

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA**

**NORTHERN LOCAL DIVISION,**

**OSHAKATI**

**REVIEW JUDGMENT**

Case no: CR 62/2022

In the matter between:

**THE STATE**

**v**

**ABEL INOTILA**

**ACCUSED**

(HIGH COURT NORTHERN LOCAL DIVISION REVIEW REF NO. 208/2022)

**THE STATE**

**v**

**SAMUEL MARTHA**

**ACCUSED**

(HIGH COURT NORTHERN LOCAL DIVISION REVIEW REF NO. 209/2022)

**Neutral citation:** *S v Inotila; S v Martha* (CR 62/2022) [2022] NAHCNLD 120 (03 November 2022)

**Coram:** SALIONGA J *et* KESSLAU AJ

**Delivered on:** 03 November 2022

**Flynote:** Criminal Procedure- Automatic review- Convictions are proper- Framing of community sentence orders- Suspended sentences and conditions of suspension should be framed in no ambiguous terms- A suspended sentence should

be clear for the accused to be certain of what he is expected or prohibited to do and how he is to comply with the conditions of the sentence imposed.

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### **ORDER**

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1. The convictions in both cases are confirmed.

2. The sentences in both matters are corrected to read:

2.1 In respect of High Court ref. no. 208/2022 accused is sentenced to a fine of N\$1000 (One thousand Namibian dollars) or 3 (three) months imprisonment wholly suspended for 5 years on conditions;

- 1) The accused is not convicted of theft committed during the period of suspension;
- 2) That accused performs 150 hours of community service at Oshikango police station under the supervision of Sgt. Willbard Hamukoshi from Mondays to Fridays excluding public holidays and weekends between the hours of 08:00 am to 17: 00 pm with effect from the 28<sup>th</sup> day of February 2022.

2.2 In High Court ref. no. 209/2022 the convictions on count 1 and 2 are taken together for purposes of sentencing and accused is sentenced to a fine of N\$1000 (One thousand Namibian dollars) or 5 (five) months imprisonment wholly suspended for 5 years on conditions;

- 1) The accused is not convicted of theft committed during the period of suspension;
  - 2) That accused performs 200 hours of community service at Kornelius Combined School under the supervision of Nande Silas Mwaudasheni from Mondays to Fridays excluding public holidays and weekends between the hours of 08:00 am to 13: 00 pm with effect from the 28<sup>th</sup> day of February 2022.
3. The review cover sheets in High Court ref. no. 209/2022 are accordingly amended and corrected to reflect the above sentence.
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## JUDGMENT

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SALIONGA J (KESSLAU AJ concurring):

[1] The accused in both matters were charged with the crime of theft. The matters appeared before the same magistrate sitting in Eenhana and Ohangwena Magistrate's Courts respectively. It is worth mentioning that the conditions of suspension of sentence are similar in form in the aforesaid matters, a reason why one judgment is prepared.

[2] The convictions in both matters are in order and will be confirmed. However the framing of the second conditions of the suspended sentences in both cases poses a challenge. Adding to that is a sentence of N\$10000 (SIC) or 5 months reflected on the review cover sheets in High Court ref. no. 209/2022 which is totally different from the sentence in the original record and J15.

[3] In order to evidently illustrate this point, the following is an extract of the sentence from the records. In High Court ref. no. 208/2022 the sentence was framed in the following terms;

'A fine of N\$1000 (One thousand Namibia dollars) or 3 (three) month's imprisonment wholly suspended for a period of 5 (five) years on the following conditions:

1. The accused is not convicted of theft committed during the period of suspension.
2. The accused should undergo community service at the Oshikango police station under the supervision of Sergeant Wilbald Hamukoshi. He is to carry out 150 (One hundred and fifty) hours or 30 (thirty) days of community service from Mondays to Fridays except on public holidays and weekends from 08:00 - 17: 00. Accused is entitled to lunch hour.

[4] Equally in the High court ref. no. 209/2022 the sentence was framed in a similar fashion as follows;

'Counts 1 and 2 will be taken together for purposes of sentencing. The court sentences the accused to a fine of N\$1000 (One thousand Namibian dollars) or 5

(five) months imprisonment of (SIC) wholly suspended for a period of 5 (five) years on the following conditions;

1. The accused should not be convicted of theft committed during the period of suspension.
2. The accused should undertake community service at the Korneulius Combined School under the supervision of Nande Silas Mwaudasheni. She is to carry out 200 hours/40 days of community service from Mondays to Fridays except on public holidays and weekends from 08:00 - 13: 00. The community service begins on Monday 28 February 2022 and ends on 28 April 2022.'

[5] Queries were directed to the learned Magistrate to clarify why the condition of suspension in High Court review no. 208/2022 was framed as follows; 'Accused was sentenced to N\$1000 (One thousand Namibia dollars) or 3 (three) month's imprisonment wholly suspended for a period of 5 (five) years on condition stated there in. However one of the conditions is that he was to carry out 150 hours or 30 days of community service. Clarity is sought how the sentence is going to be carried out in case of the breach of conditions if the accused is already sentenced to 3 months imprisonment wholly suspended.' Also in respect of High Court Ref no 209/2022 why an original record and J15 reflect a sentence of N\$1000 or 5 months imprisonment which is totally different from the one on the review cover sheets.

[6] The reviewing Judge received responses from the Divisional Magistrate for Oshakati division stating that magistrate Kalla Shaatuna has since resigned. He expressed his dismay on the delays in submitting records to the High court for review. He shared the same sentiments with the remarks pointed out in the queries with regard to a wrong sentence on the review coversheets and the framing of hours/periods of community services. He assured this court that in the meantime the wrong sentence on the review cover sheets is rectified. With regard to the framing of conditions he opined that the court may correct the conditions of suspended sentences by striking down the 30 and 40 days stipulated along with the hours of community service in the aforesaid matters which opinion in my view was correctly expressed.

[7] The conditions of suspension must be framed in no ambiguous terms. It must be clear for the accused to be certain of what he is expected or prohibited to do and

how he is to comply with the sentence imposed. The difficulties in these conditions are that it is not clear whether the accused is expected to clock the hours as per the order or render the days of community service given. Doing what the magistrate in the present case did, poses a challenge on how the sentence is going to be put into operation in case of a breach.

[8] I find the condition of suspension that accused should carry out 150 hours or 30 days and 200 or 40 days of community service vague, unclear and impermissible. They have to be struck down. With regard to a wrong sentence reflected on the review cover sheets, though rectified in the meantime the rectified cover sheets were not signed or authenticated. Magistrates are once again reminded of the importance of proof reading the record before submitting cases to the High Court on review.

[9] Accused in both instant matters were sentenced in February 2022 and might have fully complied with the conditions of community service or might have served their sentences, rendering this exercise an academic one.

[10] Consequently, in both matters the following orders are made

1. The convictions in both cases are confirmed.
2. The sentences in both matters are corrected to read:
  - 2.1 In respect of High Court ref. no. 208/2022 accused is sentenced to a fine of N\$1000 (One thousand Namibian dollars) or 3 (three) months imprisonment wholly suspended for 5 years on conditions;
    - 1) The accused is not convicted of theft committed during the period of suspension;
    - 2) That accused performs 150 hours of community service at Oshikango police station under the supervision of Sgt. Willbard Hamuskoshi from Mondays to Fridays excluding public holidays and weekends between the hours of 08:00 am to 17: 00 pm with effect from the 28<sup>th</sup> day of February 2022.
  - 2.2 In High Court ref. no. 209/2022 the convictions on count 1 and 2 are taken together for purposes of sentencing and accused is sentenced to

a fine of N\$1000 (One thousand Namibian dollars) or 5 (five) months imprisonment wholly suspended for 5 years on conditions;

- 1) The accused is not convicted of theft committed during the period of suspension;
- 2) That accused performs 200 hours of community service at Kornelius Combined School under the supervision of Nande Silas Mwaudasheni from Mondays to Fridays excluding public holidays and weekends between the hours of 08:00 am to 13:00 pm with effect from the 28<sup>th</sup> day of February 2022.

3. The review cover sheets in High Court ref. no. 209/2022 are accordingly amended and corrected to reflect the above sentence.

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J T SALIONGA  
Judge

I agree,

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E E KESSLAU  
Acting Judge