REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Ashley Eiseb and another*	**Case No:** CR 2/2024
High Court Ref. No. 2038/2023	**Division of Court:** Main Division
Heard before: Shivute J *et* Usiku J	**Delivered on:** **24 January 2024**
Neutral citation: *S v Eiseb and another* (CR 2/2024) [2024] NAHCMD 8 (24 January 2024)	
The order: 1 The convictions and sentences on counts 1 and 2 are set aside. 2. If the accused persons are still being held in custody they must be released forthwith.	
Reasons for order:	
SHIVUTE J (concurring Usiku J): [1] This is a review matter which came before me in terms of s 302 (1) of the	

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

[2] The two accused persons appeared in the Windhoek Magistrate's Court, held at Katutura on charges of; count 1: Hunting of protected game namely, two kudu and two oryx, in contravention of s 27 of the Nature Conservation Ordinance 4 of 1975, as amended (the Ordinance) and count 2: Hunting of huntable game namely, two waterbuck, in contravention of s 30 of the Ordinance.

[3] Both accused persons pleaded guilty to both counts. The magistrate then proceeded to question the accused persons in terms of s 112 (1) *(b)* of the CPA. After questioning, the court satisfied itself that both accused persons admitted all the allegations and found them both guilty as charged.

[4] When the matter came before me on review, a query was directed to the presiding magistrate on whether a kudu and oryx are protected game; whether a waterbuck is huntable game; and what the exact offences are that the accused persons are convicted of.

[5] In her reply to the query, the magistrate stated that the charge annexures attached to the review record were erroneously provided to her by the State and that, in terms of the Ordinance, a waterbuck is protected game whilst oryx and kudu are huntable game and that she had failed to give proper attention to the charge annexures provided.

[6] The magistrate further states that she convicted each accused of count 1 for hunting two kudu and two oryx without a permit and in count 2, convicted each accused of hunting protected game to wit, two waterbuck.

[7] These concessions, in as far as categorising the game, are correctly made by the magistrate.

[8] However, it is apparent that the record is riddled with confusion. At the beginning

of the questioning of each accused, in terms of both charges, the magistrate categorised waterbuck as protected game and the oryx and kudu as huntable game. This categorisation was correct and in contrast with what is depicted in the charge sheet.

[9] However, in further questioning of the two accused respectively, the magistrate confuses the two categories of game and the two counts the accused persons are charged with. This confusion is discussed below.

[10] Firstly, in respect of count 1, the court questioned accused 1 among other things, whether he hunted protected game to wit, two waterbuck and at the same time, questioned him on how he hunted the oryx. This is irregular in that the oryx and the waterbuck are contained in separate charges. Furthermore, count 1, in terms of the charge sheet deals with two oryx and two kudu, as opposed to the waterbuck.

[11] Secondly, still in respect of count 1, the magistrate questioned accused 1 whether or not he knew that a waterbuck is protected game that requires a person to obtain written authority or a permit, to which accused 1 answered ‘no’. His answer is indicative of denying one of the elements of the offence, namely, knowledge of the required permit or authority and the magistrate should have invoked s 113 of the CPA.

[12] Thirdly, in respect of count 2, accused 1 was questioned whether he hunted huntable game to wit, two kudu and one oryx, and again whether he was aware that it was against the law to hunt protected game without permission.

[13] Fourthly, the questioning only dealt with hunting of 1 oryx in opposition to the charge sheet which reflects hunting of two oryx by accused 1.

[14] At the end of the questioning, accused 1 was found guilty as charged.

[15] In regard to accused 2 and in respect of count 1, the magistrate questioned him,

amongst other things, whether he hunted protected game to wit, two waterbuck and at the same time, he was convicted as charged. The charge reads that a waterbuck is huntable game.

[16] In respect of count 2, accused 2 was questioned whether he hunted huntable game which are two kudu and one oryx (as opposed to two oryx as reflected on the charge sheet), and at the same time, he was also asked whether he was aware that it was against the law to hunt protected game without authorisation.

[17] It is therefore safe to say that the questions by the magistrate did not address the charges accurately, therefore the answers by the accused do not, with accuracy answer to the charges. Furthermore, the magistrate deviated from the charge sheet in terms of categorising the game, but still found the accused persons 'guilty as charged.'

[18] Additionally, accused 1 having denied knowing that he needs a permit to hunt waterbuck, should have led the court to enter a plea of not guilty in terms of s 113 of the Act in respect of that count.

[19] Most importantly, and as set out above, because the magistrate's questioning is confusing and not in line with the charges as set out in the charge sheet, the convictions ('guilty as charged') cannot stand.

[20] In the result, in respect of both accused persons, it is ordered:

1. The convictions and sentences on counts 1 and 2 are set aside.
2. If the accused persons are still being held in custody they must be released forthwith.

N N SHIVUTE **JUDGE**	**D USIKU** **JUDGE**