value of N\$6000. It is an outdated annexure reflecting a sentence not exceeding R2000 or imprisonment not exceeding two years or to both such fine and imprisonment, whereas, the amended fine prescribed, is a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

[5] It is evident that the review of the matter was unnecessarily delayed by the Magistrate's omission to ensure that a complete and correct record is submitted for

review. This remissness cannot be condoned. It is re-emphasized that the ultimate responsibility to ensure that a complete case record is kept and submitted for review lies with the Magistrate.

[6] The matter was thereafter periodically postponed for various reasons. Eventually, the trial commenced on 07 April 2022, about two years and six months after the accused persons indicated that they will conduct their own defence. There was no further enquiry, after this period, as to whether they still wanted to conduct their own defence. These omissions constitute gross irregularities.

[7] Further, the record reflects that the charge was put to the accused persons. They pleaded not guilty and gave plea explanations. Thereafter, the State started to call witnesses.

[8] There is no indication of assistance or an attempt thereto by the Magistrate to the accused in order for them to cross-examine witnesses, not even witnesses who directly implicated them.

[9] From the failure to cross-examination and limited cross-examination by the accused persons, it is evident that the accused persons did not fully comprehend the right to cross-examination.

[10] In relation to the duties that arise during cross-examination pertaining to an unrepresented accused, the court held in *S v Haraseb*<sup>1</sup>;

'It is settled law that it is no longer sufficient for a presiding officer to merely inform the unrepresented accused of his/her rights, but also to assist the accused when he/she experiences difficulty during cross-examination by clarifying the issues, formulating the questions, and putting his/her defence properly to the witnesses. Furthermore, where the accused fails to cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the

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<sup>1</sup> *S v Haraseb* (CR 34 /2021) [2021] NAHCMD 217 (10 May 2021).

risk of a failure of justice.’

[11] The record is silent as to whether the Magistrate explained the purpose of cross-examination to the unrepresented accused persons or attempted to steer them in the right direction. Cross-examination is integral in the adjudication of a trial and considering the deficiencies herein, it is clear that justice was not done.<sup>2</sup>

[12] The law is clear that not every irregularity is fatal. In *Kandovazu v S*<sup>3</sup> it was held that:

‘The test proposed by our common law is adequate in relation both to constitutional and non-constitutional errors. What has to be looked at was the nature of the irregularity and its effect. If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial, then a failure of justice per se has occurred and the accused person is entitled to an acquittal for there has not been a trial, therefore there is no need to go into the merits of the case at all.’

[13] In the absence of the presiding officer explaining to the accused persons the importance of cross-examination and the effect it may have on the outcome of their trial, a failure of justice has in fact occurred. These failures individually and collectively are of such a fundamental nature that it vitiates the whole proceedings as the accused persons were not afforded a fair trial.<sup>4</sup>

[14] In these circumstances, the accused persons are entitled to an acquittal. Therefore, there is no need to go into the merits of the case.

[14] In the premises and for the stated reasons, it is ordered:

The conviction and sentence of all 3 accused persons are set aside.

<sup>2</sup> *Kativa v State* (HC-MD-CRI-APP-CAL-2021/00060) NAHCMD 64 (18 February 2022).

<sup>3</sup> *S v Kandovazu* [1998] NASC 2 (10 February 1998).

<sup>4</sup> See *S v Shikunga* (SA-1995/6) [1997] NASC 2 (20 August 1997).

<b>JANUARY J</b> <b>JUDGE</b>	<b>LIEBENBERG J</b> <b>JUDGE</b>