REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 41/2016

In the matter between:

MATE HENDRICK KAKOMA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Kakoma v S* (CA 41/2016) [2018] NAHCMD 283
(14 September 2018)

Coram: LIEBENBERG J and SIBOLEKA J
Heard: **10 September 2018**
Delivered: **14 September 2018**

Flynote: Criminal Procedure – Condonation – Application for condonation to be made as soon as applicant realizes that the rules have not been complied – Where flagrant breach of rules of court exists and no explanation provided condonation will be refused whatever the prospects of success – Condonation application refused.

Summary: The accused was convicted in the magistrate's court on a charge of theft in contravention of the Stock Theft Act 12 of 1990 and he was sentenced to five (5) years' imprisonment. He appealed against his sentence. The appellant noted an appeal, however, it was struck from the roll for lack of proper grounds of appeal and because it was filed out of time. An amended notice of appeal, accompanied by an application condoning the appellant's late filing of the appeal were filed. The Respondent took issue on the basis that the appellant's explanation as set out in the condonation application did not satisfactory explain the delay.

Held that an application for condonation is required to be made as soon as the party concerned realizes that the rules have not been complied with.

Held, further that, where flagrant breach of the rules of court exists and no explanation tendered, the condonation application will be refused, whatever the prospects of success.

ORDER

1. The application for condonation is refused.
2. The appeal is struck from the roll.

JUDGMENT

LIEBENBERG J (SIBOLEKA J concurring):

Introduction

[1] The accused was tried and convicted in the magistrate's court for the district of Katima Mulilo on a charge of theft in contravention of s 1(1)*(a)* of the Stock Theft Act 12 of 1990, and sentenced to five (5) years' imprisonment. He now appeals against the sentence imposed on him.

Background

[2] The appeal was initially set down for hearing on the 29th of May 2017 but was struck from the roll for reasons that (a) the Notice of Appeal being defective as it lacked proper grounds of appeal; and (b) the appeal having been lodged out of time as per the rules[1] and appellant failing to apply for condonation for non-compliance with the rules of court. An Amended Notice of Appeal, accompanied by an application condoning the appellant's late filing of the appeal and Amended Notice of Appeal, were filed on 31 May 2018. In turn, the respondent filed a Notice of Intention to Oppose on 10 July 2018, setting out reasons why the application should not be granted and prays that same be 'dismissed'.

Condonation

[3] The basis of the respondent's opposition of the condonation application emanates from his erstwhile counsel's heads of argument which solely addressed the issue of conviction and not sentence. From this it is deduced that the appellant never intended appealing against sentence. This inference is fortified by the fact that from the notice itself it is evident that the appellant raised several 'grounds' of appeal only against his conviction, and not the sentence. That would explain why counsel (then) only intended arguing the conviction as stated in his heads of argument, despite par 2 thereof reading that 'the appellant lodged an appeal against conviction and sentence' which is clearly wrong. (Emphasis provided) Nothing came from it however as the matter was struck from the roll. The appellant now seeks to resuscitate the appeal by way of the Amended Notice of Appeal but has changed course as the appeal this time lies against sentence only.

[4] Appellant in his affidavit gave a comprehensive explanation of obstacles he encountered as a layperson to lodge the appeal until such time that his present counsel was appointed on the 13th of April 2018 to represent

[1] Magistrates' Court Rule 67(1).

him. He further stated that after being sentenced, he all along intended appealing this matter and that his failure to file proper grounds of appeal and an application for condonation immediately thereafter, was not due to wilful disregard of the court rules, or any fault on his part. He is further of the view that there are reasonable prospects of success on appeal.

[5] The thrust of the respondent's opposition turns on the appellant's failure to even attempt to explain the delay in filing the Amended Notice of Appeal and accompanying application for condonation. He has signed his affidavit one year after he had been informed by the court on 29 May 2017 that his appeal was defective and filed out of time, thus requiring of him to seek the court's indulgence by applying for condonation. No explanation by the appellant was tendered in his affidavit in support of the condonation application explaining what caused the further delay in lodging the present appeal and application for condonation. Whatever the reason was, should have been explained by the appellant on oath. This explanation was only forthcoming in the appellant's replying affidavit after the State had filed a notice to oppose the condonation application. The opposition was based on the appellant's failure to give a satisfactory explanation for the delay. This obviously alerted the appellant and prompted the filing of his replying affidavit, only now providing reasons for the delay. It is against this background that the respondent argues that the appellant was not honest with the court as he should have given this explanation right in the beginning.

[6] In a recent judgment the Supreme Court in *Dietmar Dannecker v Leopard Tours Car and Camping Hire CC and Others*[2] considered an application for condonation which was more than a year late and stated thus: 'An application for condonation is required to be made as soon as the party concerned realizes that the rules have not been complied with.'[3] The court referred with approval to the matter of *Aymac CC and Another v Widgerow*[4] where it was held that condonation or reinstatement should not be granted in the face of gross breaches of the rules as inactivity by one party affects the

[2] Case No SA 79/2016 (unreported) delivered on 31 August 2018.
[3] *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D.
[4] 2009 (6) SA 33 (W) at 452 para 40.

interest of the other party in the finality of the matter. Though these remarks were made in a civil context, I find them equally applicable to criminal proceedings where the swift finalization of the trial is imperative and in the interest of the administration of justice. It is settled law in this jurisdiction that a litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of condonation without delay.[5]

[7] When applying the aforesaid principles to the present facts, it is evident that the appellant already as far back as 29 May 2017 was informed of the procedure he had to follow ie to file an application for condonation. Though being a layperson, this was no longer the case when he prepared his affidavit explaining the delay in filing the Amended Notice of Appeal outside the prescribed time limits. In my view in the present case there has been a flagrant breach of the rules of court for which no satisfactory explanation was tendered, except for the belated explanation provided in the replying affidavit after the State had indicated its opposition to the condonation application. In an instance where the disregard for the rules amounts to a flagrant disregard (as the present case) the court will not grant condonation whatever the prospects of success may be.[6] Thus, for this reason alone, condonation should be refused.

[8] In support of his application the appellant relied on the matter of *Mofokeng v Prokureur-Generaal*[7] where it was said that, even if there was an abnormal delay, the applicant would still be entitled to go into the merits of the case in an attempt to convince the court that his prospects of success are so good that, despite the delay, condonation should be granted. In light of the view taken by the Supreme Court in *Dannecker* (*supra*), the *Mofokeng* case is no longer authoritative or applicable law on this point. The argument advanced in this regard is accordingly without merit.

[9] Notwithstanding, the court reserved its ruling on the condonation application and invited counsel to argue the appeal against sentence.

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[5] *Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) at 639 paras 9 – 10.
[6] *Dietmar Dannecker (supra) at para 23.*
[7] 1958 (4) SA 519 (O) at 521.

The merits

[10] The thrust of the appeal against sentence is directed at the period of five years' imprisonment imposed for theft of one cow valued at N$4 500 which, it was said, was grossly excessive, inappropriate and shocking.[8] Moreover, in view of the carcass of the animal having been claimed by and returned to the lawful owner. In support of this contention counsel cited several stock theft cases in which similar sentences, or less, were imposed, but where the value of the stock was substantially higher than what it is in this case. In one instance a wholly suspended sentence was imposed. In addition, it was submitted that the time the appellant had spent in custody should have led to a reduction in sentence.

[11] It is a settled rule of practice that a court of appeal will only interfere with sentence if it has been shown that the sentencing court did not exercise its discretion judiciously and properly. Also, that the power of this court to ameliorate sentences on appeal are limited.[9] An instance where the court of appeal will intervene is when the sentence imposed is found to be so manifestly excessive that it induces a sense of shock in the mind of the court (*Tjiho supra*).

[12] In the present case the appellant under the cover of darkness stole one head of cattle from the complainant's kraal and killed it. Despite the carcass of the dead animal having been returned to the owner, his actual prejudice lies in the future loss of its offspring as it was a cow which could have reproduced. This much the court *a quo* correctly acknowledged in its judgment on sentence. The argument that the complainant's loss was limited to the actual value of the animal, being N$4 500, is therefore without merit. The offence of stock theft has always been considered serious by the courts and moreover where the complainant did what could have been expected of him to safeguard his cattle, by keeping it in the kraal at night. Notwithstanding, it did not deter the appellant. The fact that imprisonment is the only form of

[8] *S v Tjiho* 1991 NR 361 (HC) at 366A-B.
[9] *S v Ndikwetepo and Others* 1993 NR 319 (SC) at 322.

punishment that could be imposed, underscores the need to emphasise deterrence as the main objective of punishment in cases of this nature. The court *a quo* came to the same conclusion and was cognisant of the prevalence of the particular offence in that district. Also that the appellant had shown no remorse for having committed the crime. These factors are indeed relevant to sentencing and the trial court was entitled to take them into account. We are accordingly unable to fault the court *a quo* for doing so.

[13] The cases cited and referred to by counsel for the appellant, Mr *Kamwi,* are, as pointed out by Mr *Marondedze,* are clearly distinguishable from the present case and therefore cannot assist the appellant's argument.

[14] As regards the appellant having been in custody pending the finalisation of the trial, the court remarked that it was not a mitigating factor. Though the court did not explain why no weight was accorded to the period spent by the appellant in custody, it would appear that this came as a result of the appellant, at some stage, having been sentenced to imprisonment in another matter, as pointed out by the respondent in his heads of argument. It was further pointed out that the appellant was out on bail in another matter when committing the offence under consideration, explaining why he was not given bail in the first instance but only later. Notwithstanding, it was argued on behalf of the appellant that there was still a pre-conviction incarcerated period of 14 months as the appellant, despite having been admitted to bail, was unable to raise the amount set.

[15] The appellant's contention that the trial court failed to consider or totally ignored the time spent in custody by the appellant is wrong, as the court in its judgment on sentence did refer thereto and concluded that it was not a mitigating factor. What however must be decided is whether the court *a quo* exercised its discretion judiciously in light of the facts presented.

[16] The court in *S v Kauzuu*[10] found that it would constitute a misdirection if the court disregarded the pre-conviction period as a mitigating factor. Though

[10] 2006 (1) NR 225 (HC) at 232.

correct that the period spent in custody prior to the finalisation of the case, especially if it is a lengthy period, would usually lead to a reduction in sentence, it is our considered view that it falls within the discretion of the court and will depend on the circumstances of the case. Factors such as bail having been granted to the accused person, him having been in custody on other matters or being a sentenced prisoner on another case (as in this instance), will be taken into account by the court in exercising its discretion. In *Kauzuu* the appellant was in pre-conviction custody for a period of two years and four months, which was found on appeal to have been a mitigating factor that the sentencing court should not have ignored. There is a significant difference between that case and the time spent in custody by the appellant in this instance.

[17] In conclusion, we are of the view that there was no misdirection committed by the trial court in sentencing the accused which would justify interference by this court on appeal. Neither do we find a sentence of five (5) years' imprisonment excessive, nor does it induce a sense of shock, in the circumstances of the case. Accordingly, we are not persuaded that there are prospects of success on appeal.

Conclusion

[18] In the result, it is ordered:

1. The application for condonation is refused.
2. The appeal is struck from the roll.

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JC LIEBENBERG

JUDGE

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A SIBOLEKA

JUDGE

APPEARANCES:

APPELLANT:	K. Kamwi Of Sibeya & Partners Legal Practitioners, Windhoek.
RESPONDENT:	E. E. Marondedze Of the Office of the Prosecutor-General, Windhoek.