

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Billman Kalimukwa</i>	<b>CR No:</b> 126/2022
<b>High Court MD Review No:</b> 1514/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> January J et Usiku J	<b>Delivered on:</b> 04 April 2023
<b>Neutral citation:</b> <i>S v Kalimukwa</i> (CR 126/2022) [2023] NAHCMD 166 (04 April 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. If the accused paid a fine, it should be refunded to him.</li></ol>	
<b>Reasons for order:</b>	
January J (Usiku J concurring):  [1] This review matter stems from the Katima Mulilo Magistrates Court and is submitted in terms of s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	

[2] The accused was charged with contravening s 34(3) read with s 1, 24, 26, 27, 28, 29. 34(2) and (3) of the Immigration Control Act 7 of 1993. The charge reads that in or about the 16<sup>th</sup> day of June 2022, at or near Sangwali area in the district of Katima Mulilo the said accused being not exempted under s 35, was found in Namibia without any permit authorising him to be in Namibia issued under s 26 (residence permit), s 28 (employment permit) and s 29 (visitors entry permit), study permit and failed to present himself to an immigration officer or to an officer of the Ministry as required by s 34(1).

[3] The accused admitted that he was found in Namibia without the necessary permits and without having presented himself to an immigration officer or an officer of the Ministry. He was not questioned and did not admit to the unlawfulness and wrongfulness thereto. The magistrate however proceeded and directed his questioning to the entering of the accused into Namibia at a place other than a port of entry, the unlawfulness and wrongfulness thereto. He was never charged with such an offence.

[4] Consequently, I directed the following query to the learned magistrate:

a) 'The charge relates to the fact that accused person was unlawfully found in Namibia in contravention of s 34(3) of the Immigration Control Act 7 of 1993. The magistrate must please explain the relevance of questions relating to when the accused unlawfully entered Namibia at a place other than a port of entry.

b) Further, how the magistrate was satisfied that the accused appreciated the unlawfulness of having been found in Namibia without the necessary required documents whereas the accused only admitted to his unlawful entry?'

[5] The Magistrate responded as follows:

a) 'Paragraph 1: I accept that the questions to be posed to the accused must be relevant

to the charge put to the accused. Now that the Review judge has enlightened me and directed me to see my glaring error and I am fully repentant and I endeavour not to repeat it.

b) Paragraph 2: I accept that it was necessary to establish whether the accused appreciated the wrongfulness of his offence. Now that the Review judge has enlightened me and directed me to see my glaring error and I am fully repentant and I endeavour not to repeat it....'

[6] It is common sense that the questioning in terms of s 112(1)(b) of the CPA must be relevant and purposeful to establish whether the essential elements of the offence the accused is charged with are admitted. Otherwise, the magistrate cannot be satisfied that an accused admits to the commission of the crime.

[7] In the matter at hand, it is clear that the accused only admitted the unlawfulness of his entry into Namibia, however, he did not admit the unlawfulness of him being found in Namibia without the necessary permits or authorization as appearing in the charge sheet. The concession is properly made. The conviction and sentence therefore, fall to be set aside.

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

1. The conviction and sentence are set aside.
2. If the accused paid a fine, it should be refunded to him.

<b>H C JANUARY</b>  <b>JUDGE</b>	<b>D USIKU</b>  <b>JUDGE</b>