

# REPUBLIC OF NAMIBIA



## IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

### REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Regina Kwando</i>	<b>Case No:</b> CR 44/2021
<b>High Court MD Review No:</b> 1411/2020	<b>Division of Court:</b> Main Division
<b>Review Judgment:</b> Honourable Ms. Justice Dinah Usiku et Honourable Ms. Justice Claasen	<b>Delivered on:</b> 20 May 2021
<b>Neutral citation:</b> <i>S v Kwando</i> (CR 44/2021) [2021] NAHCMD 241 (20 May 2021)	
<b>The order:</b>  1. The conviction of the accused on a charge of assault with intent to do grievous bodily harm is set aside and substituted with a conviction on a charge of assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003  2. The sentence is confirmed, but altered to read as follows:  Accused to pay a fine of N\$1500,00 or 8 months imprisonment wholly suspended for 5 years on the condition that the accused is not convicted of the offence of assault by threat, committed during the period of suspension.	

**Reasons for order:**

USIKU J (concurring CLAASEN J)

[1] The accused pleaded guilty to a charge of assault with intent to do grievous bodily harm.

[2] During the questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 the accused when asked why he was pleading guilty to the charge, gave a lengthy explanation whereafter the Court entered a plea of not guilty in terms of s 113 of the Criminal Procedure Act.

[3] The complainant was called to testify and informed the Court that the accused is her biological daughter. On the date of the incidents he picked up an axe and run after her. She felt threatened and was scared. The accused then left her house.

[4] A query was directed to the magistrate to explain on what basis he convicted the accused person on a charge of assault with intent to do grievous bodily harm to which the accused had tendered a plea of guilty. The magistrate conceded that from the evidence adduced by the complainant was that the accused only lifted an axe and chased after her.

[5] That would constitute an offence of assault by threat. There was no evidence of the complainant having actually sustained any injury.

[6] In terms of s 270 of the Criminal Procedure Act 51 of 1977, it provides.

“If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but prove the commission of an offence which by reason of the essential elements of that offence is included in the offence

so charge, the accused may be found guilty of the offence so process.”

[7] It therefore follows that the magistrate erred in convicting the accused of the offence of assault with intent to do grievous bodily harm. Instead the evidence proves the offence of assault by threat.

[8] The learned magistrate conceded and such concession was in fact correctly made.

[9] As a result the following orders are made:

1. The conviction of the accused on a charge of assault with intent to do grievous bodily harm is set aside and substituted with a conviction on a charge of assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

2. The sentence is confirmed, but altered to read as follows:

Accused to pay a fine of N\$1500,00 or 8 months imprisonment wholly suspended for 5 years on the condition that the accused is not convicted of the offence of assault by threat, committed during the period of suspension.

<b>D USIKU</b> <b>JUDGE</b>	<b>C CLAASEN</b> <b>JUDGE</b>