

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT
PRACTICE DIRECTIVE 61

Case Title: Rufus Mutunga Kandara v S	Case No: (HC-MD-CRI-APP-CAL-2023/00045)
	Division of Court: High Court, Main Division
Coram: Liebenberg J et Christiaan AJ	Delivered: 6 October 2023
Neutral citation: <i>Kandara v S</i> (HC-MD-CRI-APP-CAL-2023/00045) [2023] NAHCMD 624 (6 October 2023)	
ORDER: The appeal is struck from the roll.	
REASONS FOR ORDERS:	
LIEBENBERG J (CHRISTIAAN AJ concurring):	

[1] The appellant in this appeal was arraigned on a charge of theft of stock as per the provisions of the Stock Theft Act 12 of 1990 (the Act), in that he unlawfully and intentionally stole one sheep valued at N\$1200. He pleaded not guilty to the charge and after evidence was led, was convicted and sentenced to 3 years' imprisonment. The appellant was unrepresented during his trial and his status remains unchanged for purposes of this appeal. The respondent is represented by Ms. Amukugo.

[2] What is determinable from the record, particularly the notice of appeal, is that the appellant takes issue with the sentence imposed on him by the trial court. On 30 March 2023, the appellant was sentenced to 3 years' imprisonment and on 17 April 2023, timeously so, he lodged his appeal. Although not clearly set out, what can be gathered from the wording of the supposed notice of appeal is that the appellant takes no issue with the conviction but only complains about the fact that he should have been sentenced to a fine as opposed to imprisonment.

[3] For the sake of completeness, it is necessary to elucidate what has been stated as supposed grounds of appeal in the appellant's notice of appeal. The appellant states the following: he apologises for the delay in bringing the appeal and attributes it to a 'misunderstanding'; that he is of ill health in that he has a medical condition which can only be treated traditionally; his father is of advanced age and needs his help seeing that he is the one who assists him in collecting his pension money; and, finally, that he is a breadwinner and father of two.

[4] The appeal is opposed and the respondent raises two points *in limine* namely: the late filing of the notice of appeal and that the document filed by the appellant which purports to be a notice of appeal is not a valid notice of appeal in that it does not point out any misdirection or errors, either in fact or in law, committed by the magistrate.

[5] As regards the first point, it need not be dealt with as there can be no doubt that the notice of appeal was filed within the 14 court days and therefore no condonation is required. This much was conceded by counsel for the respondent during oral submissions before us. The argument by the respondent that there is no explanation for the delay on account of appellant having failed to file a condonation affidavit therefore

falls away.

[6] What remains for determination is whether there are any valid grounds of appeal set out in the notice of appeal for consideration by this court.

[7] Rule 67(1) of the Magistrate Court Rules provides as follows:

‘A convicted person desiring to appeal under section 103(1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based. . . .’

[8] What is trite is that rule 67(1) requires that grounds of appeal must be clear and specific for reason that a notice of appeal constitutes the founding document of an appeal. It is meant to clearly set out whether the appeal is brought against issues of law or fact or both.¹ Because the notice of appeal is the very basis of an appeal, it follows that if it does not comply with the rules, there can be no appeal before court as the notice would then amount to a nullity. As was rightly stated in *Petrus v S*,² failing to lodge a notice of appeal which meets the requirements of rule 67 has the consequence that there is no appeal at all. The appeal thus stands or falls on the notice of appeal.

[9] In the present instance, it can hardly be said that the purported grounds enumerated in the appellant’s notice of appeal, amount to proper grounds of appeal satisfying the requisites of rule 67. What the appellant has presented to this court as grounds of appeal amount to nothing more than information regarding his personal circumstances; some of which he has already presented to the trial court during his mitigation of sentence. The driving factor behind this appeal is, undoubtedly, for the appellant to be afforded the opportunity to present these circumstances to the appeal court, coupled with a request to alter the custodial sentence imposed by the trial court, to a fine. It is against this backdrop that it can be inferred that this appeal is against sentence. However, the duty of this court is not to draw inferences as to what an appellant is appealing against. This notwithstanding, even if it were to be assumed that

¹ See: *Haoseb v S* (HC-MD-CRI-APP-CAL-2021/00047) [2022] NAHCMD 120 (17 March 2022); *S v Gey van Pittius and Another* 1990 NR 35.

² *Petrus v S* (HC-MD-CRI-APP-CAL-2021/00082) [2022] NAHCMD 455 (2 September 2022).

the appeal is indeed against sentence, owing to the defective nature of the notice of appeal, it lacks clarity as to the basis or the grounds against which the appeal against sentence is sought. What needs mentioning, is that the appellant did not attack the severity of the sentence imposed on him.

[10] Appellant's request to be afforded the opportunity to be sentenced to payment of a fine, is simply unattainable, for reason that the applicable penalty provisions, set out in s 14(1) of the Act, only provide for imprisonment without the option of a fine. The appellant would thus not have been successful on appeal, even if his notice of appeal was proper.

[11] Although appellant being a lay man who drafted the notice of appeal in person and argued the matter before us, it has been stressed in various judgments of this court that lay litigants are as much under obligation as those represented by lawyers, to follow the rules of court. A court may not condone non-compliance with the rules even by lay litigants where non-compliance with the rules would render the proceedings unfair or unduly prolonged.³

[12] It follows that, where the notice of appeal herein is found to be defective, consequently, there is no appeal before this court. An inevitable consequence of this fateful situation for the appellant, is that there is no appeal to begin with and the appeal falls to be struck from the roll for non-compliance with rule 67(1) of the Magistrates' Court Rules.

[13] In the result, it is ordered:

The appeal is struck from the roll.

³ *Kalenga Iyambo v S* CA 165/2005 at 5. See also: *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) and others* 2014 (NR) 234 (SC).

J C LIEBENBERG JUDGE	P CHRISTIAAN ACTING JUDGE