

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: CR 58/2017

In the matter between:

**THE STATE**

and

**JONAS MWALYOMBU**

Neutral citation: *S v Mwalyombu* (CR 58/2017) [2017] NAHCMD 271 (25 September 2017)

**CORAM: DAMASEB JP et LIEBENBERG J**

**DELIVERED: 25 September 2017**

**Flynote:** **Criminal Procedure** – Trial – Unavailability of presiding officer to continue with trial – Irregular to proceed with trial before magistrate other than one who noted a plea of not guilty without explanation regarding unavailability of initial magistrate – Such procedure sanctioned by section 118 of the Criminal Procedure Act, 51 of 1977 only in instances when initial magistrate unavailable – The State has a duty to place unavailability of the initial magistrate on the record – Failure in the latter regard renders continuation of the trial before another magistrate irregular.

Irregular proceedings – Whether irregularity vitiates the proceedings depends on the circumstances of particular case.

**Summary:** Trial proceedings continued and were concluded before one magistrate while the accused had pleaded not guilty before a different magistrate. The record is absent a recordal of the initial magistrate's unavailability, thereby rendering the trial proceedings irregular. Court satisfied that the irregularity does not vitiate the entire proceedings.

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### ORDER

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1. The conviction and sentence are confirmed.
2. The registrar is directed to bring this judgment to the attention of the Chief Magistrate.

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## REVIEW JUDGMENT

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LIEBENBERG J (DAMASEB JP concurring):

[1] The accused was arraigned, convicted and sentenced in the magistrate's court, Windhoek, on a charge of theft by false pretense, the particulars whereof are of no moment. On 07 June 2017, the accused person appeared before magistrate Shapumba for plea and trial, whereupon he pleaded not guilty. Thereafter, the matter was postponed for continuation of trial to 03 August 2017. When the matter was called on the aforesaid date, magistrate Savage presided over the trial, applied section 115 of the Criminal Procedure Act 51 of 1977 ("Act") in respect of the accused person's plea, found the accused person guilty and convicted and sentenced him.

[2] When the matter came on review I enquired from magistrate Savage as follows:

'... On what authority did magistrate Savage act to commence trial proceedings if there is nothing on record explaining the unavailability of the magistrate before whom the accused pleaded?'

[3] The magistrate responded as follows:

'The plea taken by Magistrate Shapumba was a plea in accordance with Section 115 of the Criminal Procedure Act. When the matter appeared on 3/08/17 Magistrate Shapumba was and still is on vacation leave. The accused wanted his trial to proceed and I acted within the ambit of section 118 of the Criminal Procedure Act. No evidence was adduced before Mr Shapumba and the accused was not prejudiced.'

That magistrate Shapumba's absence was not reflected on record is an oversight on my part.'

[4] The application of section 118 of the Act is not novel and has previously received attention from this Court. In *The State v Lucas*<sup>1</sup>, similar to the facts of this matter, the following (to be read with the necessary modifications) was stated:

[5] "The magistrate is correct in pointing out that when she presided over the matter no evidence had been adduced. However, she would *only* have been entitled to proceed with the matter 'If the ... magistrate before whom [the] accused at a summary trial has pleaded not guilty ... [was] for any reason not available to continue with the trial ...'. The record of the proceedings does not reflect that [the] magistrate ... was *unavailable* and it is not clear how this fact came to the attention of the magistrate when she decided to continue in terms of s 118, as this was not addressed by the prosecutor. In *S v Mkhuzangewe* the court said that it was for the State to establish the fact of the unavailability of the magistrate and where this has not been done, then the continuation of the trial before another magistrate would be *irregular*. In *S v Wellington*, 1990 NR 20 (HC) at 24F-G Frank AJ, (as he then was), dealt with the identical situation and stated the following:

*'Section 118 of the Criminal Procedure Act only sanctions this procedure where the original presiding officer is "not available" and does not entitle the prosecution to proceed before another presiding officer for any other reason. I agree with M T Steyn J, (as he then was) that to continue with a trial in front of another magistrate where the original magistrate is still available constitutes an irregularity. If the original magistrate is not available it is the duty of the State to place this fact on record. See: **S v Mkhuzangewe**, 1987 (3) SA 248 (O) at 266F-267A.'* (My emphasis)

[6] In a different matter but on the same point, this court in *The State v Sakaria Ekandjo and Another* as per Maritz J (as he then was) at 4-5 said:

*'There is no indication on the record that magistrate .... before whom the accused had pleaded, was no longer available to continue with the trial. In the absence of such indication by the Prosecution, it was irregular for magistrate ... to continue with the trial and sit in judgment of the accused.'* (My emphasis)

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<sup>1</sup> CR 02/2013) [2013] NAHCNLD 10 (04 March 2013), preceding *The State v Judas Simon Immanuel* Case No.: CR 23/2010 ((unreported) delivered on 29 September 2010.

[7] It must be clear in the present case that where the trial continued before a different magistrate without the prosecution informing the court about the unavailability of the magistrate before whom the accused had pleaded, that those proceedings are irregular.'

[5] As can be gleaned from magistrate Savage's reply, similarly in this matter, on the record is impermissibly absent a recordal regarding magistrate Shapumba's unavailability. This renders the trial proceedings irregular.

[6] It then remains to consider whether the irregularity alluded to above is so grave as to vitiate the trial proceedings before magistrate Savage. It will be recalled magistrate Savage asserted that the accused person suffered no prejudice on account of the impermissible procedure adopted, and moreover, that the accused person desired a speedy disposal of the trial. As stated earlier, since the record containing no recordal of magistrate Shapumba's unavailability, this Court is unable to ascertain the explanation proffered, if at all, to the accused person in this respect.

[7] In *The State v Judas Simon Immanuel*, this Court set aside the conviction and sentence of the accused person on account of the impermissible application of section 118 of the Act, holding, without furnishing reasons, that the irregularity vitiated the proceedings. In *The State v Lucas Wilhelm*, this Court, upon the impermissible application of section 118 of the Act, did not find the irregularity to have vitiated the proceedings and accordingly confirmed the sentence and conviction on review. Similarly in this matter, the perusal of the record shows that the trial proceedings were in accordance with justice and the accused suffered no prejudice. The accused person's conviction and sentence will therefore be confirmed.

[8] I hasten to caution that the above approach must not be construed as an invitation by magistrates to conduct proceedings contrary to the ambit and import of section 118 of the Act as articulated in the above authorities.

[9] In the result, it is ordered:

1. The conviction and sentence are confirmed.
  - a. The Registrar is directed to bring this judgment to the attention of the Chief Magistrate.

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**J C LIEBENBERG**

**JUDGE**

I concur.

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**P T DAMASEB**

**JUDGE-PRESIDENT**