

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Kuwe Samwele Mushanga</i> <i>The State v Custodia K N Nghishidimbwa</i>	Case No: High Court Ref No. 1445/2019 1400/2019 CR 55/2019
High Court MD Review No:	Division of Court: High court Main Division
Heard before: Honourable Mrs. Justice Shivute <i>et</i> Honourable Mr. Justice Sibeya Acting	Delivered on: 20 August 2019
Neutral citation: <i>S v Mushanga; S v Nghishidimbwa</i> (CR 55/2019) [2019] NAHCMD 295 (20 August 2019)	
The order: In the result the convictions and sentences are hereby set aside.	
SIBEYA, AJ and Shivute, J (concurring)	
[1] This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).	

[2] Kume Samwele Mushanga appeared in the Magistrate's Court for the district of Rundu where he was charged with the following offence:

'entry into Namibia without an unexpired passport bearing a valid visa or authority. Contravening section 12(1) read with sections 1, 2 and 12(4) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the 1st day of May 2019 at or near Kehemu Location in the district of Rundu the accused, not being a Namibian citizen or a person domiciled in Namibia, did wrongfully and unlawfully enter Namibia without an unexpired passport;

(a) bearing a valid visa, or

(b) an endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia, or without a document containing

(a) statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and

(b)The particulars of such passport.'

[3] Custodia K N Nghishidimbwa also appeared in the same Court and on the same charge with similar particulars save for the date of the alleged commission of the offence which was which was stated as 29th April 2019.

[4] The two accused persons pleaded guilty to their respective charges on the same day 10th May 2019. The Court then invoked the provisions of section 112(1)(b) of the CPA and convicted the accused persons as charged. Thereafter the court sentenced Kuwe Samwele Mushanga to a fine of N\$2,000.00 or 12 months imprisonment while Custodia K N Nghishidimbwa was sentenced to a fine of N\$4,000.00 or two years imprisonment.

[5] Section 12(1) of the Immigration Control Act, 1993 (Act No. 7 of 1993) reads:

“12. (1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.” My own underlying for emphasis purposes.

[6] During the questioning of the accused persons the learned Magistrate did not ask the accused to explain whether or not the production of an unexpired passport bearing a valid visa or endorsement by an authorized person was demanded from any of them by the Immigration officer.

[7] On review, queries were directed to the learned Magistrate who presided on the matters, enquiring as to whether the convictions were competent in law where the charges did not allege that the accused persons failed to produce unexpired passports which bears a valid visa or an endorsement by an authorised person, after being demanded by an immigration officer to produce such unexpired passports which bears a valid visa or an endorsement by an authorised person and therefore did wrongfully and unlawfully enter or remain in Namibia, without an unexpired passport bearing a valid visa or an endorsement by an authorised person, as required by Section 12(1) of the Immigration Control Act. Section 12(4) of the Immigration Control Act provides that if any person enters or has entered Namibia in contravention to the provisions of Section 12(1) of the Immigration Control Act commits an offence.

[8] The learned Magistrate responded to the queries in both matters as follows:

'The conviction in this matter is incompetent in law taking into account the cases of *S v Wellen*; *S v Levy Nkomo*¹.'

9. Van Niekerk J in *S v Wellem*; *S v Nkomo* (supra) at page 353 cited a passage by Maritz J (as he then was) in *S v Ngono* 2005 NR 34 (HC) at 35A-B where this Court stated that:

'One would have expected the charge to follow the words of s 12(4) of the Act which creates the offence, or words to that effect (see s 84(3) of the Criminal Procedure Act 51 of 1977). At the very least, though, the formulated charge should have contained the provisions of the subsection relating to the essentials of the offence [created] thereby.'

[10] The above sentiments were echoed by Siboleka J with Parker J concurring, in the cases of *S v Mutinda Brian*, *S v Manduku Gerald*, *S v Chipodze Tom* and *David Ndatanufa & Another*², where it was stated that the principles in *S v Wellen* and *S v Nkomo* cases were also applicable to a charge of contravening sections 12(1) and 12(4) of the Immigration Control Act.

[11] Section 12(4) of the Immigration Control Act creates two offences:

- (i) entering or having entered Namibia in contravention of the provisions of section 12(1) of the Immigration Control Act and,
- (ii) being found in Namibia after having been refused entry into Namibia in terms of that subsection.

The accused persons appear to have been charged for an offence in paragraph (i). The charge did not contain the allegations that the accused persons failed on demand by an immigration officer, to produce to such an immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia. This is an essential element of the charge and the absence of such allegations thereof from the charge entails that the accused persons were not properly charged and the charges were objectionable as provided for in section 85(1)(a) of the Criminal

¹ 2009 (1) NR 352 (HC).

² High Court Review Case No: [737/2010] - [CR 79,80,81 & 82/2010] at page 6 para 8

Procedure Act.

[12] The questioning of the accused persons by the learned Magistrate in terms of section 112(1)(b) of the Criminal Procedure Act towed in compliance with the allegations in the charges. The questions of the learned Magistrate were therefore restricted to allegations contained in the charge. The accused persons were not questioned on whether they failed to produce an unexpired passport which bears a valid visa or an endorsement by an authorised person, after being demanded by an immigration officer to produce such an unexpired passport which bears a valid visa or an endorsement by an authorised person and no such admissions were made by the accused persons. The learned Magistrate could therefore not have been satisfied that all the elements of the preferred offence were admitted.

[13] The concessions of the learned Magistrate are properly made in that the charges did not contain the necessary wording to constitute offences committed in terms of the statutory provisions of Section 12(4) read with Section 12(1) of the Immigration Control Act. As a result, such proceedings cannot be confirmed to have been in accordance with justice.

[14] I endorse the sentiments expressed by Siboleka J in *S v Okuani*³, where he stated that a charge in terms of a statute must cite the actual elements of the offence contravened as contained in the enabling section. A failure to do so may render the charge defective.

[15] I pause to observe that it is trite that Prosecutors play a vital role in the criminal justice system and it is therefore incumbent on them to ensure that they draft charges with professionalism and precision to avoid drafting defective charges. Magistrates should equally carefully examine charges to ensure that such charges are not objectionable in

³ CR 07/2013) [2013] NAHCMD 32 (05 February 2013).

terms of section 85(1)(a) of the CPA. Failure to comply with the above calls of duty may result in the Courts proceeding on incurably defective charges which manifests in failure of justice as in the present matter. I direct that this judgment be brought to the attention of the Magistrates and Prosecutors.

[12] In the result, it is ordered that:

The convictions and sentences are hereby set aside.

O S SIBEYA ACTING JUDGE	N N SHIVUTE JUDGE