

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO.: HC-MD-CRI-APP-CAL-2019/00064

In the matter between:

FESTUS ASINO

FIRST APPLICANT

JOSEPH NAKAMBUNDA

SECOND APPLICANT

and

THE STATE

Neutral Citation: *Asino v S* (HC-MD-CRI-APP-CAL-2019/00064) [2020] NAHCMD 225
(15 June 2020)

Coram: USIKU, J and UNENGU, AJ

Heard: 15 May 2020

Delivered: 15 June 2020

Flynote: Criminal Procedure – Appeal – Against sentence – Appellant and fellow police officer convicted of four counts of offences under s 38(b) of the Anti - Corruption Act, 2003 (Act 8 of 2003) – Both sentenced to an effective four years imprisonment – appellant filed defective Notice of Appeal – Counsel acting without power of attorney –

No mandate to lodge and act on behalf of the appellant – Point in *limine* – notice of appeal defective – No grounds of appeal – In appeal – Point in *limine* upheld and appeal struck from the roll.

Summary: The appellant and a fellow police officer were charged with and convicted of four counts of offences under s 38(b) of the Anti-Corruption Act 8 of 2003; and were sentenced to an effective four years imprisonment each. Dissatisfied with the sentence imposed on him, the appellant lodged an appeal against the sentence; but the notice of appeal is defective because it does not contain clear and specific grounds of appeal. In addition, counsel acting on his behalf, did not obtain special power of attorney from him to lodge the appeal and act on his behalf.

As a result of the notice of appeal being defective, the respondent raised a point in *limine* which point in *limine* was, as a result, upheld and the appeal struck from the roll. The court held: that even though the appellant lodged the appeal within the period of 14 days as prescribed by Rule 67(1) of the Magistrate's Court Act 32 of 1944, it lacked clear and specific grounds of appeal.

Held further: that there was no valid appeal before court for determination.

Held further: that in view of the failure by counsel to obtain a power of attorney from the appellant himself to lodge and act on his behalf, the papers drawn up and filed by counsel are of no use or effect in the appeal proceedings.

ORDER

- (a) The point in *limine* raised by the respondent is hereby upheld.
- (b) The appeal is struck from the roll and considered finalized.

APPEAL JUDGMENT

UNENGU, AJ (USIKU, J concurring):

Introduction

[1] The appellant and another were charged with offences under s 38 (b) read with sections 32, 46, 49 and 51 of the Anti-Corruption Act¹, which prohibits bribery, soliciting or accepting or agreeing to accept gratification by a public officer as a reward to perform or abstain from performing an official act.

[2] They were charged with 7 main and 7 alternative counts for which the appellant was convicted of the main counts for counts 1, 3, 4 and 6 after a full trial in the Walvis Bay Magistrate's Court and sentenced to an effective four (4) years imprisonment, all four counts were taken separately for purposes of sentencing. This happened on 11 April 2018.

Background

[3] On 26 April 2018 the appellant and accused 1 filed notices of appeal against their sentences. However, accused 1 has withdrawn his appeal in the meantime leaving the appellant alone pursuing prosecuting his appeal.

[4] The notice of appeal was prepared and drawn up by the appellant himself without the assistance of a legal representative. It is thus needless to say that the notice of appeal, even though, filed within the time prescribed in Rule 67(1) of the Magistrate's Court Act², did not clearly and specifically state the grounds of appeal. It only states in para 3 thereof that he was appealing against both the conviction and for a reduction of the sentence imposed by the learned magistrate.

¹ Act 8 of 2003.

² Act 32 of 1944.

[5] That being the case, there is no valid appeal filed for the determination by the court, as the notice is defective. (See *Mbarandongo v The State*).³

[6] On 13 March 2020 when it was pointed out to Mr Wessels, counsel for the appellant, that the notice of appeal was defective, therefore, there was no appeal before court for determination, counsel then quickly drafted a letter dated 16 March 2020, attached to it an old notice of appeal of 29 January 2020 with grounds of appeal and filed it on the e-justice system. This was done on 17 March 2020.

[7] An application for condonation of the late filing of the notice of appeal accompanied by a founding affidavit of the appellant confirmed by Mr Wessels, his purported counsel of record, was filed together with the said notice. This second notice of appeal purported to replace the initial notice of appeal filed by the appellant himself.

[8] That could not be correct for counsel to do that. The initial notice of appeal, even though defective for lack of grounds, it was timeously filed. It lacked grounds of appeal only. The right thing counsel was supposed to do was to file an amended notice of appeal (not an additional or supplementary notice of appeal) with proper grounds of appeal which the purported counsel failed to do. It follows therefore, that the initial defective notice filed by the appellant himself is still in force and intact in its original form, as it stands.

[9] In any event, Mr Wessels was not properly instructed by the appellant to note the appeal on his behalf. Counsel was asked by the partner of the appellant to assist the appellant without a mandate from the appellant himself.

[10] Mr Wessels proceeded to draft papers without a special power of attorney from the appellant as provided for in Rule 67(1) of the Magistrate's Court Act 32 of 1944 as amended to authorize him to note the appeal and to act on his behalf.

[11] The provisions of the Rule are mandatory and provide as follows:

³ Case No. CA, 1279/2009 (unreported).

'(1) A convicted person desiring to appeal under section 103(1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based. Provided that if such an appeal is noted by a legal practitioner on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person.' (Emphasis added)

[12] There is no indication on the papers before us why the special power of attorney was not obtained by counsel from the appellant. The consequence thereof is that all papers drawn up and filed by Mr Wessels are of no value and force in the proceedings before us and as such will be ignored.

[13] In that regard, Mr lipinge, counsel for the respondent, in my view, was correct to raise a point in *limine* to the effect that the appellant's notice of appeal is defective for failure to comply with the mandatory requirements set out in rule 67(1) of the Magistrate's Court Act supra. Counsel supports the point raised with case law principles dealing with defective notices of appeal in criminal proceedings.

[14] Regrettably, the appellant did not oppose the point in *limine* raised by the respondent. In those circumstances, the point in *limine* is unopposed.

[15] In the matter of *The State v Kakololo*,⁴ Hannah, J and Maritz, J (as he then was) held that the noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall. In this appeal, the foundation is found wanting and it will fall.

[16] Therefore, and with the above in mind, the point in *limine* raised by the respondent should succeed and the appeal is struck from the roll and considered finalized.

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

⁴ 2004 NR 7 (HC).

- (a) The point in *limine* raised by the respondent is hereby upheld.
- (b) The appeal is struck from the roll and considered finalized.

E P UNENGU
Acting Judge

D N USIKU
Judge

APPEARANCES:

For the Second Appellant:

J Wessels
Stern & Barnard
Windhoek

For the Respondent:

Office

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