



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 48/2019

In the matter between:

THE STATE

and

DAWID LINKS

ACCUSED ONE

JAPIE MARKUS

ACCUSED TWO

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1122/2019)

Neutral citation: *S v Links* (CR 48/2019) [2019] NAHCMD 223 (03 July 2019)

Coram: NDAUENDAPO, J and UNENGU, AJ

Delivered: 03 July 2019

Flynote: Review – Record of proceedings and the presiding officer missing – Article 12 of the constitution provides for a fair and speedy trial.

Summary: The matter was submitted by the magistrate of Mariental Magistrate's Court with a letter addressed to Registrar of this court stating that the record of proceedings in the matter conducted by a certain magistrate Kamahene is missing and the magistrate has absconded from duty. The author of the letter therefore

requested to review and set aside the proceedings conducted by magistrate Kamahene and order the trial to start afresh before a different magistrate.

Held that it is prudent for this court not to cause a further unnecessary delay in finalizing the matter which delay may violate the accused person's right to a fair and speedy trial as provided for in term of Article 12 of the Constitution.

Held further that the proceedings in the matter conducted by magistrate Kamahene is hereby reviewed and set aside; and ordered the trial to start afresh before a different magistrate.

ORDER

- (a) The proceedings in the matter conducted by magistrate Kamahene are hereby reviewed and set aside.
 - (b) The matter is remitted to the magistrate's court of Mariental to start *de novo* before a different magistrate.
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REVIEW JUDGMENT

UNENGU, AJ (NDAUENDAPO, J concurring):

[1] This matter has come from the magistrate of Mariental under the cover of a letter to the Registrar of this court with a request to review and set aside the proceedings in the matter conducted before magistrate Kamahene and order the trial to start afresh before another magistrate, as magistrate Kamahene has probably absconded from duty.

[2] The proceedings sought to be reviewed and set aside and the record thereof cannot be located by the prosecutor dealing with the matter to establish the status of the matter.

[3] However, it would seem though, according to the author of the letter, that the case record of the matter he had perused does not have a record of proceedings in the form of evidence adduced or the questioning in terms of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977.

[4] Article 12 of the Constitution provides for a fair and speedy trial. In sub-article (1) (b), it states that a trial referred to in sub-article (1) (a) shall take place within a reasonable time, failing which the accused shall be released.

[5] In the present matter, not only the record of proceedings in the matter has gone missing but the presiding officer as well. His superiors in the Office of the Judiciary do not know of his whereabouts. Therefore, to delay the matter further in an attempt to locate both the missing record and the magistrate, in my opinion, will cause a further unnecessary delay in finalizing the case of the accused thereby violating his right to a fair and speedy trial as provided for Article 12.

[6] Even though no record of proceedings was provided by the author of the letter to be reviewed and set aside, it is my view, that the fact that such record is nowhere to be found, it has disappeared, is sufficient ground to review and set aside any proceedings which might have been conducted by magistrate Kamahene in the case and order the trial to start afresh before another magistrate.

[7] In the result, the following order is made:

(a) The proceedings in the matter conducted by magistrate Kamahene are hereby reviewed and set aside.

(b) The matter is remitted to the magistrate's court of Mariental to start *de novo* before a different magistrate.

E P UNENGU
Acting Judge

N NDAUENDAPO
Judge