

**REPUBLIC OF NAMIBIA**



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

**JUDGMENT**

CASE NO.: HC-MD-CRI-APP-CAL-2019/00020

In the matter between:

**AMBROSIUS KATATA**

**APPLICANT**

and

**THE STATE**

**Neutral Citation:** *Katata vs S* (HC-MD-CRI-APP-CAL-2019/00020) [2020] NAHCMD 94  
(13 March 2020)

**Coram:** USIKU, J and UNENGU, AJ

**Heard:** 02 March 2020

**Delivered:** 13 March 2020

**Flynote:** Criminal Procedure – Appeal – Against conviction and sentence – Late filing of notice of appeal – Condonation application defective – Affidavit for condonation refers to condonation for leave to appeal in terms of s 316 (1) of the Criminal Procedure

Act, 51 of 1977 – Point *in limine* – Respondent raising points *in limine* that affidavit does not give reasonable explanation for the delay.

**Summary:** The appellant and his co-accused who were charged with murder were convicted and sentenced in the Regional Court to an imprisonment period of 18 years. The appellant is now appealing against both his conviction and sentence on various grounds. The appellant, however lodged his appeal seven months plus outside the period prescribed by law for noting an appeal. That being the case, the respondent raised points *in limine* to the effect that the delay for the late filing of the appeal was not properly explained and that the grounds of appeal are not clear and specific as required by Rule 67(1) of the Magistrate’s Court Act 32 of 1944.

Held – that the delay to file the notice of appeal timeously is not properly explained in the affidavit.

Held – further that the appellant also failed to state in the affidavit that the matter enjoys prospects of success on appeal, therefore condonation should be granted to him.

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### ORDER

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- a) The points *in limine* by the respondent are upheld.
  - b) The matter is struck from the roll and is considered finalized.
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### APPEAL JUDGMENT

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**UNENGU, AJ (USIKU, J concurring):**

[1] This matter concerns an appeal by the appellant against his conviction and sentence. The appellant and his co-accused (accused 1) were arraigned in the Regional Court sitting at Katutura in the division of Windhoek on a charge of murder. He was legally represented by Mr Coetzee appointed by the Directorate of Legal Aid. Both the

appellant and his co-accused pleaded not guilty to the charge preferred against them, but, after a trial, were convicted of murder with direct intent (*dolus directus*) and sentenced to an imprisonment period of 18 years imprisonment on 18 June 2018. The appellant is now appealing against the conviction and sentence on the following grounds:

**1. AD. CONVICTION**

- 1.1 That the court a quo erred in Law and or on the facts in convicting appellant and deciding that the state proved beyond reasonable doubt and on evidence presented that the was a stabbing to the body of the deceased.
- 1.2 That the Court a quo erred in law and or facts in that it ruled that the evidence presented by the state proves beyond reasonable doubt that 2<sup>nd</sup> appellant perpetrated the respective count of murder and convicted appellant accordingly.
- 1.3 That the Court a quo erred in law and or facts in convicting 2<sup>nd</sup> Appellant substantially replying on the evidence of the state witness, notwithstanding the fact that the evidence of the state witness was unimpressive, which evidence was riddled with contradictions, lies and inconsistencies.
- 1.4 That the Court a quo erred in convicting 2<sup>nd</sup> Appellant further relying on evidence of the State pertain to murder, which evidence was full of contradictions, inconsistencies and improbabilities.

Kindly further take notice that the principle grounds of appeal against 2<sup>nd</sup> Appellant's sentence are inter alia:

**2. AD. SENTENCE**

- 2.1 That the sentence of 18 years imprisonment in respect of murder is shockingly inappropriate and startling heavier given the circumstances of the case in particular.
- 2.2 That the sentence of 18 years imprisonment was imposed after the court gave undue weight to the seriousness of the offence and retributive urges of the community at the expense of reformatory sentencing consideration and other factors in favour of 2<sup>nd</sup> Appellant.
- 2.3 That the sentence of 18 years imprisonment in respect of murder is inconsistency with other sentences in Namibia on more or less the same facts.
- 2.4 That the 18 years imprisonment term imposed by the Court a quo in the prevailing circumstances is shockingly inappropriate.
- 2.5 That the court a quo unjustifiably over emphasised the seriousness of the offence at the expense of mitigating circumstances.'

[2] The notice of appeal was filed at the Magistrate's Court Windhoek on 24 January 2019, seven months and five court days from the date he was sentenced, instead of within fourteen days provided for in rule 67(1) of the Magistrate's Court Act<sup>1</sup> (the Act).

[3] The rule in peremptory terms also provides that the notice of appeal has to be accompanied by clear and specific grounds of appeal – not vague or ambiguous grounds.

[4] In the instant matter, the appellant has filed his notice of appeal and grounds for appeal outside the prescribed time, therefore, has to give a reasonable explanation for the failure in noting the appeal timeously and to convince the court that the appeal enjoys prospects of success on appeal for this court to hear the merit of the appeal to grant condonation.

[5] At the hearing, Mr Lisulo, counsel for the respondent, raised preliminary points against the appeal on the grounds that the appeal was filed late on 24 January 2019 and it does not specifically and clearly set out the grounds of appeal against his conviction and sentence.

[6] In support of his points, counsel referred to the case of *S v Horne*<sup>2</sup> where Diemont, J said that the Rule provides in simple unambiguous language that the appellant must lodge his notice in writing in which he must set out clearly and specifically the grounds on which the appeal is based and that he must do this for good reason.

[7] Diemont, J further said that the grounds must inform the magistrate what the issues are which are being challenged so that he can deal with them in his reasons for judgment and counsel for the State to know what the issues are to properly prepare and present argument, which will assist the court of appeal in its deliberations as well as for the court itself to be fore-warned of the grounds so that it knows what portions of the record to concentrate on and what preparation, if any, it should make in order to guide and stimulate a good argument in court.

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<sup>1</sup> Act 32 of 1944.

<sup>2</sup> 1971 (1) SA 630 (c) at 631H.

[8] Counsel further referred the court to judgments of this court in *S v Wellington*;<sup>3</sup> *S v Gey van Pittius and Another*;<sup>4</sup> and *S v Lukume*.<sup>5</sup> He furthermore contended that where a notice of appeal does not comply with the provisions of rule 67(1) or where it does not contain any grounds upon which the appeal is based, as is the case in this matter, is not a notice of appeal, therefore, should be struck from the roll.

[9] It is common cause that the appellant filed the application for condonation which in paras 2 and 3 thereof, he acknowledges that he was aware that he must file his notice of appeal timeously because, he says, a family member of his a certain Mr Augustinus Vetira assured him that a private legal practitioner would be funded to represent him as the mandate of his legal practitioner funded by the Legal Aid Directorate has ended at the conclusion of his trial.

[10] Despite that awareness though, the appellant only filed his notice of appeal against the conviction and sentence on 24 January 2019, seven months and five days after sentencing.

[11] It is trite law that an application for condonation of the late noting of the appeal be filed accompanied by an affidavit in which the applicant (appellant) must state the reasons for the delay. The explanation must be reasonable and *bona fide*.

[12] In this matter no affidavit explaining the delay was filed by the appellant. Instead, the appellant filed “a verifying affidavit” purporting to verify the application for condonation of the late filing of the notice for the leave to appeal application in terms of s 316(1) of the Criminal Procedure Act,<sup>6</sup> stating that he waited for more than seven months for Augustinus Vetira to come back to him to tell him that unfortunately the family was unable to raise the funds asked by the legal practitioner who could have conducted his legal representation.

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<sup>3</sup> 1990 NR 35 (HC).

<sup>4</sup> 1990 NR 20 (HC) at 22H-I.

<sup>5</sup> 2000 NR 115 (HC) at 116-117.

<sup>6</sup> Act 51 of 1977.

[13] The appellant never bothered to mention what steps he himself had taken in the seven months to secure the assistance of either an own funded or a legal aid funded legal practitioner to assist him with his appeal. He also for seven months failed to enquire from Mr Augustinus Vetira why it took him so long to find a legal practitioner for him.

[14] The confirmatory affidavit of Mr Vetira is defective because the official stamp of the Commissioner of Oaths is absent from the purported confirmatory affidavit. The confirmatory affidavit is not of assistance to the appellant even if it was duly stamped with an office stamp of the Commissioner of Oaths because it does not confirm the content of the verifying affidavit of the appellant but part of what is contained in the notice of appeal. Therefore, no explanation for the delay was advanced. Similarly, nowhere in the purported affidavit had been mentioned that the matter enjoys prospects of success therefore, condonation should be granted.

[15] In any event the application for condonation filed by the appellant is not an application for condonation for the late filing of the appeal but for an application to condone the late filing of the notice for leave to appeal in terms of s 316(1) of the Criminal Procedure Act, which application the appellant did not file. The court has no such an application for consideration before it.

[16] Before us, is a notice to appeal the conviction and sentence. Ms Mbaeva, counsel for the appellant, did not argue an application for leave to appeal. So did Mr Lisulo for the State as well. What was argued before us is an appeal against the conviction and sentence.

[17] An application for leave to appeal for which condonation was sought by the appellant, is not required in appeal by an accused person. It is also not necessary for the court to consider the second leg of enquiry, namely the prospects of success because the appellant has failed to show that his appeal enjoys prospect of success on both the conviction and the sentence on the grounds advanced in the notice of appeal.

[18] Accordingly the following order is made:

- a) The points *in limine* by the respondent are upheld.
- b) The matter is struck from the roll and is considered finalized.

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E P UNENGU  
Acting Judge

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D N USIKU  
Judge

APPEARANCES:

For the Appellant:

L Mbaeva

Of Brockerhoff & Associates Legal Practitioners

For the Respondent:

Adv Lisulo

Of the Prosecutor-General's Office