

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 117/2016

In the matter between:

**ARON NGHIFIKEPUNYE KAIYAMO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Kaiyamo v S* (CA 117/2016) [2023] NAHCMD 467 (4 August 2023)

**Coram:** SHIVUTE, J and CHRISTIAAN, AJ

**Heard:** 3 July 2023

**Delivered:** 4 August 2023

**Flynote:** Criminal Procedure – Appeal – Against conviction and sentence – Noting of appeal out of statutory time limit – Requirements – Prospects of success on appeal – Satisfactory explanation for delay – In instant case appellant has failed to give satisfactory explanation for the delay but there are prospects of success on appeal against sentence. – Point in limine – Respondent raising points in limine – Record incomplete – Court capable of evaluating evidence and determine whether in

accordance with justice – Appeal - Conviction – Contravening section 35(1)(a) of the Anti-Corruption Act, 2003 (Act 8 of 2003) – Factual findings by learned magistrate correct – No misdirection on the factual findings – No reason for appeal court to interfere – Appeal against conviction dismissed – Appeal against sentence – Appellant contending that trial court considered appellant not being a first offender – Court a quo misdirected itself in this regard – Court finding proceedings on sentence was vitiated by an irregularity – Appellant sentenced afresh – Appeal against sentence upheld.

**Summary:** The appellant was charged with six counts of contravening section 35(1)(a) of the Anti-Corruption Act No.8 of 2003, corruptly accepting gratification by an agent as an inducement, and was convicted and sentenced in the District Court to an imprisonment period of 2 years. The appellant is now appealing against both his conviction and sentence on various grounds. The appellant, however lodged his appeal seven months out of time. The appellant's explanation for the cause of the delay was due to insufficient funds, lack of knowledge and poor health. This court finds the explanation not to be satisfactory. However, the court found that the appellant has reasonable prospects of success on appeal against the sentence and granted application for condonation. The appellant also raised a point in limine that is the incompleteness of the record. The court decided that the record is comprehensible and adequate for a proper consideration of the appeal as all the relevant evidence necessary for the court to make a decision is before the court. The court found that the indistinct parts are not such that the court could not make sense of the evidence that was adduced and that the appellant is not prejudiced in any way by certain parts being indistinct. With regard to the appeal against conviction, this court finds that there was no misdirection on the factual findings by the learned magistrate. There is no reason for the appeal court to interfere with the conclusion arrived at by the learned magistrate. The appeal against the conviction is therefore dismissed.

With regard to the appeal against sentence, the court a quo misdirected itself by regarding the appellant as having a previous conviction whilst in fact he is a first offender. Therefore, the proceedings on sentence was vitiated by an irregularity or misdirection on the part of the learned magistrate. The sentence is set aside and this

court is at liberty to sentence the appellant afresh. The appeal against the sentence is upheld.

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### ORDER

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- (a) The late filing of the notice of appeal is condoned.
- (b) The point in limine is dismissed.
- (c) The appeal against conviction is dismissed.
- (d) The appeal against sentence is upheld.
- (e) The sentence is set aside and the appellant is sentenced afresh as follows: A fine of N\$12 000 or in default of payment, 12 (twelve) months' imprisonment. All counts are taken together for purposes of sentence. The fine to be deposited with the Registrar of the High Court.
- (f) The appellant's bail is cancelled.

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### APPEAL JUDGMENT

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**CHRISTIAAN, AJ (SHIVUTE, J concurring):**

Introduction

[1] On the 24 April 2014 the applicant was convicted of six counts of contravening section 35(1)(a) of the Anti-Corruption Act 8 of 2003 ("the Act"), corruptly accepting gratification by an agent as an inducement. He was subsequently sentenced to an imprisonment period of 2 years on 5 May 2015. The appellant is now appealing against the conviction and sentence.

[2] The matter was set down for appeal for the first time on 22 June 2015. On that date it was struck from the roll due to the absence of the appellant. An order was made that the learned magistrate inform the court whether the appellant is on bail, as no bail receipt was attached to the record of proceedings. Further to the

aforementioned, an observation was made that the record of proceedings in the lower court was incomplete, as it reflects that the defence intended to call a witness. However, it is not clear whether the second witness was called or not. The appellant has also not indicated whether the witness was indeed called.

[3] The appellant is represented by Mr. Kanyemba whilst Ms. Jacobs appeared for the respondent.

#### Grounds of appeal

[4] The grounds of appeal against the conviction are; the learned magistrate misdirected herself by finding that the allegations against the Appellant, even if found to be true, amount to corruption when it was clear that the Appellant was not responsible for the employment of staff in the Ministry of Education; the Magistrate erred by finding that the Appellant was guilty of corruption despite the fact that there was no evidence on the complainant's intention to corrupt the Appellant; the magistrate erred by rejecting the version of the Appellant person despite the fact that it was reasonably possibly true and corroborated by the evidence of Tuahafeni Naholo; the magistrate erred by accepting the version of witness Albanus despite the fact that there was serious contradiction pertaining to how much money was purportedly given to the Appellant.'

[5] The grounds of appeal against the sentence are; the magistrate erred when she imposed a sentence which in the circumstances was startlingly shocking and inappropriate and by overemphasizing the nature of the crime and the interest of the society at the expense of the Appellant; the magistrate erred by finding that Appellant had a previous conviction when same could not be sustained by the evidence before her, when the Appellant adduced an authentic certificate from the Ministry of Safety and Security which stated that accused had no previous convictions.'

*Point in limine- incomplete record of appeal*

[6] Mr Kanyemba raised a point in limine in his heads of argument in that the record of proceedings in the trial court is incomplete. He submitted that the state called several witnesses to testify and the defence called one witness. It was further submitted that most of the delay of this appeal was wasted on trying to reconstruct the record, which turned out to be futile.

[7] It was the appellant's contention that, not much can be made out of what transpired with the missing testimony and as such this will prejudice him and it would amount to a failure of justice. The court was referred to a matter of *Katoteli and Another v The State* (CA 201/2004) [2009] NAHC 117 (06 March 2009) at para 7 where it reads:

'The reconstruction of a record is an administrative process, requiring of the clerk of the court to obtain the best secondary evidence of the content of the court proceedings. It has been submitted ... that there is no legal basis on which to subject an accused person to a second "trial" and that it may also be unconstitutional to do so. Where the record of proceedings in a court of law cannot be reconstructed, an appeal court may not refer the matter back to the court a quo to start proceedings de novo or for a "retrial".'

[8] In reply thereto, Ms Jacobs acknowledged that some pages of the record of proceedings are missing, such as the evidence of the defence witness. However, the appellant's averment that the judgment of the court was silent on this aspect, because the court did not consider the facts and evidence before it, has no merit. Ms Jacobs submitted that the court a quo considered the evidence of both state and defence, in determining whether the appellant was guilty of the offences charged.

[9] Ms Jacobs submitted that the Appeal Court is in a position to consider the appeal, since the record of proceedings and the evidence of the state and the defense is understandable, clear and can be followed comprehensively, and this will not cause prejudice to the appellant. This court is therefore, in a position to evaluate the appellant's case as well as the state's case as presented in the trial court.

[10] In *Soondaha v The State* (CA 28/2013) [2016] NAHCNLD 76 (22 August 2016) at para 29 it was stated:

'The court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirection's have any merit.'

[11] We associate ourselves with this view, however in the present instance the appellant substantially relies on the dicta enunciated in the *Katoteli matter*, in support of a contention that a material irregularity occurred, in that the record of proceedings is so poorly constructed, that it creates prejudice that cannot be remedied. It would however appear to us that the facts of that case are significantly distinguishable from the facts before us.

[12] Based on the aforementioned legal principles, we therefore dismiss the point in limine as the court is capable of evaluating the evidence in conjunction with the reasons of the learned magistrate, in order to decide whether the conviction was just and in accordance with justice and to proceed on the merits of the appeal. We will now deal with the next point for consideration, which is the late filing of the appeal and the application for condonation.

#### *The Condonation Application*

[13] The applicant filed an application for appeal on the 8 October 2015 which is clearly out of time. Section 316 of the Criminal Procedure Act 51 of 1977 provides that an accused person wishing to apply for leave to appeal, is required to do so within a period of 14 days after sentence.

[14] Pursuant thereto the applicant filed a condonation application, explaining under oath his cause of delay in lodging the application for appeal within the prescribed time limit. The state, in response, gave notice of its intention to oppose both the application for leave to appeal and the condonation application.

[15] It is well established that the granting of condonation for non-compliance with the rules of court, is not for the mere asking. A litigant seeking condonation bears the onus to satisfy the court that there is sufficient cause to warrant the granting of

condonation and to launch the condonation application without delay. The applicant is firstly required to provide a full, detailed and accurate explanation for the period of the delay, including the timing of the application for condonation; secondly, satisfy the court that there are reasonable prospects of success on appeal. (See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J).

[16] Mr Kanyemba, counsel for the appellant, made submissions with regard to the filing of the application for leave to appeal outside the prescribed time limit and advanced the following reasons subsequent to him being sentenced on the 5 May 2019, he instructed a legal representative, Mr Amoomo, to assist him with the appeal. Mr Amoomo, according to the appellant, did not assist him during the trial, but was engaged only for the purpose of filing an appeal. Mr Amoomo thus required time to go through the record of proceedings and had to be placed in funds to assist the appellant. Being without the required funds, he, without delay, approached family members for assistance, and he could only tender the amount required after the 29 May 2015.

[17] Mr Kanyemba further submitted that the abovementioned were not the only reasons, the appellant as a lay person and the fact that the trial involved a number of complex factual and legal issues, he was not able to attend to the notice of appeal on his own. He further informed the court that the appellant endured considerable medical ailments between the time he was convicted and sentenced, as he was hospitalised and bedridden. As for the prospects of success on appeal, applicant relies on the grounds set out in the notice filed. It is finally submitted that the court have mercy and condone the late filing of the appeal.

[18] Ms Jacobs for the respondent, in opposition of the application, submitted that the notice of appeal only reached her office on the Friday afternoon, before the hearing on 3<sup>rd</sup> of July 2023, and she was not able to file heads to assist the court on this aspect. She however addressed the court from the Bar, and submitted that the late filing of the appeal should not be condoned as the appellant does not have prospects of success on the merits.

[19] Against this background, a supporting affidavit from Mr Amoomo to the effect that the applicant at all times intended to appeal against his conviction within the prescribed time limit, but that he was impeded, due to applicant's financial constraints, appears to have been a necessity. Further to the aforementioned, medical certificates that could sustain the medical condition alleged was not submitted to support the position of the appellant. Applicant bold assertion of lack of funds, being a lay person, and his illness as the reasons for the delay in filing the application, is inadequate and falls short of being reasonable and acceptable. We will deal with the second requirement, which is whether there are prospects of success on appeal.

Prospects of success

#### Conviction

[20] Here the appellant relies on the grounds set out in the notice of appeal.

[21] It is established law that the test to be applied in applications of this nature is that the applicant must satisfy the court that there is reasonable prospects of success on appeal (*R v Ngubane and Others* 1945 AD 185 at 186-7; *R v Baloi* 1949 (1) SA 523 (AD) at 524-5).

[22] Mr Kanyemba submitted that the evidence on record does not support the charge under section 35(1) of the Act preferred against the appellant, what was alleged was misplaced and that theft by false pretence was the preferred charge. It was further submitted that the appellant did not act as an agent for anyone, the state failed to prove that the appellant had the requisite intention as he was not employed by the Ministry of Education to recruit people. It was argued that the intention required, did not end with the appellant.

[23] Mr Kanyemba further submitted that the version of the appellant was reasonably possibly true, but the court a quo, failed to mention that the version of the appellant was rejected as false beyond reasonable doubt. It was argued that, the record was incomplete and did not include the evidence of the second defense



witness. At the pain of being repetitive, it is worth mentioning that, although the defense intended to call a witness it is not clear from the record that such witness was indeed called. The appellant also never indicated what was testified by the said witness.

[24] Ms Jacobs in a spirited reply to the above submissions, highlighted the definition of what an agent is in terms of the Anti – Corruption Act, and maintained that the appellant acted as an agent, as he was employed by the Ministry of Education. On the ground that the version of the appellant was rejected by the court a quo based on the fact that the record was incomplete, it was submitted that the record ,even though incomplete , is sufficient for this court to adjudicate the Appeal, thus the ground has no merit.

[25] Ms Jacobs, further submitted that, the ground that there were various contradictions and deficiencies in witnesses' testimonies, has no merit, as counsel for the appellant, in the court a quo made the suggestions without providing any evidential basis for such suggestions. In support of her proposition, the respondent, cited the matters of *S v Aloysius Jaar* (Case number CA 43/2002), delivered on 09 December 2002 and *S v Strong* (CC 16/2019) [2020] NAHCMD 210 (4 June 2020).

[26] It is evident from these grounds that the appellant takes issue with the findings of fact by the learned magistrate. In *S v Hangu 2016 (1) NR 258 (SC) Maritz JA (Shivute CJ and Chomba AJA concurring) at page 287 – 288 paragraph 60 – 61* has the following to say in respect of an appeal on a factual question: 'Referring the court to the appeal guidelines enumerated by Davis AJA in *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705 – 706, he submitted that, where there had been no misdirection on facts by the trial judge, the presumption is that his conclusion is correct and that this court would only reverse it where it is convinced that it is wrong'.

#### *Ad Grounds 1, 2 and 3*

[27] The first three grounds of appeal will be taken together as they deal with the same aspect. The question which the trial court needed to consider was, whether the appellant could be construed as an agent in terms of the Act, because according to

counsel for the appellant in the court a quo, the intention of the appellant to give a job to the witnesses and the givers' intention to induce the appellant, was not proven. Further to the aforementioned, is whether the allegations against the appellant amounts to corruption, as there was no evidence to support such a finding.

[28] In this regard the magistrate found that the action by the appellant, that he would give the witnesses employment if they paid him, shows that the appellant had the necessary *mens rea* as is required for a conviction under section 35 (1) of the Act. On the aspect of the intention of the givers, the magistrate found that, considering the evidence placed before court, there was an intention to induce the appellant to provide them with employment, and this she has done by relying on the dictum laid down in the matter of *R v Geel 1953 (2) SA 398 (A)*, which is restated as follows:

*'An agent cannot be guilty [of corruption] if he knows or believes that the giver has no intention to bribing. The onus is on[ the State] to prove, at least, that the agent believed when he accepted the gift or consideration that the giver intended such gift or consideration as an inducement for ding or forbearing to do as a reward to do any action relation to the principal's affairs or business.'*

[29] We now proceed to consider the argument by the appellant that he could not be regarded as an agent in the Ministry of Education in that he did not have the power to recruit.

[30] The state bears the burden, to prove beyond reasonable doubt, that the appellant is guilty of the offence. Section 35(1) of the Act stipulates as follows:

'An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification-

(a) as an inducement to do or to omit doing anything;

(b) as a reward for having done or having omitted to do anything, in relation to the affairs or business of the agent's principal.'

[31] The state bears the burden to prove beyond reasonable doubt that there was a prior meeting during which the appellant corruptly solicited money from the victims and that he on the day in question, accepted this money as an inducement to do or to omit doing anything.

[32] It should be noted that the definition of corruptly has been declared unconstitutional by the High Court for being over-broad (*Lameck & another v President of the Republic of Namibia* 2012 (1) NR 255 (HC). In *S v Goabab & another* 2013 (3) NR 603 (SC) the court held that for purposes of that judgment it sufficed to hold that the word 'corruption', at its lowest threshold when used in the context of the public service, included the abuse of a public office or position (including the powers and resources associated with it) for personal gain. The synonyms of 'corruptly' included 'immorally, wickedly, dissolutely and dishonestly'.

[33] The magistrate, after considering the evidence, found that the act by the appellant suits the definition of agent in terms of section 32 of the Anti- Corruption Act, and that an agent includes a person employed by another, and it is irrelevant whether he was responsible for recruitment or whether he merely misled the witnesses. What remains is that the appellant was employed by the Ministry of Education and is therefore regarded as an agent.

[34] We are of the view that, having regard to the reasons provided, the magistrate did not commit any material misdirection by finding that the allegations against the appellant person amounted to corruption as stipulated in section 35(1) of the Act and that the appellant was an agent of the Ministry of Education, thus eventually convicting the appellant of the crime he was charged with. Based on the aforementioned, we find that these grounds have no merit and stand to be dismissed.

[35] Grounds four, five, six and seven of the notice of appeal on conviction deal with the rejection of the version of the appellant, despite the fact that it was reasonably possibly true and contradictions and deficiencies were found in the witnesses' testimonies.

[36] In *S v Johannes* 2009 (2) NR 579 (HC) Muller J, at 584 para 11, stated as follows:

'It is accepted that the correct approach in a criminal case is not to weigh up the version of the State witnesses against that of the accused and then to balance it and accept or reject one and not the other. This approach has been clearly enunciated by other courts in the past. It has often been stated that the consideration of the probabilities of a case in order to decide whether the accused's version is reasonably possibly true is permissible. This is done by looking at the probabilities of the case in order to determine whether the accused's version is reasonably possibly true. Only if the version of the accused is so improbable that it cannot be regarded as the truth is it inherently false and it falls to be rejected. It is also accepted that the test is not whether the court disbelieves the accused, but it will acquit him if there is any reasonable possibility that his evidence might be true. (*S v Jaffer* 1988 (2) SA 84 (C) at 88F - 89E; *S v Singh* 1975 (1) SA 227 (N); *S v Munyai* 1986 (4) SA 712 (V) at 716B; *S v Kubeka* 1982 (1) SA 534 (W) at 537F - H.)'

[37] It is quite evident from the judgment of the learned magistrate that she did not find the version of the appellant to be credible or even plausible.

[38] We are of the view that having regard to the reasons provided, the magistrate did not commit any material misdirection in accepting the testimony of the state witnesses and rejecting that of the appellant and eventually convicting the appellant of the crime he was charged with. We will now deal with the grounds of appeal on sentence.

### Sentence

[39] Mr Kanyemba submitted, in line with the grounds in the notice of appeal, that the presiding magistrate erred in fact and law during sentencing. She imposed a sentence which in the circumstances was startlingly shocking and inappropriate; the learned magistrate overemphasized the nature of the crime and the interest of the society at the expense of the appellant and the learned magistrate erred by finding that the appellant had a previous conviction when same could not be sustained by the evidence before court. The appellant submitted an authentic certificate from the Ministry of Safety and Security which stated that he had no previous convictions.

[40] Ms Jacobs submitted that the learned magistrate did not misdirect herself by overemphasising the seriousness of the offence at the expense of the personal circumstances of the appellant and that it does not induce a sense of shock.

[41] It is trite that appellate court will not interfere with a sentence imposed by a lower court if such sentencing was exercised judiciously. (See *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 693) 366A-B).

[42] The third ground of appeal deals with the previous convictions of the appellant. Mr Kanyemba, counsel for the appellant argued that the appellant submitted a certificate from the Ministry of Safety and Security that he does not have any previous convictions. The state further failed to prove a record of previous convictions.

[43] It is clear from the submissions by the state before sentence, in the court a quo, that reference was made to the fact that the appellant has previous convictions of fraud dating back to 1998. However, the aforementioned submission was not supported by evidence. No detailed account of the case including the case number as well as the sentence handed down was provided to the court.

[44] The learned magistrate in her reasons for sentencing highlighted the fact that the appellant is not a first offender, and that he had a previous conviction involving an element of dishonesty, this was however not backed by any evidence to support the conclusion by the court. It would have been desirable for the state to prove the previous conviction in the usual way, including the handing over of the certificate of previous convictions, for the purposes of sentencing. It was not adequate for the state to address the court from the Bar, without handing up the previous convictions, to be confirmed by the appellant, as this would amount to the mere say so of the state. Given the fact that the appellant denies prior convictions, this should have been placed before the appellant to confirm or deny.

[45] Based on the abovementioned, it is therefore safe to conclude that the court a quo was not correct to make the finding that the appellant was not a first offender.

This was an irregularity, which was material, that occurred during the sentencing proceedings. Thus the court a quo misdirected itself.

[46] A court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh. (See *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E).

[47] It is therefore, evident that we must consider the sentence of the appellant afresh, and have regard to the fact that the appellant is a first offender. We wish to echo the sentiments of our brother Liebenberg J in the matter of *Hanse Himarwa v State* (2)(CC 5/2018) [2019] NAHCMD 260 (31 July 2019) he had the following to say at paras 43-44:

‘ Though it should as far as possible be avoided to send a first offender to prison, this is not always an option as the seriousness of the crime may be such that there is no other appropriate sentence available. Neither should families be torn apart if that could be prevented. It is not in society’s interest if an offender with fixed employment and a steady income loses his or her position as a result of the sentence imposed in circumstances where another sentence would equally have been appropriate.

‘A factor that should weigh heavily with this court is that the accused at the age of 52 years has no criminal record and has proved herself to be a productive member of society. She has served the government at different levels with success and transgressed on this one occasion when abusing the powers vested in her office. It is a general rule of law that the court should as far as it is possible avoid sending a first time offender to prison, moreover, when the same sentencing objectives could be achieved by the imposition of another adequate form of punishment. As per Maritz JA in the unreported case of *Harry de Klerk v The State*, SA 18/2003 delivered 8 December 2006 the ratio behind this approach is that accused persons falling within this category of offenders do not have a demonstrated record of criminal inclinations and are more likely to be rehabilitated by an appropriate sentence than hardened criminals. Also that it is likely the only offence they would commit during their lifetimes and that there is no real risk of them becoming repeat offenders.’

[48] When applying these principles to the present facts, we are satisfied that the appellant falls within this category of offenders who should be afforded a second chance in life. To adhere to the court a quo's finding to impose direct imprisonment, in

our view, amount to over-emphasising the seriousness of the offence and the interests of society, whilst giving no or little weight to the appellant's personal circumstances.

[49] We are mindful that corruption is a serious offence, and should not be tolerated. It is important to highlight that the appellant is on bail pending appeal and that he has already served four months of his sentence.

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

- (a) The late filing of the notice of appeal is condoned.
- (b) The point in limine is dismissed.
- (c) The appeal against conviction is dismissed.
- (d) The appeal against sentence is upheld.
- (e) The sentence is set aside and the appellant is sentenced afresh as follows: A fine of N\$12 000 or in default of payment, 12 (twelve) months' imprisonment. All counts are taken together for purposes of sentence.  
The fine to be deposited with the Registrar of the High Court. All counts are taken together for purposes of sentence.
- (f) The appellant's bail is cancelled.

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P CHRISTIAAN  
Acting Judge

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N N SHIVUTE  
Judge

## APPEARANCES

APPELLANT: S Kanyemba  
Of Salmon Kanyemba Legal Practitioners,  
Windhoek

RESPONDENT: S L Jacobs  
Of Office of the Prosecutor-General, Windhoek