



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 23/2015

In the matter between

**ALEX MUTAKALIMO LIZAZI**  
**SUSANNA SHANGELO HAMATA**

**FIRST APPELLANT**  
**SECOND APPELLANT**

and

**THE STATE**

**Neutral citation:** *Lizazi v State* (CA 23/2015) [2020] NAHCMD 91  
(13 March 2020)

**Coram:** CLAASEN, J et MILLER, AJ

**Heard:** 21 February 2020

**Delivered:** 13 March 2020

**Flynote:**

Appeal – incomplete record of trial proceedings – absence of cross-examination of a state witness – reconstruction of missing portion of evidence not possible - record inadequate for adjudication of appeal – proceedings set aside on account of absence of material portion of evidence.

**Summary:**

The appellants were convicted and sentenced in the district court in Windhoek on three counts of contravening section 43(1) of the Anti-Corruption Act 8 of 2003. The essence of the charges were that the accused persons, who were employed as recruiting officers acted in concert to corruptly and un-procedurally recruit their relatives into the Namibian Police. The appellants appealed against the convictions and sentences respectively.

A portion of the trial evidence was not recorded as the tape was blank. Magistrate requested to reconstruct the missing evidence. Considerable time appears to have been spent on efforts to reconstruct the evidence, but it was to no avail. None of the role-players were able to find their notes. The missing evidence constituted cross-examination of one of the state witnesses.

Question before court whether the missing portion was material for the appeal court to assess whether the convictions were correct.

Held – that the importance of cross-examination of a material witness cannot be underscored. It serves as an opportunity to test the veracity of the testimony and how it compares with that of the other witnesses on the same aspects.

Held – that the appeal court cannot improvise on the whim of an idea. The court was not placed in a position to know which way the evidence swayed in cross-examination and how it compared with that of the other witnesses.

Held – considering the lacuna in the evidence, the court record is not adequate for an objective assessment of the question of whether the convictions of the appellants were in order.

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**APPEAL JUDGMENT**

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- a) The appeal is upheld.
- b) The convictions and the sentences are set aside.

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## JUDGMENT

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CLAASEN J (MILLER AJ concurring)

[1] This appeal originates from offences allegedly committed by the appellants during September 2007. The appellants were charged in the District Court in Windhoek with three counts of contravening section 43(1) of the Anti-Corruption Act 8 of 2003. The essence of the charges was that the accused persons, who were employed as recruiting officers acted in concert to corruptly and unprocedurally recruit their relatives into the Namibian Police.

[2] Evidence on the matter commenced on 8 April 2009 and after a drawn out trial the accused were convicted as charged on 17 April 2013. The matter was postponed to the next year for submissions on sentence, which was imposed on 30 April 2014.

[3] On 22 May 2014 a notice of appeal was filed. The grounds of appeal are set out below:

“(a) The learned Magistrate erred in not properly, fully and fairly analyse the totality of evidence in reaching its conclusion;

(b) The learned Magistrate erred as he should have had careful regard to the evidence of Chief Inspector Kashikumwa read together with the evidence of the Inspector General Ndeitunga he would have found that the accused’s version is reasonably possibly true particularly to the fact that Commissioner Endjala was informed and knew about the application forms of the three recruits in question;

(c) The learned Magistrate erred in not finding that the State did not beyond reasonable doubt prove the accused’s version as false. The court regard being to the poor, inconsistent and contradictory evidence of the State’s witnesses should have found that the State did not prove all the elements of the offense.

(d) The court erred in not finding that the appellants did not act with the required criminal *mens rea*.”

[4] The matter was set down for appeal for the first time on 23 January 2017. On that date it was struck from the roll with an order that the Clerk of Court reconstruct the record.

[5] Subsequent thereto it was again enrolled on 30 September 2019, but was referred back to the review roll due to the incomplete record.

[6] It is apparent that the efforts to reconstruct and submit a complete court record did not yield the desired results. This was evident from an affidavit by the Clerk of Court, an affidavit by counsel for the first appellant, a letter from the trial magistrate as well as correspondence between the role-players.

[7] On 15 October 2019 the matter was postponed for the allocation of a hearing date. By the time the matter was heard it no longer turned on the merits, but on the missing portion of the court record.

[8] It is common cause that the whole of tape 4 is blank, which tape contained the cross-examination of one of the witnesses for the prosecution, Inspector General Sebastian Ndeitunga.

[9] The issue before the court is whether the missing evidence is material for the adjudication of the appeal.

[10] It was submitted by Ms Mbaeva on behalf of the first appellant that the portion of the missing record constitutes the basis for the grounds of appeal. Ms Mbaeva argued that it is material and that without it the appeal court will not be able to adequately decide the matter.

[11] Counsel for the second appellant, Mr Mhata made common cause with the arguments by counsel for the first appellant, by re-iterating that the present court record is not an adequate appeal record.

[12] Counsel for the respondent, Ms Shikerete urged the court to have regard to the the totality of the evidence. She advanced that though the cross-examination of

Inspector General Ndeitunga was missing, that the questions in re-examination can give an idea of what was asked in cross-examination. It was her view that the evidence of Inspector General Ndeitunga is not crucial. She referred the court to the matter of *Katoteli and 1 other v The State*<sup>1</sup> wherein it was stated that an appeal record need not be a perfect record, but it must be adequate.

[13] The prosecution called several witnesses, namely Commissioner Nicolaas Endjala, the head of Human Resources in the Namibian Police, Commissioner Abed Kashihakumwa who employed in the Recruitment Office of the Namibian Police, Constable Jacob Muzamae who was deployed at Kahenge Police station, Sergeant Cynthia Salunsando who was employed in the Namibian Police Band Unit, Sergeant Naomi Uuwanga stationed at the time at the Dordabis Police barracks, and the Inspector General in the Namibian Police, Sebastian Ndeitungwa.

[14] Both appellants testified in their defence. The crux of the defence was that the Inspector General had a discretion to deviate from the recruitment policy in marginalised cases, that the management knew of the three recruits and that their recruitment was defended by the Inspector General in a letter that he authored.

[15] It was in this respect that counsel for second appellant's view was that the evidence by Inspector Endjala and that of Inspector General Ndeitunga as the principal role-players was inconsistent with each other.

[16] It is trite that a defective court record does not automatically result in a convicted accused walking away free. When there is an incomplete court record in the District Court, the Magistrate will always be the first port of call for the Clerk of Court who is tasked with reconstruction of the record. That is because a presiding officer is duty bound to keep a proper court record. That is stipulated in section 4(1) of the Magistrate's Court Act<sup>2</sup> as follows:

'Every court shall be a court of record.'

[17] In addition, rule 66(1) of the Magistrate Court Rules provides that:

'The plea and explanation or statement, if any, of the accused, the evidence orally given, any

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<sup>1</sup> CA 201/2004 delivered on 26 September 2008

<sup>2</sup> Act 32 of 1944 as amended

exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of the proceedings, may be noted in shorthand (hereinafter also referred to as "shorthand notes") either verbatim or in narrative form or recorded by mechanical means.'

[18] Rule 66(5) of the Magistrate Court Rules furthermore reads that:

'Subject to the provisions of subrule (6), any shorthand notes and any transcript thereof, certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question.'

[19] It is disconcerting that the notes of the Magistrate, who has since retired, could not be retrieved. In the same vein reconstruction of the record was not possible despite a meeting between the magistrate, prosecutor and counsel for the appellants.

[20] In turning to the issue at hand, I disagree with counsel for the respondent that the evidence of the Inspector General, who is the principal official in command of the Namibian Police was not crucial. Furthermore the importance of cross-examination of a material witness cannot be overstated as it serves as an opportunity to test the veracity of testimony and how it compares with the other witnesses. At times, a solid account of events may surface in evidence in chief, just to be dismantled during cross-examination.

[21] The problem in the matter before the court, is that the court does not know which way the evidence swayed in the cross-examination that is not before court and how it tallied with that of the other witnesses. The court cannot subscribe to counsel for the respondent's proposal to get an idea from re-examination, as that does not paint a complete picture. The judgment of the court *a quo* does little to allay the concerns of this court.

[22] In *Soondaha v The State*<sup>3</sup> at para 29 it was stated:

'The court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirections have any merit. This court is not in a position to do that without a proper record or proper reconstructed record of those

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<sup>3</sup> (CA 28/2013) [2016] NAHCNLD 76 (22 August 2016)

proceedings. The missing record in relation to cross-examination may be material to the appeal and in my view to decide the appeal in the absence thereof may be detrimental to both the appellants and the respondent.'

[23] I associate myself with the sentiments expressed in that matter. Considering the lacuna in the evidence, the present court record is not adequate for an objective assessment of the question of whether the convictions of the appellants were correct.

[24] A last aspect that complicated the reading of the matter, concerns the confusing arrangement of parts of the record. The judgment was inserted between the testimony of the prosecution and the defence and the transcript leaps from the testimony of the last defence witness to submissions on sentence, instead of submissions before judgment.

[25] The court expressed itself on numerous occasions on the responsibility of the Clerk of Court and the Magistrate to collaborate in reconstruction so as to provide a proper appeal or review record. Clearly the directions were in vain in this matter which does not reflect well on the officials who dealt with this matter.

[26] In the result it is ordered:

- (a) The appeal succeeds.
- (b) The convictions and sentences are set aside.

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C CLAASEN  
JUDGE

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K MILLER  
ACTING JUDGE

## APPEARANCES:

1ST APPELLANT: Ms Mbaeva  
Brockerhoff & Associates

2ND APPELLANT: Mr Mhata  
Sisa Namandje & Co. Inc.

RESPONDENT: Ms. Shikerete  
Office of the Prosecutor General