

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no.: HC-MD-CRI-APP-CAL-2023/00003

In the matter between:

**HAFENI HAMUKOTO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Hamukoto v S* (HC-MD-CRI-APP-CAL-2023/00003) [2023]  
NAHCMD 794 (5 December 2023)

**Coram:** SHIVUTE J et CHRISTIAAN AJ

**Heard:** 3 November 2023

**Delivered:** 5 December 2023

**Flynote:** Criminal Procedure – Appeal against conviction – Noting of appeal out of statutory time limit – Requirements – Satisfactory explanation for cause of delay – Prospects of success on appeal – Appellant alleging cause for delay due to lack of

means to instruct private legal practitioner – Such explanation not reasonable and bona fide under circumstances – Prospects of success – Appellant contending among other things that the court a quo misdirected itself by convicting appellant in absence of forensic evidence – Court may convict in absence of forensic evidence if presented with equally convincing evidence.

**Summary:** The appellant was convicted of murder. He appealed against his conviction. However, his notice of appeal was filed out of the prescribed time limit. There are two requirements to be met for the court to condone the application for the late filing of a notice of appeal, namely the appellant must give a satisfactory and reasonable explanation for the cause of the delay and such explanation must be bona fide. The appellant must also satisfy the court that he has reasonable prospects of success when prosecuting the appeal. The appellant in this matter contended, among other things, that the court a quo misdirected itself by convicting him in the absence of forensic evidence. Although forensic evidence would usually assist with the identification of the suspect, the absence of forensic evidence such as DNA does not invalidate or nullify equally convincing evidence presented before court. In the present matter, the State led direct evidence implicating the appellant. Looking at the evidence as a whole, appellant has failed to establish that he has prospects of success in prosecuting his appeal.

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### **ORDER**

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1. The application for condonation is refused.
2. The matter is struck from the roll and considered finalised.

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### **APPEAL JUDGMENT**

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SHIVUTE J (CHRISTIAAN AJ concurring):

[1] The appellant appeared in the Regional Court sitting in Windhoek on a charge of murder. After the evidence was heard, he was convicted as charged and sentenced to 14 years' imprisonment on 15 June 2022. Aggrieved by the conviction, the appellant lodged an appeal on 27 October 2022.

[2] Apart from the initial notice of appeal, the appellant filed an amended notice of appeal on 14 August 2023 and a supporting affidavit as well as a confirmatory affidavit in respect of the application for condonation for the late filing of the notice of appeal on 15 August 2023.

[3] The appellant's notice of appeal may be summarised as follows:

3.1 The court a quo erred by relying on contradictory evidence by State witnesses.

3.2 The court a quo misdirected itself by relying on the evidence of Cecilia Tobias, when she testified that she saw the appellant wearing a t-shirt that had bloodstains on it, when such t-shirt was not produced before court and it was not forensically examined to confirm that the alleged bloodstains belonged to the deceased. Furthermore, the State failed to produce the Tassenberg bottle alleged to be the murder weapon before court and to present forensic evidence that links the appellant to the killing of the deceased.

3.3 The learned magistrate misdirected herself by failing to make a finding that Reimo Muaare also known as Kampini who fought with the deceased over his (Muaare's) missing cellphone must be the one who killed the deceased.

3.4 The learned magistrate misdirected herself by failing to apply her mind and to come to the conclusion that the only reason why Muaare committed suicide after his release as a suspect was because he killed the deceased.

3.5 The learned magistrate misdirected herself by failing to accept that the appellant left before the fight between the deceased and Muaare took place, therefore, it could not have been possible for the appellant to cause the deceased's death.

3.6 The court a quo misdirected itself by convicting on insufficient evidence.

3.7 The learned magistrate erred in law and/or fact by rejecting the appellant's version without making a finding that the appellant's version is not only false, but false beyond reasonable doubt.

[4] The respondent raised points in limine contending that the notice of appeal was filed outside the prescribed time of 14 days as required by the applicable rule. Rule 67(1) of the Magistrate's Court Rules requires that convicted persons desiring to appeal under s 309(1) of the Criminal Procedure Act 51 of 1977 (the CPA), shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of court the notice of appeal in writing in which he or she shall set out clearly and specifically the grounds, whether of fact or law or both fact and law on which the appeal is based.

[5] Respondent argued that in terms of s 307(2) of the CPA, the court of appeal may condone an applicant's failure to timeously file his notice of appeal. This can be done if the applicant provides an explanation which is acceptable to the court as to why he was unable to file his notice within the prescribed time limits. An applicant has to show that he also has reasonable prospects of success on appeal.

[6] Counsel argued that the explanation tendered by the appellant that after his conviction and sentence he was not in a financial position to instruct a private legal practitioner is not satisfactory. The appellant was aware of this fact all along as he was represented by a lawyer funded by Legal Aid during his trial. There was nothing to stop the appellant from applying for legal aid again. Therefore, his explanation could not be

said to be reasonable or bona fide. Counsel again contended that the appellant also failed to show that he has good prospects of success on appeal for this Court to condone the appellant's late filing of the appeal.

[7] Furthermore, counsel for the respondent contended that the appellant should not be allowed to make any argument based on ground 3.7 as it is not a valid ground. It was further argued on behalf of the respondent that ground 3.7 is vague and not clear and specific.

[8] Counsel for the respondent's third point in limine was that the appellant has introduced new grounds in his heads of argument to the effect that the trial court misdirected itself by finding that the appellant was the one who hit the deceased with a two litre bottle and that it was not possible to accurately identify that the appellant was the one who caused the deceased's death. The issue of identity was never raised in the grounds of appeal. The appellant's ground was that he had left and therefore, was not at the scene at the time the deceased was killed.

[9] The fourth point in limine raised by the respondent is that the appellant has raised the defence of alibi in his heads of arguments which was never part of his grounds of appeal. It was submitted that the appellant should not be allowed to argue on identification and the defence of an alibi.

[10] The appellant in his affidavit regarding the application for condonation of the late filing of the notice of appeal stated that he always had an intention to appeal his conviction, but he was not in a financial position to lodge his notice of appeal on time as he wanted the service of a private legal practitioner for the appeal process.

[11] However, afterwards he decided to lodge his notice of appeal on 27 October 2023 which was obviously late. On 15 February 2023 a legal representative was appointed by the Director of Legal Aid to represent him. However, the legal practitioner so appointed withdrew as attorney of record on 15 March 2023 after he advised the

appellant that he was of the opinion that the appeal had no prospects of success on the merits.

[12] On 10 May 2023, the current legal practitioner was appointed by the Director of Legal Aid to represent the appellant. He requested the matter to be postponed to 14 June 2023 to familiarise himself with the record and to file an amended notice of appeal. The amended notice of appeal was then filed on 14 August 2023. With regard to the prospects of appeal, the appellant in his affidavit that accompanied his application for condonation, stated that he had prospects of success based on the grounds stated in his amended notice of appeal.

[13] After having heard arguments on the application for condonation, we reserved judgment thereon and allowed the parties to argue the appeal on the merits.

[14] Counsel for the appellant argued that the trial court misdirected itself by finding that the appellant was the one who hit the deceased with a bottle of Tassenberg based on the testimonies of the State witnesses, despite the fact that the photo plan revealed that it was pitch dark at the bar. As such, it was not possible to accurately identify that the appellant was the one who caused the deceased's death.

[15] Counsel for the respondent correctly raised a point in limine that this is a new ground of appeal that was raised in the heads of argument. The issue of identity was never raised in the grounds of appeal.

[16] An appellant is confined to his grounds of appeal. He cannot smuggle in further grounds through his heads of argument. In *S v Tjiho* 1991 NR 361 (HC) at 363 D – E Strydom JP stated as follows:

'A notice of appeal must set out clearly the grounds of appeal. It serves as a notice to the prosecutor and to the court what grounds will be argued. An appellant is confined to his

grounds of appeal and generally will not be allowed to argue any matter not raised in his grounds of appeal.’

[17] The above ground was introduced through heads of argument. It was not set out clearly and specifically in the grounds of appeal. Applying the above legal principles, the appellant is barred from arguing this ground on the basis that he failed to raise it in his grounds of appeal.

[18] With regard to grounds 3.1 – 3.2, counsel for the appellant argued that the court a quo misdirected itself by relying on hearsay evidence tendered by Haushona concerning what he was told by Tobias, that it was the appellant who assaulted the deceased with a bottle on the head whilst such evidence was contradicted by Tobias who testified that she was not present when the incident took place. Furthermore, counsel argued that the court a quo took into account that the appellant was wearing a t-shirt that had bloodstains as testified to by Tobias. However, the State did not produce the bottle that was used in the commission of the crime and the t-shirt that was alleged to have bloodstains. It was again a point of criticism that the bottle used to kill the deceased and the t-shirt was not forensically examined to link the deceased to the commission of the crime.

[19] Counsel for the respondent in this regard argued that the trial court never took into account the testimony of Haushona that he was told by Tobias that the appellant assaulted the deceased with a bottle. Nowhere in the court’s judgment is it reflected that the court relied on hearsay evidence. Furthermore, there is nothing in the judgment when addressing Tobias’ version, that the court took into consideration that Tobias saw the appellant with a blood stained t-shirt. However, the fact that it is not mentioned does not mean that it is not part of the circumstantial evidence against the appellant.

[20] It is trite that though forensic evidence would usually assist with the identification of the suspect, the absence of scientific evidence such as DNA or other forensic evidence, does not invalidate or nullify equally convincing evidence presented.

*Muyongo v S* (HC-MD-CRI-APP-CAL-2019/00106 [2020] NAHCMD 297) [2020] (17 July 2020 para 13).

[21] The facts that the bottle used to commit the crime was not produced before court as well as the t-shirt that was alleged to have bloodstains, do not mean that the court cannot convict on the reliable evidence presented before it. The court a quo was presented with evidence from eye witnesses Kamanya and Shilongo who testified that they witnessed the appellant assaulting the deceased with a bottle on the head after he was first assaulted by Muaare with fists. According to the post-mortem report, the deceased suffered a basal skull fracture among other things. The cause of death was determined to be blunt force trauma to the head. It follows that these grounds bear no prospects of success.

[22] Concerning ground 3.3, counsel for the appellant argued that the court a quo misdirected itself by not applying its mind that Muaare who was fighting the deceased was the one who killed him.

[23] On the other hand, counsel for the respondent argued that there is overwhelming evidence against the appellant that he killed the deceased. The trial court was correct in taking into account the evidence of Kamanya and Shilongo that although Muaare assaulted the deceased with fists first, the appellant assaulted the deceased with a bottle three times at the back of the head.

[24] It is common cause that the deceased was initially assaulted with fists by Muaare. After Muaare assaulted the deceased there is evidence from eye witnesses that the appellant assaulted the deceased on the head three times with a bottle. The deceased fell and never got up again. The blows to his head were confirmed to be the cause of death by medical evidence. Therefore, the ground that Muaare was the one who caused the deceased's death is equally unmeritorious and has no prospects of success.



[25] The next ground is that the only reason Muaare committed suicide was because he killed the deceased. I pause here to state that although there is evidence that Muaare had passed on, the evidence that he committed suicide because he killed the deceased is not borne out of the record. These are assumptions made on behalf of the appellant. Therefore, they have no merit.

[26] The next ground to be considered is that the court a quo misdirected itself by failing to accept that the appellant left before the physical fight between the deceased and Muaare broke out. Therefore, he could not have been responsible for the deceased's death. It was argued on behalf of the appellant that he was not present when the crime was committed. He left the bar where the incident took place between 22h00 and 23h00 and went home to State witness Tobias. The mere acceptance of the prosecution's evidence is not sufficient on its own to justify the dismissal of the appellant's alibi defence. The fact that Tobias testified that appellant arrived home between 02h00 and 03h00 does not disprove that the appellant was not present at the bar at the time the deceased was killed.

[27] Furthermore, counsel for the appellant argued that the court a quo convicted the appellant on circumstantial evidence and it drew an inference that was not consistent with the proven facts. The second leg of circumstantial evidence was also not satisfied given the fact that there were no proven facts presented before it that excluded every reasonable inference from them. The evidence presented before the court a quo did not prove that the appellant is guilty beyond a reasonable doubt.

[28] Concerning the above arguments, counsel for the respondent argued that the trial court was correct to accept the evidence of Shilongo and Kamanya that it was the appellant who caused the deceased's death. The visibility was good and witness Kamanya knew appellant before the incident. Therefore, he could not have been mistaken as to his identity. Kamanya and Shilongo testified that the appellant was at the bar during the time the deceased was killed. Tobias also testified that the appellant only went back home between 02h00 and 03h00.

[29] With regard to circumstantial evidence, counsel for the respondent argued that the court a quo did not rely on circumstantial evidence as there were two eye witnesses who saw the appellant hitting the deceased with a bottle. The photo plan that is in black and white clearly shows the deceased where he was found and the points as pointed out by Shilongo.

[30] Although counsel for the respondent had raised a point in limine that the defence of alibi was raised in the heads of argument and was not part of the grounds of appeal, I am unable to appreciate this, because one of the appellant's grounds of appeal is that he had left before the fight between the deceased and Muaare took place. Hence, it could not have been possible for the appellant to cause the deceased's death. This ground of appeal clearly raises an alibi defense.

[31] In order to determine whether or not the appellant's conviction in the present matter was not justified and whether the appellant has prospects of success when prosecuting his appeal, regard must be had to the whole evidence adduced before the court a quo and its judgment. It is common cause that the appellant went to the place where the incident took place on 24 February 2018 in the company of Muaare and Tobias, Muaare's sister and these three people were residing at the same residence.

[32] According to Tobias, they arrived at the bar around 23h00. Because the place was overcrowded, she did not stay long. She went home and left the appellant with Muaare at the bar. Upon arriving at home, she found one of her cousins and she decided to go back to the bar with her cousin. When she went back to the bar, she found the appellant and Muaare still there. Tobias left her cousin, the appellant and her brother Muaare at the bar around 02h00. The appellant only came back home between 02h00 and 03h00.

[33] Both Kamanya and Shilongo testified that whilst they were at the bar around 02h00, a report was made that the bar was closed and one guy who had lost his phone

was saying no one was going to leave or enter the bar. However, the door was opened by Kamanya according to his testimony.

[34] After the door was opened, the deceased came out and he was followed by one Muaare known as Kampini who was asking about his phone. He was assaulting the deceased with fists. The appellant who was behind Muaare, hit the deceased thrice on the back of his head. The deceased did not get up after he was hit. He died on the spot. When the appellant assaulted the deceased, both eye witnesses were standing about four metres away from the spot where the incident took place. According to both eye witnesses, the incident took place in the early hours of the morning around 02h00.

[35] On the other hand, the appellant testified that he left the bar around 23h00 and went home. However, according to his testimony, before he went home he had received a report from Muaare that Muaare had lost his cell phone. Muaare had also told the security guard that no one should enter or exit the bar. The one who was arguing with Muaare over the phone kicked the door open and went out. Muaare followed him asking about his phone. They fought each other and the appellant told them to leave each other and left the bar. The appellant disputed that he hit the deceased with a bottle or caused his death as he was not present when the deceased met his demise.

[36] Three State witnesses placed the appellant at the scene beyond midnight. Tobias testified that the appellant only arrived home between 02h00 and 03h00 and not around 23h00 as the appellant testified. The appellant testified that the incident of the door being closed and opened happened before he left. He also said that, when the deceased and Muaare were fighting after the door was opened, that occurred around 23h00 to midnight.

[37] However, the appellant's version was contradicted by Kamanya and Shilongo who testified that after the door was closed, Muaare who lost a phone was saying that no one was allowed to enter or leave the bar and that happened around 02h00. When the door was opened, the deceased came out and Muaare was following him and

assaulted him with fists. Immediately thereafter, the appellant hit the deceased thrice with a bottle.

[38] None of the State witnesses were discredited during their respective testimonies. Kamanya, Shilongo and Tobias corroborated each other in material respects where their versions met. In its assessment of the evidence as a whole, the trial court was satisfied that the above mentioned three State witnesses were credible and reliable as opposed to the appellant who fabricated his testimony that the closing of the door and its opening as well as the stopping of the fight between the deceased and Muaare happened around 23h00 and that was the time he left the bar. Although the court a quo is criticised for not stating specifically that the appellant's version is rejected because it is not only false, but false beyond reasonable doubt, the evidence against the appellant is overwhelming.

[39] There were eye witnesses who identified the appellant being the person who caused the deceased's death. Both witnesses knew the appellant before the incident. The visibility was clear as there were lights inside and outside the bar. Probabilities also favour the version of the State rather than the appellant's version. The appellant had only tendered a blunt denial. In my view, the court a quo was entitled to make a finding that the State had established beyond a reasonable doubt that the appellant was guilty of the crime as charged.

[40] In conclusion, the explanation given by appellant concerning the cause of the delay is not reasonable and bona fide. Appellant has also failed to establish that he has reasonable prospects of success on the merits of the appeal. Accordingly, there is no basis on which a court sitting on appeal would come to a different conclusion and overturn the conviction.

[41] In the premise, the following order is made:

1. The application for condonation is refused.

2. The matter is struck from the roll and considered finalised.

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N N Shivute

Judge

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P CHRISTIAAN AJ

Judge

## APPEARANCES

APPELLANT: S Kanyemba  
Of Salomon Kanyemba Inc., Windhoek

RESPONDENT: M H Muhongo  
Office of the Prosecutor-General, Windhoek