

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: The State v Arnim Modisa Steve Kalahari Madi	Case No: High Court Ref. No.:965/2022 CR 119/2023
	Division of Court: High Court Main Division
Heard before: Honourable Lady Shivute <i>et</i> Honourable Justice January	Delivered on: 8 November 2023
Neutral citation: <i>S v Modisa and Another</i> (CR 119/2023) [2023] NAHCMD 716 (8 November 2023)	
Order: The conviction and sentence in respect of accused two (2) and three (3) are set aside.	
Reasons for order:	
Shivute J (Concurring January J):	
[1] This is a review matter submitted from Otjinene Magistrate's Court in terms of section	

302(1) of the Criminal Procedure Act 51 of 1977 as amended (the CPA).

[2] The two accused persons were initially jointly charged with two other accused persons. One of them pleaded guilty and a separation of trial was ordered. The matter proceeded to trial in respect of the three accused. However, before the trial was completed the first accused absconded and this resulted in the two accused remaining.

[3] The accused persons were charged with stock theft, taking into consideration the provisions of section 11(1)(a) of the Stock Theft Act 12 of 1990. They were convicted as charged and each was sentenced to two (2) years' imprisonment on 13 April 2022. They were granted bail pending review proceedings.

[4] The matter was placed before me for review on 28 June 2022. The record was incomplete and it was referred back to the magistrate to prepare a complete record. It came back on 11 August 2022 with a covering letter from the magistrate stating that he has been transferred from Otjinene Magistrate's Court. However, he was informed by the clerk of court that the missing transcribed record was mistakenly not attached to be part of the record and it is now found and attached. He further stated that the accused persons were released on bail pending review.

[5] When the record was placed before me for the second time, it was still incomplete. The transcribed proceedings were not part of the record as stated by the magistrate. I referred the record back to the magistrate on 31 August 2022, informing him that the record is still incomplete and that he should prepare a complete record. If the transcribed proceedings cannot be traced, then the record should be reconstructed. Furthermore, there were some proceedings that were manually recorded and they were not typed. Since the handwriting was illegible I gave a direction for those proceedings to be typed. I further raised a query with the magistrate why the accused persons were released on bail pending review.

[6] The record was only returned to my chambers months later with the transcribed

record attached and some parts missing or indistinct. The way it was prepared leaves much to be desired as the pages were not put in an orderly manner. There are instances where you find a testimony however, the name of the witness is not indicated. It is so difficult to read this matter and make proper sense of it.

[7] From what can be gleaned from the record, the two accused persons received meat from the co-accused persons. However, there is no evidence pertaining to whether they knew that such meat was stolen. Therefore, it is hard to comprehend how the court a quo satisfied itself that the two accused persons committed the offence of stock theft.

[8] Section 4(1) of the Magistrate Court Act 32 of 1944 as amended provides that every court is a court of record. It is very critical for a judicial officer to keep proper notes of plea and trial proceedings by hand. There is a legal obligation on magistrates to keep a proper record of court proceedings. A record must be prepared in an orderly manner and not in a disorderly manner like the present matter where you find a judgment and sentence in the middle of the record. One cannot easily determine where the proceedings had started and ended. It is incumbent for magistrates and clerks of courts to prepare records in an orderly manner.

[9] The magistrate in this matter ignored the query why he granted bail pending review. There is no provision in the (CPA) that authorises the magistrate to grant bail pending review. Therefore, the procedure he followed was irregular.

[10] The magistrate is under obligation to respond to the queries directed to him by the reviewing judge. This should be done as soon as possible. The inordinate delay may cause prejudice to the accused persons because this may result in some of them having completed serving their sentences before the review proceedings. However, in this matter there is no prejudice caused to the accused persons as they were granted bail albeit the court adopting an irregular procedure.

[11] As pointed out earlier, there is no sufficient evidence to warrant a conviction of the two accused persons of stock theft. Therefore, the convictions and the sentence of two years' imprisonment cannot be allowed to stand.

[12] In the premise, the following order is made:

The conviction and sentence in respect of accused two (2) and three (3) are set aside.

N N SHIVUTE JUDGE	H C JANUARY JUDGE