

REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: HC-MD-CRI-APP-CAL-2018/00015

**MUBITA  
APPELLANT**

**GIFT**

**MULONDA**

versus

**THE  
RESPONDENT**

**STATE**

**Neutral citation:** *Mulonda v S* (HC-MD-CRI-APP-CAL-2018/00015) [2019] NAHCMD  
186 (14 June 2019)

**Coram:** NDAUENDAPO, J et SHIVUTE, J

**Heard:** 26 April 2019

**Delivered:** 14 June 2019

**Flynote:** Appeal – Late filing of notice of appeal – Court in determining application for condonation – Two requirements – First leg – Good and reasonable explanation for cause of delay – Second leg – Prospects of success – Basis to be led – Two requirements not be considered in isolation – All cumulative effect of the factors to be considered – Appellant failed to give an acceptable and reasonable explanation for cause of delay – Appellant failed in his affidavit to lay the basis for prospects of success – Compliance with rules of court – Very important – Failure to obey court rules may

result in dysfunctional of court system especially its procedure and practice – Notices of appeal should conform to established requirements.

Criminal Procedure – Sentence – Substantial and compelling circumstances – Appellant arguing on the merits – Court misdirected itself for not finding that substantial and compelling circumstances existed due to a lengthy period appellant spent in custody awaiting for finalisation of his trial – Court finding that – Although the lengthy period spent in custody awaiting for the finalisation of the trial may be taken into consideration when sentencing – such by itself does not constitute substantial and compelling circumstances – for the court to deviate from the mandatory sentence provided for by the Act – Application for condonation refused and appeal dismissed.

**Summary:** Appeal – Late filing of notice of appeal – The appellant filed an initial notice of appeal in person. This notice of appeal was late for about two months. The initial notice of appeal was withdrawn upon the advice of the appellant's legal representative of record that the notice of appeal was defective. A second notice of appeal that was late for about 4 years and 5 months was filed. The appellant did not give an acceptable and reasonable explanation for the cause of delay. In his affidavit supporting the application for the late filing of the notice of appeal he stated that he had prospects of success when prosecuting his appeal. However, he did not lay the basis to that effect. The court in determining the application for condonation, there are two requirements to be met. The first requirement is a good and reasonable explanation for the cause of delay. The second requirement is the prospect of success. Appellant cannot just say he has prospects of success without laying the basis why he is saying so. The appellant had failed to satisfy both requirements. Compliance with the rules of court is very important. Failure to do so may result in dysfunctional of the court system especially its procedure and practice. It is very important for notices of appeal to conform to the established requirements.

Criminal Procedure: Sentence – substantial and compelling circumstances – Appellant when arguing the merits alleging that – substantial and compelling circumstances existed due to the lengthy period appellant spent in custody.

Held: Although the lengthy period the appellant spent in custody awaiting for the finalisation of his trial may be considered when passing sentence, a lengthy period on its own does not amount to substantial and compelling circumstances. The application is refused and appeal is dismissed.

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### ORDER

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- (a) The application for condonation is refused.
  - (b) The appeal is dismissed.
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### APPEAL JUDGMENT

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#### SHIVUTE, J (NDAUENDAPO, J CONCURRING)

[1] The appellant was convicted of Rape Contravening s 2 (1) (a) of the Combating of Rape Act 8 of 2000. He was sentenced on the 10<sup>th</sup> day of September 2014 in the Regional Court seated at Katima Mulilo to 16 years' imprisonment. The accused is not satisfied with the sentence hence this appeal.

[2] The appellant filed the original notice of appeal on 25 November 2014 in person. He was out of time for about two months. The original notice of appeal was withdrawn on 6 February 2019 and an amended notice of appeal was filed on 25 March 2019 by counsel of record. Hence the appellant's amended notice of appeal is out of time for about 4 years and 5 months.

[3] The appellant in his affidavit supporting the application for condonation of the late filing notice of an appeal stated that he filed his notice of appeal on 23 October 2014. I pause to mention here that although the notice of appeal is dated 23 October 2014 it was only received by the clerk of court on 25 November 2014. According to the appellant, the matter was only enrolled after he re-lodged the appeal on 30 October 2017 which prompted the enrolment currently before court.

[4] During January 2019 he was duly advised by his legal representative that his notice of appeal was defective in that it did not clearly set out the grounds of appeal. Subsequent to the advice an amended notice of appeal was filed.

[5] It was argued on appellant's behalf that the appellant had good prospects of success on appeal to justify the court to grant the application. The appellant in his affidavit accompanying the application for condonation stated that he has prospects of success but did not lay the basis to such effect. Appellant must lay the basis for his proposition.

[6] Counsel for the respondent argued that the appellant's first application was defective and it was not accompanied by an affidavit. The application for condonation of the late filing of the amended notice of appeal must be dismissed as it was not filed at the same time with an affidavit. Furthermore, no good and acceptable explanation for appellant's delay was filed. Again it was argued that the appellant has no prospects of success on appeal.

[7] Section 309 (2) of the Criminal Procedure Act 51 of 1977 provides the following:

'An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court.'

Compliance with the rules of court is very important. Failure to obey the court rules may result in the dysfunction of the court system especially its practice and procedure. Notices of appeal should conform to the established requirements.

[8] The court in deciding whether to grant an application for condonation or not, it must have due regard to the explanation provided for the delay, but this should not be viewed in isolation. The court should consider the prospects of success when the appellant is prosecuting his appeal on the merits as well as all the cumulative effect of all the factors.

[9] The accused explained to this court that the original notice he filed was defective and upon the advice from his lawyer he re-lodged the current appeal. However, the purported original notice of appeal that was defective was also filed out of time for about two months and the appellant did not give an explanation at all let alone a reasonable and acceptable explanation for the cause of delay. Therefore, he had failed to satisfy the first leg.

[10] During the hearing we allowed counsel to argue on the point in *limine* raised concerning the late filing notice of appeal and on the merits.

[11] The appellant's grounds of appeal are three which may be summarised as follows:

1. The sentence imposed is shockingly inappropriate.
2. The court overemphasised the seriousness of the offence at the expense of the appellant's personal circumstances.
3. The court erred or paid lip service to the combined period the appellant spent in custody awaiting the finalisation of his trial.

[12] Counsel for the respondent argued that the court misdirected itself by not taking into consideration the period of 4 years and 3 months the appellant spent in custody

awaiting the finalisation of the case. The court was supposed to consider a lesser sentence given the appellant's mitigatory factors.

[13] It was a point of criticism by counsel for the appellant that the court sentenced the appellant in terms of s 3 (1) (a) (cc) of the Combating of Rape Act however, the court did not apply s 3 (2) of the Act. The court was supposed to find that substantial and compelling circumstances existed namely; the period of 4 years and 3 months the appellant spent in custody. Such circumstances so, counsel argued justified a portion of the sentence to be suspended.

[14] Again counsel argued that it was a misdirection on the part of the court *aquo* by not finding that substantial and compelling circumstances existed and not deviated from the minimum mandatory sentence provided for by the Act.

[15] On the other hand, counsel for the respondent argued that although the appellant was a first offender, he made threats to the complainant threatening to kill her with a knife and cause harm to her mother if she did not comply with the appellant's demand. The appellant was a step father to the complainant. At the time of the commission of the offence, the complainant was 13 years old and the appellant was 37 years old. The appellant was 24 years old than the complainant. The appellant went to fetch the complainant from the school hostel where she was boarding on a false pretence that her mother needed her. He threatened the complainant that he had a knife and was willing to use it on her and no one would hear since the appellant took the complainant to a remote area far from any residence.

[16] Counsel further argued that the court found that the aggravating factors far outweighed the mitigating factors given the coercive circumstances especially the factor that the appellant was a step parent of the complainant who was morally bound and under a legal obligation to the complainant as a father figure. The court was under a statutory duty to impose at least the prescribed minimum sentence in the absence of

substantial and compelling circumstances. Both counsel referred me to authorities which I have considered.

### Mandatory Sentence

[17] The mandatory sentence provided for, under the present circumstance where coercive circumstances existed namely, the appellant threatening the complainant with a knife, the complainant being under the age of 18 years and the appellant being a step father or guardian of the complainant is a sentence of imprisonment for a period of not less than fifteen years.

[18] The appellant betrayed the trust by sexually assaulting the complainant. He violated the complainant's right to dignity, privacy and to integrity. Rape is viewed in a serious light and this is evident in the penalty provided for by the Act.

[19] In *S v JB* 2016 (1) NR 114 (SC) at 118 C-E it was held that:

'although the period that an offender has spent in custody awaiting the finalisation of his or her trial, especially if lengthy, was a factor normally taken into account in sentencing, in the circumstances of this case, such a period not by itself constitute substantial and compelling circumstances.' The trial court misdirected itself in finding that the one personal circumstances, namely the period of custody awaiting the finalisation of his trial amounted to substantial and compelling circumstances. Such misdirection on a material aspect on sentencing left this court at large to consider the sentence afresh.'

The sentence of 14 years imposed on the count of rape by the court *aquo* was set aside and replaced with the mandatory sentence of 15 years imprisonment in line with the circumstances of the case in terms of the Act.

[20] We fully agree with the decision of the Supreme Court which is binding on this court. The period the appellant spent in custody on its own does not amount to substantial and compelling circumstances. The appellant did not place any substantial

and compelling circumstances before the court *aquo*. He failed to satisfy the court on the second leg that he had prospects of success on appeal.

[21] In the present matter it is our finding that the court did exercise its discretion judiciously and it will not be justified for the court of appeal to interfere with the sentence.

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

(c) The application for condonation is refused.

(d) The appeal is dismissed.

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N N Shivute  
Judge

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G N Ndauendapo  
Judge



## APPEARANCES:

APPELLANT:

Of

T Brockerhoff

Brockerhoff and Associates Legal Practitioners,  
Windhoek

RESPONDENT:

Of

C Moyo

Office of the Prosecutor-General, Windhoek