

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Sikunga Charles Mwilima</i>	Case No: CR 38 /2021
High Court MD Review No: 253 / 2021	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	Delivered on: 10 May 2021
Neutral citation: <i>S v Mwilima</i> (CR 38 /2021) [2021] NAHCMD 221 (10 May 2021)	
It is hereby ordered that: a) The conviction is in accordance with justice and confirmed. b) The sentence imposed is confirmed but amended to read as follows: “A fine of N\$ 3000.00 or 18 months’ imprisonment of which N\$ 1000.00 or 6 months is suspended for a period of 3 years on condition that the accused is not convicted of assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, committed during the period of suspension.”	

Reasons for the order:

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977.

[2] The accused appeared in the magistrate's court for the district of Katima Mulilo where he faced a charge of assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, the complainant being the mother of the accused.

[3] The accused pleaded guilty to the charge and the court proceeded to question him in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 as amended, and he was subsequently found guilty and sentenced to a partly suspended sentence subject to certain conditions. The phrasing and conditions of suspension of the sentence imposed will be addressed.

[4] The query to the learned magistrate pointed out the observation that the record submitted for review is in shambles and arranged in no chronological order. On that basis a request in the query was that a proper record be submitted, which now has been done. The learned magistrate was directed to always check the record of proceedings to ensure that it meets the requirements set out in the Codified Instructions.

[5] Another issue raised in the query is whether the charge put to the accused when he pleaded constituted an offence. In response the learned magistrate stated that there was an error in the typed record, which now has been rectified in the resubmitted record.

[6] In relation to the observations outlined above, it is significant to note that various judgments of the High Court have reiterated that it is very important for the magistrate to proof read the record before it is sent for review.¹ In light of the observations noted above, the learned magistrate is reminded of what was held by Damaseb JP when he

¹ *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019)

dealt with the issue of records in appeal matters in the unreported case of *Coetzee v S*.² I find the same approach to be applicable to review matters. In that case he found that the record was in shambles, and stated that the record of proceedings must be prepared in accordance with '*Chapter XIII of the Codified Instructions: Clerk of the Criminal Court*' issued by the Permanent Secretary for Justice to create certainty about proceedings in fairness to an accused and the State. He further held that the ultimate responsibility rests on the presiding magistrate to ensure that the record is a correct reflection of proceedings that took place before him or her.³

[7] The learned magistrate is also reminded of what was held by Van Niekerk J in relation to the preparation of a record for review in *S v Kamudulunge*,⁴ as summarized in the headnote at p 433 at G-H: 'Headnote: The clerk of the court who prepares the cases for review and the magistrate who takes final responsibility for the preparation of the record should take more care when these tasks are executed. The prosecutor should take care that the information on the charge-sheet corresponds with an annexure to the charge-sheet. Alternatively he/she should draw the line through the initial charge indicated on the charge-sheet and write 'As per annexure A'.'

[8] Regarding the suspended sentence imposed, the magistrate was asked in the same query if the condition of suspension is not too wide. In response he conceded that it is wide and vague.

[9] The sentence imposed by the learned magistrate reads as follows:

"A fine of N\$ 3000. 00 (three) thousand or 18 (eighteen) months imprisonment of which N\$ 1000.00 (one) thousand or 6 (six) months is suspended for a period of 3 (three) years on condition that accused is not convicted of the same offence or similar offence committed during the period of suspension."

² *Coetzee v S* (CA 52/2009) [2011] NAHC 72 (11 March 2011).

³ See also *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).

⁴ *S v Kamudulunge* 2007 (2) NR 608 (HC)

[10] The magistrate proposed that the sentence be amended to read as follows:

'A fine of N\$ 3000.00 or 18 months' imprisonment of which N\$ 1000.00 or 6 months' is suspended for a period of 3 years on condition that the accused is not convicted of assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003, committed during the period of suspension.'

[11] The condition of suspension is indeed too wide, vague and not properly framed; hence the concession by the learned magistrate is properly made. In the current form and framing, it is difficult to ascertain the same or similar offences being referred to as a condition of suspension where there is an indefinite list of offences that could be the same or similar. The condition of a partly or wholly suspended sentence must be clear and specific to avoid ambiguity. For the aforesaid reasons the sentence will need to be amended.

[12] In the result, it is ordered:

- a) The conviction is in accordance with justice and confirmed.
- b) The sentence imposed is confirmed but amended to read as follows:

'A fine of N\$ 3000.00 or 18 months' imprisonment of which N\$ 1000.00 or 6 months is suspended for a period of 3 years on condition that the accused is not convicted of assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, committed during the period of suspension.'

J C LIEBENBERG JUDGE	C CLAASEN JUDGE