

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION

HELD AT WINDHOEK

APPEAL JUDGMENT

<p>Case Title:</p> <p>Sadam Sasa Mainga v The State Silishebo Obert Munihango v The State</p>	<p>Case No:</p> <p>HC-MD-CRI-APP-CAL-2022/00099 HC-MD-CRI-APP-CAL-2022/00100</p> <p>Division of Court:</p> <p>Main Division</p>
<p>Heard before:</p> <p>Mr Justice January <i>et</i> Lady Justice Usiku</p>	<p>Heard on: 09 June 2023 and 19 June 2023 Delivered on: 30 June 2023</p>
<p>Neutral citation: <i>Mainga v S; Munihango v S</i> (HC-MD-CRI-APP-CAL-2022/00099; HC-MD-CRI-APP-CAL-2022/00100) [2023] NAHCNLD 371 (30 June 2023)</p>	
<p>The order:</p> <ol style="list-style-type: none">1. The applications` for condonation is granted;2. The sentence of 15 years` imprisonment of which five years` are suspended for five years` on condition the accused is not convicted of contravening s 4(a) read with ss 1, 4(2)(a), 8, 9,12, 13, 14, of Act 9 of 2008 committed during the period of suspension, is set aside; and substituted with the following sentences;	

3. The accuseds` are each sentenced to six (6) years` imprisonment of which three (3) years` are suspended for a period of five years` on condition that the accused`s are not convicted of contravening s 4(b) read with sections 1, 4(2)(b), 8, 9,12, 13, 14, of Act 9 of 2008 committed during the period of suspension;
4. The sentence in respect of the first appellant is backdated to 13 April 2022 and that of the second appellant to 14 April 2022 respectively.

Reasons for the order:

JANUARY J (USIKU J concurring):

[1] Both appeals stem from the Magistrate's Court, Katima Mulilo against the sentences imposed after conviction. The appellants were charged and convicted in that court in separate trials on a charge of contravening s 4 (1)(b) read with ss 1, 4 (2)(b) , 8, 9, 12, 13, and 14 of the Controlled Wild Life Products and Trade Act 9 of 2008 (the Act), as amended by Act 6/2017 and further read with s 18(1) of the Riotous Assemblies Act 17 of 1956 - attempting to deal in any controlled wildlife product.

[2] The two appeals were filed separately and stem from, on the face of it, separate cases with separate case records of proceedings. On perusal of the records, though, it is clear that the charge and cases relate to the same incident when the appellants were arrested. They were initially jointly charged with a third accused in one case. All three were arrested on 15 January 2022 in connection with an incident where they allegedly attempted to deal in four elephant tusks.

[3] The case for all three accused persons were set down for plea and trial on 13 April 2022. On that date the first appellant, Silishebo Obert Muniango pleaded guilty to the charge whereas the second appellant, Sasa Mbanga Mainga and a third accused person, Kennedy Mbanga Simasiku pleaded not guilty. The trials were separated and the first appellant

(Munihango) was convicted on his guilty plea and sentenced to 15 years` imprisonment of which five years` are suspended for five years` on condition that he is not convicted of contravening s 4(a) read with sections 1, 4(2)(a), 8, 9,12, 13, 14, of Act 9 of 2008 committed during the period of suspension.

[4] On 14 April 2022, the separated case of the second appellant and the third accused was enrolled for trial. The second appellant (Mainga) then pleaded guilty, was convicted and sentenced to the same sentence as the first appellant. The trials of the second appellant and the third accused were again separated.

[5] The condition refers to s 4(a) as the condition of suspension. This appears to be a typographical error or mistake as that section refers to the possession of controlled wildlife products and not dealing. It is corrected to read s 4(b) which refers to dealing. There is another error in the annexure to the charge in both cases in that, whereas they both refer to the correct contravention of s 4(b) of the Act, the description of the offence refers to possession of any controlled wildlife product. These mistakes are not the subject of the appeal and because neither party took issue with it, it is safely accepted that the appellants were convicted for attempting to deal in controlled wildlife products.

[6] We have decided to deal with the two appeals at once, although they were heard on separate dates. They stem from the same court and magistrate. They are on the same facts and in both instances the appellants pleaded guilty and were sentenced to the same sentence which is the subject of the appeals. The first appellant was sentenced on 13 April 2022 and the second appellant on 14 April 2022.

Condonation

[7] It is trite that a party in an application for condonation for a delay and non-compliance with the rules of court needs to satisfy the court that he/she has a reasonable explanation for the delay and has good prospects of success on appeal. Further, 'these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of

Court.¹ In addition, in *Elton Jossop v The State*², this court held that an application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation.

[7] Both appellants filed identical notices of appeal out of time on 25 August 2022. They were late by two months and 24 days. Both filed applications for condonations with identical explanations that they were in a state of shock after sentencing and did not fully understand the Magistrate's explanation of their right to appeal and review. Further, that they were laymen and did not understand the procedure of appeal.

[8] In *Kalenga Iyambo v S*³, the court held that the obligation and position of laypersons and court proceedings are as follows:

'What we want to stress is that lay litigants are just as much under an obligation as those represented by Lawyers to follow the rules of court, and cannot, as they please, (fail to) comply with the rules of court.'

[9] The record of proceedings in both cases reflects that the appellants' rights to appeal and review were appropriately explained by the magistrate. Both appellants responded that they understood. They did not require any further explanation and signed the annexure where the rights were explained.

[10] Their explanations ring hollow and is a standard repetitive and habitual one in appeals, especially from appellants who were undefended in the court a quo and who do not have acceptable and reasonable explanations for their delays to file notices of appeal on time. In addition, it does not provide a detailed and accurate explanation for the entire period of the delay, including the timing of the application for condonation. We find it unreasonable, not true and unacceptable. There is authority from this court that, where the explanation is not reasonable or true or bona fide, the appellant is out of court.⁴ This will however depend on the

¹ *S v Nakapela and another* 1997 NR 184 (HC) at 185 F-H

² *Elton Jossop v The State* Case No. SA 44/2016 (unreported) delivered on 30 August 2017.

³ *Kalenga Iyambo v S* CA 165/2008, para 10.

circumstances of each case.

[11] On an application for condonation *Kohler v S*⁵ at para 5, Liebenberg J had the following to say:

‘...In addition, the courts have elucidated certain principles as regards condonation applications which, *inter alia*, are the following:

- a) Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court *may* condone the non-compliance.⁶
- b) Where the applicant's non-compliance is found to be a flagrant disregard of the rules of court, a court need *not* consider the prospects of success on appeal.
- c) If prospects of success on appeal are non-existent, it matters not whether there is a reasonable explanation or not, the application will be *refused*.⁷

[12] Turning to the second leg of the enquiry; We have considered the merits of these appeals to adjudicate on the prospects of success. Considering that the appellants were convicted for an attempt to commit the crime of dealing in controlled wildlife products i.e. four elephant tusks, the sentence of 15 years is shocking, inappropriate and not a sentence that this court would have imposed, had it sat as the court of first instance. More so, when we considered the principle of consistency or uniformity of sentences imposed in similar or more or less similar cases, we find that the Magistrate committed a misdirection in not properly applying his mind. He overemphasised the seriousness of the crime and did not judiciously exercise his sentencing discretion. There are therefore good prospects of success on appeal. In the circumstances condonation is granted.

[13] Mr Andreas, representing the appellants in this court, referred to *S v Khumalo*⁸ where on appeal, a sentence of five years' imprisonment for a conviction of possession or dealing in two rhino horns in contravention of s 2(1)(a) of Proclamation AG 42 of 1980 was set aside.

⁴ *S v Nakapela and another* 1997 NR 184 (HC) at 185 F-H.

⁵ *Kohler v S* (CC 21/2017) [2020] NAHCMD 96 (16 March 2020).

⁶ *S v Nakale* 2011 (2) NR 599 (SC) at page 603.

⁷ *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112.

⁸ *S v Khumalo* 1994 NR 3 (HC).

One appellant in that matter was sentenced to one year imprisonment and the other to three years' imprisonment. The court of appeal considered the different roles of the appellants, thus, the different sentences. That case is not authority to consider the principle of consistency. The law under which the appellants were convicted in that case was repealed. It is not certain at this time what the prescribed sentences, if any, were.

[14] The court was further referred to the case of *Mukwangu v S*⁹ where two accused persons pleaded guilty to importing one elephant tusk in contravention of 4(1)(d) of the Controlled Wildlife Products and Trade Act. The prescribed sentence is a fine not exceeding N\$25 000 000 or imprisonment for a period not exceeding 25 years`, or to both such fine and such imprisonment, which is the same as for a conviction in this appeal. The accused in the case referred to were in addition convicted for disguising unlawful origin of property in contravention of s 4(b) (i) and (ii) of the Prevention of Organised Crime Act 29 of 2004. The accuseds` were each sentenced to N\$400 000 or four years' imprisonment on each count. The court on appeal substituted the sentences of N\$400 000 or four years' imprisonment to three years' imprisonment and two years' imprisonment respectively.

[15] Although, the *Mukwangu* matter may be of a similar nature in relation to the charge of the elephant tusk, there was a conviction on an additional charge. The court had to consider the cumulative effect of the sentences. In addition it involved only one elephant tusk. That case differs from this appeal where four tusks were involved.

[16] Ms Amukugo, representing the respondent, submitted that there was no misdirection by the court a quo in relation to sentencing and that the sentences should be confirmed. She referred the court to the case of *Xiaoling v S*¹⁰ in relation to the principle of consistency or uniformity. That case relates to the unlawful exportation of Controlled Wildlife Products involving 14 rhino horns on the first count and a leopard skin on the second count. These offences were in contravention of s 4(1)(e) read with schedule 1 and with ss 1, 4(2)(b) of the

⁹ *Mukwangu v S* (HC-MD-CRI-APP-CAL-2022/000420 [2022] NAHCMD.

¹⁰ *Xiaoling v S* (CA 18/2017) [2019] NAHCMD 94 (12 April 2019).

Controlled Wildlife Products and Trade Act 9 of 2008 and as read with s 18 of The Riotous Assemblies Act No. 15 of 1956. A third count relating to money laundering: acquisition of proceeds of unlawful activities in contravention of s 6(a) read with ss 1, 8 and 11 of the Prevention of Organized Crime Act No. 29 of 2004.

[17] In the court a quo, the accused were all discharged on count three, convicted on counts one and two and sentenced to fourteen years` of which thirty and twenty eight months respectively were suspended for five (5) years` on condition they are not convicted on the above and relevant competent alternative sections.

[18] On appeal, the discharge of all four appellants on count three was set aside and they were accordingly found guilty as charged. All three main counts were taken together for purposes of sentence. The four appellants were each sentenced to twenty years' imprisonment of which five (5) years were suspended for a period of five (5) years` on condition that the appellants are not convicted of the offences referred to in s 4, 5 and 6 of the Prevention of Organized Crime Act 29 of 2004, committed during the period of suspension.

[19] That case is similarly not authority for the principle of uniformity on sentencing. It involves a crime in relation to the contravention of s 4(1)(e) of the Controlled Wildlife Products and Trade Act 9 of 2008, as amended relating to 14 rhino horns. The prescribed sentence is a fine not exceeding N\$25 000 000 or imprisonment for a period not exceeding 25 years, or to both such fine and such imprisonment, which is the same as for a conviction in this appeal. This is, however where the similarity stops.

[20] In the appeal at hand, only four elephant tusks were involved whereas in the *Xioaling* matter, 14 rhino horns and a leopard skin were involved. Further, different charges were taken together justifying a sentence of 20 years` imprisonment. This appeal only involves one charge.

[21] The crime the appellants` were convicted of is indeed serious and prevalent, not only in the Zambezi Region, but countrywide if not worldwide. The seriousness is evident from the prescribed sentence of a fine not exceeding N\$25 000 000 or to imprisonment for a period not exceeding 25 years, or to both such fine and such imprisonment. Controlled wildlife, in this case elephants, attracts tourism. At least two elephants must have been killed illegally for their tusks. Poaching of wildlife is a serious concern worldwide. The illegal dealing or smuggling of controlled wildlife products, if not stopped, will undoubtedly contribute to more unabated killing of wildlife.

[22] The appellants are 31 years old and 28 years old respectively. Both pleaded guilty, expressed that they are remorseful for the crime they committed and promised that it would not happen again. They were unemployed, single but have children.

[23] Having considered the personal circumstances of the appellants, their mitigating and aggravating circumstances, it is inescapable that the appellants have to serve custodial sentences. Both indicated that they are in a position to pay a fine of N\$5000 and N\$3000 respectively. Imposing fines in those amounts as requested would trivialise the crime.

[24] In the result in relation to both appeals:

1. The applications for condonation is granted;
2. The sentence of 15 years` imprisonment of which five years` are suspended for five years` on condition the accused is not convicted of contravening s 4(a) read with sections 1, 4(2)(a), 8, 9,12, 13, 14, of Act 9 of 2008 committed during the period of suspension, is set aside; and substituted with the following sentences;
3. The accuseds` are each sentenced to six (6) years` imprisonment of which three (3) years` are suspended for a period of five years` on condition that the accused`s are not convicted of contravening s 4(b) read with sections 1, 4(2)(b), 8, 9,12, 13, 14, of Act 9

of 2008 committed during the period of suspension;

5. The sentence in respect of the first appellant is backdated to 13 April 2022 and that of the second appellant to 14 April 2022 respectively.

Judge(s) signature	Comments:
January J:	None
Usiku J:	None
Counsel:	
Appellant	Respondent
Mr. J Andreas Andreas-Hamunyela Legal Practitioners, Windhoek	Ms A Amukugo Office of the Prosecutor-General, Windhoek