



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 52 /2017

In the matter between:

MAIBA KOLELA JONATHAN

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Maiba v S* (CA 52/2017) [2017] NAHCMD 359 (29 December 2017)

Coram: UNENGU AJ *and* SALIONGA AJ

Heard: 4 December 2017

Delivered: 29 December 2017

Flynote: Application for condonation of the late filing of a notice of appeal – No reasonable explanation for delay – No prospect of success - Condonation for the late filing of the notice of appeal is refused – Application is dismissed and the appeal is struck from the roll.

ORDER

- (i) The application for the late filing of the notice of appeal is refused.
 - (ii) The application for condonation is dismissed.
 - (iii) The appeal against sentence is struck from the roll.
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APPEAL JUDGMENT

SALIONGA, AJ (UNENGU, AJ Concurring)

[1] The appellant appeared in the Regional Court sitting at Otjiwarongo on a charge of rape contravening the provisions of section 2(1) of the Combating of Rape Act, Act 8 of 2000.

[2] The appellant pleaded guilty to the charge, was convicted upon his own plea of guilty and on the 2 December 2015 he was sentenced to 14 years imprisonment. The appellant was represented during the proceedings in the court below by an instructed legal aid counsel and is only appealing against the sentence.

[3] On the 17 November 2016 the appellant filed the notice of appeal together with his grounds of appeal. The grounds are as follow:

- (a) that the court *a quo* and his legal practitioner of record Ms Katjimune omitted to properly advise him on the requirements of Rule 67 (1);
- (b) that the appellant being a layman was misdirected, confused and left with no other means of assistance or remedy, that the appellant was not furnished with all the necessary court documents in order to subsequent file the documents within the time frame, that the further delay was also caused by the fact that court documents were not in his possession and due to lack of knowledge of the procedure on his part.

[4] It is common cause that the notice of appeal was filed late by almost two years and as a result the appellant was compelled to apply for condonation of the

late filing thereof and is required to set out clearly and specifically the reasons for non-compliance with Rule 67 of the Magistrates' Court Act.

[5] During the hearing of the appeal, we allowed counsel for the respondent to argue a point in *limine*. In his argument counsel submitted that the application should be removed from the roll due to non-compliance with Rule 67 (1). He argued that it took the appellant almost two years to file his notice of appeal after conviction and sentence but failed to give satisfactory explanation why it took so long to eventually file a notice. Counsel further argued that even after Mr Brockerhoff (counsel for the appellant) indicated at case management that he is appearing for the appellant he also failed to file the amended heads of argument which were to be filed on 14 November 2017. Again counsel could not give reasonable explanation in this regard.

[6] Counsel for the appellant confirmed what the appellant had said in the notice; that the delay was ascribed to the fact that the legal practitioner who represented the appellant at the trial did not explain his rights of appeal and that the magistrate failed in her duty to explain the appellant's rights of appeal. He conceded that he did not file a confirmatory affidavit to that effect and that there is no duty on the magistrate to explain the accused's rights where accused is defended. He also conceded that he could not file the heads of argument on time because the date slipped his mind and was too busy with a notorious trial.

[7] This court is mindful that even if the court finds the delay to have been properly explained, the court must still consider if the appeal does enjoy the prospect of success. If not, it is of no use to grant condonation. In arriving at a just decision the court has to look at the reasons given by the Regional Court Magistrate when imposing the sentence. In this appeal, looking at the magistrate's reasons for sentencing and the reasons given by the respondent in his notice filed, I am of the opinion that there is no prospect of success.

[8] The learned magistrate in sentencing the appellant to 14 years imprisonment, took the following into consideration; the personal circumstances and the nature of the offence the appellant has committed as well as the interests of society. She also

took into account the fact that appellant was 15 years old at the commission of the offence and was 18 years at sentencing, that the appellant pleaded guilty to the charge. The magistrate rightly pointed out that it is no excuse that the appellant was under the influence of alcohol and found the following as highly aggravating factors; the fact that the victim was only six years old at the time of the commission of the offence and that she was in care of the appellant; the fact that it is likely that this incident will have some repercussions on her later development.

[9] Counsel for the appellant argued that the sentence in aggregate is shockingly inappropriate and induces a sense of shock taking into account that the appellant pleaded guilty and was a minor at the time the offence was committed. He further argued that the magistrate properly applied section 3 of the Rape Act but according to counsel there is a striking disparity between the sentence imposed and that which the appeal court would have imposed if one considers the *S v Munyama's* judgement¹. That the magistrate misdirected herself by overemphasizing the seriousness of the offence at the expense of the personal circumstances of the appellant.

[10] In reply counsel for the respondent argued that the magistrate considered the personal circumstances and the nature of the offence and the interest of society. She also took into account the fact that the appellant was a minor as well as the mitigating factors. He further argued that where the offence of rape is against a minor, a lengthy term of imprisonment is appropriate even if accused is also a minor and a first offender. That Gomeb case (*S v Gomeb and others CC 18/2013*)² must be distinguished from the matter before court in that the appellant in this case was in a position of trust which he breached.

[11] There is no doubt that the appellant filed a notice of appeal out of time and no reasonable/satisfactory explanation was given. The appellant's argument that his rights were not explained cannot be accepted because the appellant knew already of his rights to appeal the same day he was sentenced. This can be confirmed by paragraph 5 of his supporting affidavit where he said "*on the same day he was under the impression his lawyer by then would file the appeal but only to learn later from his*

¹ Case No. SA 47/2011 dated 9 December 2011.

² *S v Gomeb* (CC 18-2013) [2016] NAMHCMD 344 (10 November 2016).

parents that she was unable to render services due to legal aid mandate termination". The parents did not even file the confirmatory affidavit to confirm this allegation. It is a fact that the appellant was defended during the trial and as such the magistrate was not under a duty to explain his rights. His argument that the record was not in his possession cannot also be accepted because he did not even request for it.

[12] I do not agree with counsel for the appellant that the sentence imposed is inappropriate and induces a sense of shock because the learned magistrate considered all factors and personal circumstances of the appellant. I also do agree with counsel for the respondent in his submission that Gomeb's case should be distinguished because the appellant in this case was in a position of trust. Therefore, the explanation given by the appellant in his notice of appeal why notice of appeal was filed late is not reasonable and not acceptable.

[13] In the result the following order is made:

- (i) The application for the late filing of the notice of appeal is refused.
- (ii) The application for condonation is dismissed.
- (iii) The appeal against sentence is struck from the roll.

J T Salionga
Acting Judge

E P Unengu
Acting Judge

APPEARANCES:

THE APPELLANT:

T P Bockerhoff

Instructed by Directorate of Legal Aid, Windhoek

THE RESPONDENT:

M L Olivier

Instructed by Office of the Prosecutor-General,

Windhoek