

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPEAL JUDGMENT**

Case No: HC-NLD-CRI-APP-CAL-2021/00011

In the matter between:

**EINO JOHANNES**

**APPELLANT**

**v**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Johannes v S* (HC-NLD-CRI-APP-CAL 2021/00011) [2022]  
NAHCNLD 114 (17 October 2022)

**Coram:** SALIONGA J et KESSLAU AJ

**Heard:** 30 September 2022

**Delivered:** 17 October 2022

**Flynote:** Criminal Procedure- Criminal Appeal- Condonation- Explanation for delay- Unreasonable and unacceptable- No merits and prospects of success- Appeal struck from the roll and considered finalized.

**Summary:** The appellant in this matter was convicted for malicious damage to property. He was sentenced to N\$4000.00 (four thousand) or 2 (two) years imprisonment. This appeal lies against the sentence. The notice of appeal was filed long after the stipulated time. Explanation for the delay vague and unreasonable in the circumstances. The court considered the merits and found no misdirection, irregularities and/or no prospects of success. The application for condonation is refused and appeal is struck from the roll and considered finalized.

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### ORDER

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1. The respondent's point *in limine* is upheld.
  2. The application for condonation is refused.
  3. The appeal is struck from the roll and considered finalized.
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### JUDGMENT

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SALIONGA J, (KESSLAU AJ concurring):

[1] The appellant in this matter was convicted in the Magistrate's Court, Tsumeb on a charge of malicious damage to property. The offence was committed while the appellant was serving a sentence of 30 years imprisonment and was committed against a Correctional Officer on duty. The appellant was sentenced to N\$4000.00 (four thousand) or 2 (two) years imprisonment.

[2] The record indicates that the appellant's rights to review and appeal were explained to him. Despite this, appellant filed with the clerk of court a handwritten letter termed notice of appeal on 16 March 2021 about 2 months after he was sentenced. He is appealing against the sentence only. Appellant is a self-actor and the responded is represented by Ms Petrus. The purported notice of appeal was accompanied by the supporting affidavit.

[3] Respondent equally filed heads of arguments outside the time frame. Respondent submitted an affidavit explaining the late filing. The court was satisfied with counsel's explanation and condoned the late filing.

[4] Counsel for the respondent raised a point *in limine* contending that the notice of appeal was filed late and does not reveal any grounds of appeal. She argued that although the appellant filed an affidavit stating the reasons for the late filing in this case, the reason provided is not reasonable and should not be accepted, further that the appellant did not obtain an affidavit from a person who had helped him in support of his claim. Counsel submitted that the appellant fails to make out a case for condonation and the matter should be struck from the roll.

[5] The appellant in his affidavit explained that he did not understand the way he was sentenced since he did not know how to read and write. That it took some time to get someone to assist him with the appeal and it was after everything was explained to him that he decided to appeal.

[6] The importance of complying with Rule 67(1) is clearly enunciated in *S v Kakololo* 2004 NR 7 at page 8F where Maritz J (as he then was) said:

'The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza* 1979(4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact or both. It is with reference to the grounds of appeal specifically relied on that the magistrate is required to frame his or her reasons under Magistrate's Court Rule 67(3).'

In this regard the court record reflects that the right of the appellant in relation to the appeal was fully explained to him and he confirmed as proof that he was satisfied with the explanation.

[7] The explanation for the cause of the delay is only one part of what needs to be considered before condonation can be granted. The appellant also had to satisfy this Court that he had reasonable prospects of success. In this appeal notwithstanding the

fact that the affidavit filed falls short of complying with Rule 67 (4) of the Magistrate's court rules, on a closer reading of this notice it appears that the appellant is asking or requesting for the reduction of the prison term. For that reason the court leaned towards the appellant and allowed the parties to address the merits of the appeal despite some doubt on the explanation given.

[8] In his notice of appeal appellant states that;

'I was sentenced at the magistrate court of Tsumeb on the charge of damaging of property on the 13 January 2021 as I was found guilty on the charge and the magistrate sentence me for the prison term of five (5 ) months but the prosecutors objected and said it is not worth the damage do the magistrate added three (3) months and it became eight (8) months prison term that was the last sentence term that I heard in the court that the magistrate sentenced me but when I came to sign the warrant of committal I saw that the term that I was sentenced is not 8 months but 2 years of prison term when I tried asking I was told what is done is done I must appeal if I want the sentence of opposed on me was 2 years and the fine of N\$3000.00 so I am kindly requesting for your office to reduce my prison term back to 8 months of prison term since the prison term that I was given is unfair and is too much.' (Sic)

[9] The court is confined only to consider the appeal within the four corners of the court record.<sup>1</sup> I had an opportunity to peruse the record and could only find the state's submissions before sentence as a concern for the appellant. The state in aggravation prayed for a fine in the amount of N\$3000 or 8 months imprisonment. It appears the appellant had some difficulties in following the proceedings in court given his explanation that he could not read and write. The trial court has a discretionary power to decide on what sentence to impose and though the state's submissions needs to be considered, the court is not bound to follow the same. Consequently it is not correct that the appellant only heard about the sentence of N\$4000 or 2 years imprisonment after the adjournment.

[10] In the notice of appeal, appellant did not set out the grounds upon which this court is entitled to interfere with the sentence of the court a *quo*. As stated by counsel

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<sup>1</sup> See *S v Mwambazi* 1990 NR 535 at 357

for the respondent, he is merely asking for a reduction in the sentence contending that the sentence of N\$4000 (four thousand) or 2 (two) years imprisonment was unfair and too much. It should be noted that personal circumstances are but part of the triad a sentencing court considers.

[11] Ms Petrus submitted that the sentence is clear and appropriate when regard is had to other sentences imposed in similar cases. She further submitted that the appellant in this case was given an option of a fine in cases where a direct and lengthy term of imprisonment is normally imposed. She made reference to several cases to demonstrate her point<sup>2</sup>. It was her submission that the trial court duly considered the personal circumstances of the appellant, so much so, that it even considered the appellant as a first offender despite the fact that the appellant was serving a sentence of 30 years imprisonment.

[12] It is an established legal principle that this court can only interfere with a sentence of the trial court firstly where there was an irregularity or misdirection on a sentence imposed; secondly where irrelevant factors were considered and relevant factors were disregarded; thirdly where the sentence induces a sense of shock or is so disproportionate to any sentence that this court would have imposed as a court of first instance.<sup>3</sup>

[13] From the trial court's judgment on sentence it appears that the appellant was regarded as a first offender for purposes of this matter even though he was serving a quite lengthy sentence. That he was convicted of malicious damage to property and he did not show any remorse. That he does not have children and not married. That he was unable to pay a fine and was not willing to disclose what an appropriate sentence would be. The court further took into account that the crime in question was committed

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<sup>2</sup> *S v Uirab & Another* (CR30/2014)[2014] NAHCMD 167(27 May 2014 where 8 months imprisonment was confirmed on review; *S v litula* (CR 69/2013)[2013] NAHCMD 312 (01November 201 where a fine of N\$5600 or 18 months imprisonment of which 9 months was suspended on review; *Erastus v S* (HC-NLD-CRI-APP-CAL 2019/00009) [2020] NAHCNLD127 (10 September 2020 ) where a sentence of 6 years imprisonment for damaging the surveillance in the police station was found appropriate

<sup>3</sup> *S v Shapumba* 1999 NR 342 SC at E the headnote. Held, that a Court of appeal would be entitled to interfere on appeal with a sentence imposed where the trial Court had materially misdirected itself on the facts or the law or committed an irregularity or where the sentence imposed was startlingly inappropriate or induced a sense of shock or was such that a striking disparity existed between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance.

at the correctional facility and against a Correctional Officer who was executing his duties. That the complainant suffered a loss in that she had to replace the glasses that were damaged during the commission of the offence.

[14] The personal circumstances in this appeal were considered and were well-balanced with the prevalence of the offence and the interest of society as required by law. Although this court might not have imposed the same sentence had it sat as a court of first instance, a sentence of N\$4000 or 2 years is not disproportionate to induce a sense of shock.

[15] I find no misdirection or irregularity justifying this court's interference. There are also no reasonable prospects of success on the appellant's appeal against sentence and his application for condonation is thus refused.

[16] As a result:

1. The respondent's point *in limine* is upheld.
2. The application for condonation is refused.
3. The appeal is struck from the roll and considered finalized.

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J T SALIONGA

Judge

I agree,

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E E KESSLAU

Acting Judge

APPEARANCES:

FOR THE APPELLANT:

Mr E. Johannes (In person)

Oluno Correctional Facility, Ondangwa

FOR THE RESPONDENT:

Ms S. Petrus

Office of the Prosecutor-General, Oshakati