

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case Title: <i>S v Kango Titus Asheela and Shitunda Vilio Asheela</i>	Case Number: CR 37/2023
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J <i>et</i> Honourable Mr Justice Kesslau J	Delivered on: 16 October 2023
Neutral citation: <i>S v Asheela</i> (CR 37/2023) [2023] NAHCNLD 108 (16 October 2023)	
IT IS ORDERED THAT: 1. The convictions of both accused are confirmed. 2. The sentence is amended to read; Each accused is sentenced to a fine of N\$2000 (two thousand) or Six (6) months imprisonment of which N\$1000 or 3 (Three) months imprisonment is suspended for a period of 5 years on condition that accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.	

Reasons for the above order:

SALIONGA J (KESSLAU J concurring):

[1] The matter is before court on automatic review in terms of s 302 of the Criminal Procedure Act 51 of 1977 as amended. The accused persons were charged in the Ondangwa Magistrate court for the district of Ondangwa on the charge of assault with intent to do grievous bodily harm. They pleaded not guilty to the charge however were convicted after evidence was led.

[2] Thereafter they were sentenced as follows:

'Sentence: Count 1: N\$ 2000 (Two thousand Namibian Dollar) of which N\$ 1000 (One thousand) Namibia Dollar) is suspended for a period of 5 (five) years on the following conditions.

1. On the condition that the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

Or

6 (six) months imprisonment of which 3 (three) months is suspended for a period of 5 (five) years on the following conditions:

1. On condition that the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.'

[3] The reviewing judge has no qualm with the convictions and will be confirmed but has a problem with the way in which the sentence was framed. A query was directed to the magistrate to clarify how the sentence was going to be enforced and whether it is not vague as it omitted the word 'each' on the review cover sheets.

[4] In the reply to my query the magistrate conceded that the sentence reflected on the coversheets do not indicate each accused, explaining that the sentence was incorrectly captured on the review cover sheets. However the record of the proceedings properly indicated that each accused was sentenced. Further that this has been rectified accordingly.

[5] The magistrate, in addition to giving an explanation, went ahead to alter or amend the court record to read 'each accused' as part of the sentence imposed and returned the record for review.

[6] Section 298 of the CPA provides that:

'Sentence may be corrected

298. When by mistake a wrong sentence is passed, the Court may, before or immediately after it is recorded, amend the sentence.'

[7] On the basis of s 298 a trial court when by mistake it has imposed a wrong sentence before or immediately after it is recorded, amends the sentence. However once a sentence is pronounced or a court has delivered its decision on a matter, it becomes *functus officio*. The changing of a record in these circumstances is not allowed, save by way of review as prescribed under Section 302 of the Criminal Procedure Act 51 of 1977 as amended.

[8] The magistrate in this matter corrected the sentence way after she was queried about the vague sentence imposed. The magistrate acted outside her power in terms of s 298 of the CPA when altering or amending the sentence and thus any proceedings that followed thereafter were grossly irregular and cannot be allowed to stand.

[9] In the result I made the following order:

1. The convictions of both accused are confirmed.
2. The sentence is amended to read; Each accused is sentenced to a fine of N\$ 2000 (two thousand) or Six (6) months imprisonment of which N\$ 1000 or 3 (Three) months imprisonment is suspended for a period of 5 years on condition that accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

J.T. SALIONGA	E E KESSLAU

JUDGE	JUDGE
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