

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION
HELD AT WINDHOEK**

REVIEW JUDGMENT

Case No.: CR 33/2022

In the matters between:

THE STATE

v

MAURISIUS MARUNGU

HIGH COURT MD REVIEW CASE REF NO: (577 /2022)

THE STATE

v

FAUSTINO NAILISI KAHANA

HIGH COURT MD REVIEW CASE REF NO: (578 /2022)

THE STATE

v

MBAKU KAPWITA

HIGH COURT MD REVIEW CASE REF NO: (580/2022)

THE STATE

v

KILLEBY KUFERERA

HIGH COURT MD REVIEW CASE REF NO: (581 /2022)

THE STATE

v

JUSICHO KASENGE

HIGH COURT MD REVIEW CASE REF NO: (582 /2022)

Neutral citation: *S v Marungu ; S v Kahana ; S v Kapwita; S v Kuferera; S v Kasenge ; (CR 33/2022) [2022] NAHCMD 198 (19 April 2022)*

Coram: LIEBENBERG J *et* SHIVUTE J

Delivered: **19 April 2022**

Fly note: Criminal procedure – charge – Accused persons convicted under s 12(1) and (4) of Immigration Control Act, 7 of 1993 – Charge lacking essential elements of the

offence created therein – Formulation of the charge to follow the words of the Act which creates the offence – Charge does not disclose an offence – Convictions and sentences set aside on review

Summary: On a request for special review, the magistrate conceded after considering previous decisions of this court that the charges as formulated did not contain the essential elements of the offences created by s12(1) and (4) of the Immigration Control Act 7 of 1993. Formulation of the charge should follow the words of the Act which creates the offence. The conviction and sentence are set aside.

ORDER

The convictions and sentences in the above stated cases are hereby set aside.

SPECIAL REVIEW JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The above itemised cases were sent to this court for special review. They were presided over by the same magistrate sitting in the district of Rundu and they contain the same issue. The special review comes as a result of the learned magistrate's concession that after reading a judgment of this court, it appears that the accused persons in all five review cases were not correctly charged under section 12(1) and 12(4) of the immigration control Act.

[2] The special review cover sheet stated the following:

'1. Honourable reviewing judge. The following matters below are sent on review having read S v Madume (CR 8/2022) [2022] NAHCMD 46 (11 February 2022). I am of the view that the proceedings are not in accordance with justice and should be set aside.

1.1 Faustino Nailisi Kahana ; Magistrate serial number 37/2021

1.2 Maurisius Marungu ; Magistrate serial number 41/2021

1.3 Mbaku Kapwita; Magistrate serial number 50/2021

1.4 Jusicho Kasenge; Magistrate serial number 55/2021

1.5 Killeby Kuferera; Magistrate serial number 53/2021

2. All these accused persons were charged with entry into Namibia without an unexpired passport bearing a valid visa or authority, contravening section 12 (4) read with sections 1, 2 and section 12 (1) of the immigration control Act 7 of 1993.

3. The charge did not contain the allegations that the accused persons failed on demand by an immigration officer, to produce to such an immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorised thereto by the Government of Namibia nor did the charge contain the allegations that the accused persons were found in Namibia after having been refused entry into Namibia under the provisions of section 12 (1).

4. According to Mandume, these are essential elements of the charge and the absence of such allegations from the charge entails that the accused persons were not properly charged and the charges were objectionable as provided for in section 85(1)(a) of the Criminal Procedure Act.

5. During the questioning of the accused persons, I did not ask the accused to explain whether or not the production of an unexpired passport bearing a valid visa or endorsement by an authorised person was demanded from any of them by the Immigration officer nor did I ask them whether they were denied entry into Namibia.

6. All those matters listed above were finalised during 2021 and could not be send on review pursuant to the provisions of section 303 of Act 51 of 1977 for the following reasons:

- 6.1 After reading the Mandume case I approached our administrative officer and we removed all the immigration cases finalised from the box that dealt with the same issue as in the Mandume matter. I requested him to type them for me in order for me to send them on special review.
- 6.2 The typing took a bit long because he is the only administrative officer we have .There has been an unreasonable delay in the appointment of new administrative officers since 2020.
- 6.3 Currently we have one administrative officer who is typing all cases for the three courts at the main station and three additional periodical courts. Besides typing of records, he also has other administrative functions at the station.
- 6.4 May the convictions and sentences be set aside in all matters if the honourable reviewing judge concurs with me.'

[3] From the reading of the record, the accused in all 5 review cases were charged more or less similarly, for entry into Namibia without an unexpired passport bearing a valid visa or authority in contravention of section 12(1), read with sections 1, 2, 2(4) (b) and 12(4) of the Immigration Control Act, Act 7 of 1993. The charges essentially read that upon or about a particular date and location, not being a Namibian citizen or a person domiciled in Namibia. The accused did wrongfully and unlawfully enter Namibia without an unexpired passport;

(a) bearing a valid visa, or
(b) an endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia, or without a document containing:

- (a) Statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and
(b) The particulars of such passport.

[4] In all the review cases, the accused persons pleaded guilty to their respective charges where after the court invoked the provisions of section 112(1)(b) of the CPA and convicted the accused persons as charged. They were thereafter sentenced.

[5] Section 12 (1) and 12(4)¹ read as follows:

'Passports and visas

(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

(2) ...

(4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[6] Section 12(4) creates two offences: (a) entering Namibia in contravention of the provisions of subsection (1) of s 12 of the Act; and (b) being found in Namibia after having been refused to enter Namibia in terms of that subsection. In order to be convicted under s 12 (4), the charge must allege that the accused was found in Namibia after having been refused entry into Namibia under the provisions of s 12 (1), an essential element of subsection (4). The aforesaid position was echoed in cases such

¹ Immigration Control Act 7 of 1993

as in *S v Mandume*² , *S v Ngono*³; *S v Mushanga*; *S v Nghishidimbwa*⁴ , *S v Nkomo*⁵, *S v Katiti*⁶ .

[7] The charge in this instance, did not contain the allegations that the accused person was found in Namibia after having been refused entry into Namibia under the provisions of s 12 (1). This is an essential element of the charge. The absence of such allegation entails that the accused was not properly charged. The charge does not meet the requirement set out in s 84 (3) of the Criminal Procedure Act, which requires the formulation of the charge to follow the words of the Act which creates the offence, thus rendering the charge objectionable in terms of section 85(1)(a) of the Criminal Procedure Act.

[8] I endorse the sentiments expressed by Siboleka J in *S v Okuani*⁷, where he stated that a charge in terms of a statute must cite the actual elements of the offence contravened as contained in the enabling section. A failure to do so may render the charge defective.

[9] The concessions by the learned Magistrate are properly made in that the charges did not contain the necessary wording to constitute offences committed in terms of the statutory provisions of s 12(4) read with s 12(1) of the Immigration Control Act. As a result, such proceedings cannot be confirmed to have been in accordance with justice.

[10] In the result, it is ordered that:

The convictions and sentences in the above stated cases are hereby set aside.

² *S v Mandume* (CR 8/2022) [2022] NAHCMD 46 (11 February 2022).

³ *S v Ngono* 2005 NR 34 (HC).

⁴ *S v Mushanga; S v Nghishidimbwa* CR 55/2019) [2019] NAHCMD 295 (20 August 2019).

⁵ *S v Nkomo* 2009 (1) NR 352 (HC).

⁶ *State v Fernando Katiti* Case No .CR 12/2011 (unreported) delivered on 24 March 2011.

⁷ *S v Okuani* CR 07/2013) [2013] NAHCMD 32 (05 February 2013).

NN SHIVUTE
JUDGE

JC LIEBENBERG
JUDGE