

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



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

**JUDGMENT**

**CR No: 09/2020**

In the matter between:

**THE STATE**

And

**EDWARD KAMBUNDU**

**HIGH COURT MD REVIEW CASE NO 207/2020**

*Neutral citation: S v Kambundu (CR 09/2020) [2020] NAHCMD 43 (07 February 2020)*

**Coram:** LIEBENBERG J and SIBEYA AJ

**Delivered:** 07 February 2020

**Flynote:** Criminal Procedure – Plea – Accused convicted without pleading – Gross irregularity – Proceedings nullified.

---

**ORDER**

---

- (a) The conviction and sentence in respect of contempt of court are set aside.
  - (b) The conviction and sentence on the 'main charge' are set aside.
  - (c) This judgment to be brought to the attention of the Chief Magistrate and the Magistrates' Commission.
- 

**JUDGMENT**

---

LIEBENBERG J (concurring SIBEYA AJ):

[1] This is a review in terms of s 302 (1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended.

[2] The background facts of this case are as follows: The accused who allegedly committed theft, was served with a Notice to Appear in Court issued by the police in terms of s 56 of the CPA, according to which he could pay an admission of guilt of N\$300. By default of payment the accused had to appear before court the Magistrates' Court for the district of Rundu on 02 September 2019 on a charge of theft. However, he failed to appear on the said date and a warrant of arrest was issued. The accused was arrested and brought before court on 16 October 2019.

[3] Section 55 of the CPA reads as follows:

'(1) An accused who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).'

(2) The court may. . . unless the accused satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, convict the accused of the offence referred to in subsection (1) and sentence...'

(Emphasis provided)

[4] The provisions under section 55(1) equally apply to a notice to appear issued to the accused in terms of section 56.

[5] Upon enquiring in terms of section 55(2) of the CPA into the accused's failure to appear in court, he gave the explanation that he was in police custody on another matter and only released the next day (the day he had to appear in court). However, no enquiry was made as to the time of his release and whether he could still have appeared before court on the same day. This notwithstanding, the trial magistrate rejected his explanation on the basis that the accused could have come to court after his release from custody. No evidence or counter argument was advanced by the state refuting the accused's explanation for his absence from court on the 2<sup>nd</sup> of September 2019. The accused was then found guilty and sentenced.

[6] A disquieting aspect of the court's inquiry is that the reasons advanced by the accused stood unchallenged and the magistrate's failure to ascertain from the accused the time of his release and whether he could still have appeared in court on the date of his release i.e. whether or not it was still during court hours. If not, then this was an instance provided for in s 55(2) where his failure was not due to any fault on his part, as he was in custody on another matter. It was therefore unreasonable of the court to have

simply brushed aside the accused's explanation and reject it. Thus, the conviction for contempt of court was not sound as the accused gave a reasonable explanation.

[7] Immediately after convicting the accused, the court proceeded to sentence and explain the accused's rights to him. After testifying in mitigation of sentence and the state prosecutor submitting that the offence undermines the administration of justice – clearly referring to the conviction of contempt of court – the court erroneously explained to the accused that the sentence is subject to automatic review. From the record it is clear that at that stage the accused had not been sentenced. The sentence is only reflected in the order made at the end of the proceedings stating a fine of N\$1 500 or 4 (four) months' imprisonment.

[8] More disturbing is an entry made on the charge sheet that the accused on the 'main charge' is fined N\$1 000 or 6 (six) months' imprisonment. This could only relate to the offence of theft charged and for which the accused had to appear in court. At no stage of the proceedings was the charge put to the accused or did he plead thereto. Section 105 of the CPA states as follows:

'The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77 and 85, be required by the court forthwith to plead thereto in accordance with section 106.'

(Emphasis provided)

[9] It would appear that the magistrate convicted the accused on the basis that there was an admission of guilt set at N\$300 which he could have paid. However, that could not form a basis for a plea, as the accused was required to unequivocally tender a plea to his charge. To convict an accused person without such person having pleaded to the charge preferred against him or her and not afforded the opportunity to defend the charge, constituted a gross irregularity, nullifying the proceedings.

[10] For the afore-going reasons we are of the view that this is an instance where the provisions of s 304(2)(a) of the CPA should be disposed of as the accused will be prejudiced if reasons by the magistrate are first requested, because it is clear that the conviction is not in accordance with justice.

[11] In the result, it is ordered:

- (a) The conviction and sentence in respect of contempt of court are set aside.
- (b) The conviction and sentence on the 'main charge' are set aside.
- (c) This judgment to be brought to the attention of the Chief Magistrate and the Magistrates' Commission.

---

**J C LIEBENBERG**

**JUDGE**

---

**O SIBEYA**

**JUDGE**