

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGEMENT

Case no: HC-MD-CRI-APP-CAL-2021/00079

In the matter between:

**MICHAEL UJEE KAIMU**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kaimu v S* (HC-MD-CRI-APP-CAL/2021-00079) [2023] NAHCMD 799 (7 December 2023)

**Coram:** SHIVUTE J and CHRISTIAAN AJ

**Heard:** 13 November 2023

**Delivered:** 7 December 2023

**Flynote:** Criminal Procedure – Appeal against conviction and sentence – Rape under the Combating of Rape Act 8 of 2000 – Application for condonation – Non-compliance with rule 67 of the Magistrates’ Court Rules – Appellant filing an improper notice of appeal – Grounds of appeal vague, not clear and specifically set – Notice constitutes the very foundation of the appeal – Once a nullity, it remains a nullity and cannot be resurrected or revived, neither by condonation of the non-compliance of the rules nor by the amendment of the defective notice. Counsel for appellant under obligation to comply with the Rules of Court.

**Summary:** The appellant was arraigned before the Gobabis Regional Court on two counts of rape under the Combating of Rape Act 8 of 2000. He was convicted and sentenced to thirteen years imprisonment on the first count and seven years

imprisonment on the second count. He filed an initial notice of appeal as a lay litigant and later filed two amended notices of appeal, one assisted by a fellow inmate and another assisted by a legal practitioner. The amended notices of appeal were filed out of time. Grounds of appeal in the initial notice of appeal are vague in that they are not clearly and specifically stated. Improper grounds of appeal as well as the defective notice of appeal. Once a nullity, it remains a nullity and it cannot be resurrected or revived, neither by condonation for non-compliance with the rules nor by amendment of the defective notice of appeal. The court used a relaxed approach in this regard, based on the fact that the appellant is a lay litigant.

The application for condonation for the late filing of the amended notices of appeal failed to comply with rule 67 of the Magistrate's Court Rules. Appellant was unable to give a satisfactory explanation concerning his late filing of the amended notices of appeal. The appellant is under obligation to comply with the rules of court as the notice of appeal constitutes the very foundation of the appeal. If the notice of appeal does not comply with the rules of court, it is a nullity, without force and effect.

In considering whether it should condone the appellant's late filing of his notice of appeal, the Court concluded that there existed no reasonable prospects of success on appeal.

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### ORDER

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1. The points *in limine* are upheld.
2. The application for condonation for the late filing of the appellant's amended notice of appeal is refused.
3. The appeal is struck from the roll and regarded as finalised.

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### JUDGMENT

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CHRISTIAAN AJ (SHIVUTE J concurring):

#### Introduction

[1] The appellant was arraigned before the Gobabis Regional Court on two counts of contravening section 2(1)(a) as read with, section 1, 2(2)(f), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000- Rape. He was convicted of both counts and sentenced on 11 December 2020. to thirteen years' imprisonment on count 1 and seven years on count 2.

[2] The appellant appears and prosecutes his appeal in person and the respondent is represented by Mr Gaweseb.

[3] The appellant filed an initial hand written notice of appeal with the Gobabis clerk of court on 23 December 2020. Subsequently, on 3 August 2022, a second notice of appeal dated 19 July 2021 was filed on e-justice on with no indication that it was served on the Gobabis Clerk of court. The appellant applied for legal aid and Mr Ipumbu was appointed to represent him. An amended notice of appeal dated 27 May 2022 was filed on e-justice on 5 July 2022, accompanied by an application for condonation, addressing the late filing of the notice of appeal dated 19 July 2022 and the amended notice of appeal. There is no proof that the second notice of appeal and amended notice was filed with the clerk of the court, Gobabis and there was further no compliance with Rule 67(1) of the Magistrates Court Rules, as they were was filed more than five months late.

[4] When this matter appeared for the first time on 30 October 2023 before us, the appellant was unrepresented, as his legal practitioner of record had withdrawn and the appellant was requested to provide proof that the notice of appeal was served on the Gobabis clerk of the court. The appellant was not able to provide such proof and explained that he was under the impression that his legal practitioner had complied with same. An opportunity was granted for him to file the copy of the notice of appeal on the Gobabis Magistrates Court. The matter was postponed for hearing to 13 November 2023. The matter was heard on this date, as the appellant complied with the directive.

[5] The appellant's rights to appeal were fully explained on record and in line with the guidelines as set out by Tomassi J and concurred to by Liebenberg J in *Kornelius v S*.<sup>1</sup>

[6] In *Nande v S*<sup>2</sup> the applicable principles were explained as follows:

'It is settled law that s 309 (2) of the Criminal Procedure Act, 51 of 1977, makes provision for condonation of the Appellant's failure to file a notice of appeal within the prescribed period of 14 days provided for in the Magistrate's Court Rules. Condonation is not just granted because it is requested. The Court will only condone the non-compliance with the rules once the applicant provides an acceptable and reasonable explanation, and when the prospects of success on appeal are good. This Court has on many occasions emphasized the fact that where an appeal is noted out of time, the applicant must bring a substantive and proper application seeking condonation for the late filing of the notice of appeal. Where the Appellant, as in the present instance, acted without any assistance from a legal representative, the Court, considering the circumstances of the case, pay full attention to the prospects of success on appeal.'<sup>3</sup>

[7] The appellant, in his initial notice of appeal, raises no ground of appeal. He essentially requests this court to explain to him why he was convicted of both counts of rape, in the absence of the investigating officers' testimony and the absence of medical evidence proving the act of rape. We will deal with the two points *in limine*, the defective notice of appeal that cannot be remedied by an amended notice of appeal and secondly, the late filing of the amended notice of appeal.

#### Points in limine

[8] Because of this, counsel for the respondent Mr Gaweseb raised two points *in limine*. Firstly, he submitted that there is no condonation application, supporting affidavit or any grounds forwarded for prospect of success on appeal, to have the late filing of his notice of appeal condoned by this Court and that he has not done so.

<sup>1</sup> (CA 103/2009) [2011] NAHC 110 (8 April 2011) para 10.

<sup>2</sup> (HC-NLD-CRI-APP-CAL-2020/00025) [2020] NAHCNLD 165 (19 November 2020) paragraph 10

<sup>3</sup> *Nghuulondo v The State* (CA 72/2014) [2014] NAHCMD 373 para 4 (08 December 2014); *S v Arubertus* 2011 (1) NR 157 (SC) at 160. *S v Wasserfall* 1992 NR 18 (HC) at 191-J

Secondly, he submitted that there is no proper grounds of appeal<sup>4</sup>, the appeal is a nullity and cannot be resurrected or revived by condonation or by an amendment to the defective notice.<sup>5</sup>

[9] Counsel for the respondent concluded that the appellant failed to show that he has a reasonable and acceptable explanation for the delay and that he enjoyed reasonable prospects of success on appeal. He submitted that on those grounds the appeal should be struck.

[10] In response to the points *in limine* and in addition to what was contained in the appellant's affidavit for the application for condonation, the appellant indicated that he will stand by the papers filed. He went further to state that he is a lay person and just put down what he thought was proper and therefore, his legal practitioner advised that an amended notice of appeal be filed, which was also out of time.

*Discussion of the first point in limine- late filing of the amended notice of appeal*

[11] It is submitted by counsel for the respondent that the purported grounds of the original appeal are vague and do not amount to clear and specific grounds of appeal as is required by the rules of court. It was further submitted that once a ground of appeal is defective, it cannot be revived by an amended notice of appeal. In light of the above circumstances, it was submitted that the application be struck off the roll and for the applicant to file a new amended notice of appeal.

[12] The appellant on the other hand, in his explanation for the delay in the late filing of the amended notice of appeal explained that it was his intention to appeal against the conviction and sentence from the outset. This intention was explained to the presiding magistrate, after the conviction and sentence and he was advised to

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<sup>4</sup> The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall according to *S v Kakololo* 2004 NR 7 (HC) at 8F, quoting *S v Khoza* 1979 (4) SA 757 (N) at 758B with approval.

<sup>5</sup> *Hashe v Minister of Justice and Another* 1957 (1) SA 670 (C) at 675, *R v Zive* 1960 (3) SA 24 (T) at 26F, *S v Matuba* 1977 (2) SA 164 (O) at 166, *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (B) at 94-95D and 96F, *S v Maliwa and Others* 1986 (3) SA 721 (W) at 726F and *S v Nel* 1962 (1) SA 134 (T) at 134F as approved and applied in *S v Kakololo* 2004 NR 7 (HC) at 9B-D.

draft a letter and submit it to the clerk of the court of Gobabis Magistrates Court. He further explained that he engaged his legal practitioner who was representing him to assist him with the drafting of the said letter and he refused, stating that he does not deal with criminal appeals. He further explained that he had no option but to put pen to paper and draft the letter which was submitted to the Gobabis clerk of the court on 23 December 2020. He applied for legal aid, in order to get the assistance of a legal practitioner, and this application was unsuccessful, he therefore, approached a fellow inmate, who is a law student to assist him with the drafting of a notice of appeal and this was done and this second notice dated 19 July 2021 was submitted. He further explained that he approached legal aid, and his application was successful and that his legal practitioner advised him to amend the aforementioned notices of appeal as they do not comply with the prescribed directives.

[13] It is evident from the record that the initial grounds of appeal were defective in its entirety as they were vague, in that they were not clear and specific. The notice of appeal constitutes the very basis of the appeal. If it does not comply with the rules, it is not a valid notice. However, the so-called second grounds of appeal dated 19 July 2021, contained new grounds of appeal, which are equally vague and amount to conclusions by the appellant. The amended notice of appeal contained grounds which are almost similar to the earlier grounds. If one has a closer look to the grounds of appeal in para 3, they are an attempt by counsel to remedy the defective notices of appeal. They are not proper grounds at all and are a nullity.

[14] In the matter of *Teofelus v S*<sup>6</sup>, our brother Small AJ (as he then was) with Munsu AJ (as he then was) concurring, made the following remarks in para 14 and 15:

[14] Accused persons at present have the right to appeal against their convictions and sentences imposed in lower courts. While I understand the necessity of requiring legal practitioners to properly formulate the grounds of appeal for the reasons propagated in the decisions<sup>7</sup> mentioned above, I believe it should be recognised that a properly drafted notice of appeal alone does not equal a positive result on appeal. Therefore, when the Court deals

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<sup>6</sup> *Teofelus v S* (HC-NLD-CRI-APP-CAL-2021-00009) [2021] NAHCNLD 71 (23 July 2021).

<sup>7</sup> In footnotes 8 and 9.

with laypersons technical objections requiring such appellant to formulate a ground of appeal as if a legal practitioner would have done it, does not serve substantial justice.

[15] If a notice of appeal against a sentence indicates that the lay appellant avers that his sentence is excessive and inappropriate in whatever form or manner, a court of appeal should rather consider whether there exist reasonable prospects of success on appeal and then proceed from there. Such an approach is substantially more just than striking the appeal because the notice of appeal does not comply with the strict formal prerequisites. Therefore, our Court have leaned towards a more lenient approach when it comes to appellants prosecuting their appeals in person.<sup>8</sup>

[15] We will align ourselves with the above-mentioned sentiments, based on the fact that the appellant was a lay litigant and tried to bring his appeal as early as 23 December 2020, well within the prescribed period. We will therefore address the second *point in limine*, which deals with the late filing of the amended notice of appeal.

*Discussion on the second point in limine- late filing of the amended notice of appeal*

[16] The court a quo gave the appellant a full explanation of the right to appeal and the procedure to prosecute the appeal. I am satisfied that the Appellant knew and understood what the rules prescribed and required. The record of proceedings before this court reveals that the appellant filed an application for condonation through his than legal practitioner, explaining the delay for the late filing of the notice of appeal dated 19 July 2021 and the amended notice of appeal dated 27 May 2021.

[17] In considering the appellant's application for condonation and the points *in limine* raised by the respondent, I remind myself that an application for condonation should satisfy two requirements before it can succeed. These entail firstly establishing a reasonable and acceptable explanation for the delay, and secondly,

<sup>8</sup> *S v Ashimbanga* 2014 (1) NR 242 (HC) paras 3 and 4, *Lazarus v S* (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (3 December 2020) para 7, *Ndaningina v S* (HC-MD-CRI-APP-CAL-2018/00073) [2019] NAHCMD 126 (29 April 2019) paras 7, *Endjala v S* (HC-NLD-CRI-APP-CAL-2020/00035) [2020] NAHCNLD 161 (19 November 2020) para 5, *Christof v S* (HC-MD-CRI-APP-CAL-2018/00084) [2019] NAHCMD 79 (01 April 2019) paras 4 and 5 and *Nande v S* (HC-NLD-CRI-APP-CAL-2020/00025) [2020] NAHCNLD 165 (19 November 2020) para 6.

satisfying the court that there are reasonable prospects of success on appeal.<sup>9</sup> I will therefore, deal with the explanation for the delay.

*The explanation for the delay*

[18] Regarding the first leg, the explanation is that the appellant after his conviction and sentence on 11 December 2020, informed the presiding officer that he would like to appeal and he was advised that he drafts a letter and submit the same to the clerk of the court. He further explained that he requested his legal representative to draft the letter as advised by the court and he was informed by the legal practitioner that he does not deal with criminal appeals. He thereafter, prepared the first notice of appeal, in the form of a letter and submitted that to the clerk of the court. He further explained that he applied for legal aid, which was unsuccessful, due to the fact that the appeal grounds were without merit. He approached a fellow inmate, who is a law student and requested him to assist him in drafting the notice of appeal dated 19 July 2022. He further explained that he again approached the Directorate of Legal aid in person and the application was successful, a certain Mr Bonsai was appointed, which has withdrawn due to conflicting instructions. Mr Ipumbu was appointed and he advised the filing of an amended notice of appeal, as his initial notice of appeal does not comply with the applicable legal provisions, and this notice was also out of time. It was further submitted that the amended notice of appeal was filed with the clerk of the Court in Gobabis and when the notice eventually reached her after her leave, the presiding Magistrate resigned and could not attend to the notice of appeal.

[19] It would appear therefore, that the amended notice of appeal was made some 5 months after the date by which the application ought to have been filed. On a mature consideration of all the facts reduced to writing on oath, we are of the view that the delay in this matter being that the appellant is a layperson, the delay in legal aid appointments, the withdrawal of his legal practitioner and the resignation of the presiding magistrate, without supporting affidavits from the parties, to fully explain

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<sup>9</sup> See *Balzer v Vries* 2015 (2) NR 547 (SC), *Leonard v Oshana Security Services CC* (HC-NLD-LAB-APP-AAA-2021/00006) [2023] NAHCNLD 1 (17 April 2023).



the delay, is inadequate and falls short of being a reasonable and acceptable explanation. In our view itself, this is sufficient reason to refuse the application.

[20] In the absence of a reasonable explanation for the delay, the merits of the appeal, specifically the reasonable prospects of success on appeal, are significant and can tip the scales for granting the application for condonation and consideration of the merits of an appeal.<sup>10</sup> We will now proceed to deal with the second leg of the test, which deals with prospects of success.

*Reasonable prospects of success on appeal*

[21] The second leg of the enquiry is whether the applicant has shown that he has reasonable prospects of success on appeal. To answer this aspect of the enquiry, one has to advert to the affidavit of the appellant. It is important to note that the appellant was assisted by a legal practitioner when he drafted the application for condonation. However, this affidavit is as brief as can be. The appellant, in one short paragraph stated the following regarding the issue of prospects of success at para 18:

'I am advised by my Legal Practitioner of record, which advice I verily believe to be correct and true that I have good prospects of success which are premised on multiple misdirections by the trial court. The trial Court failed to warn itself of the fact that the State witness in Count 1 is a single witness whose evidence must be treated with caution. The trial court also erred in facts in making the findings that both complainants were raped while the documentary medical evidence, to wit, the J88 show the opposite.'

Do the following averments meet muster in so far as they establish that the applicant has prospects of success?

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<sup>10</sup> *S v Nakale* 2011 (2) NR 599 (SC) paras 7 and 8. See also *S v Ngombe* 1990 NR 165 (HC) at 166 (1991 (1) SACR 351 (Nm) at 352B – C); *Pietersen-Diergaardt v Fischer* 2008 (1) NR 307 (HC). The passage in *S v Nakapela and Another* 1997 NR 184 (HC) at 185H-I quoted by Ms Khama refers to condonation for the late filing of heads of argument and not the late filing of a notice of appeal and it was in this regard that that court concluded: 'Thus if the appellant fails on the first requirement, the appellant is out of Court.' It thus does not contradict the principles set out in the three decisions quoted earlier in this footnote.

[22] A reading of the above paragraph, particularly the first, we must say reflects some reluctance at worst, or at best, a half-hearted attempt on the part of the deponent to deal with the pertinent issue of prospects of success. I say so for the reason that the applicant uses the words 'In as far as it may be necessary to deal with prospects of success...' From the authorities, it is clear that this is an issue that must be squarely addressed and fully as it weighs a lot in the decision whether or not to grant condonation. It is not one that an applicant for condonation must pay lip service to or one which he may deal with laconically or with some element of reluctance. It is an important cog in the entire enquiry.

[23] We are of the considered view that the issue of establishing prospects of success on appeal is not a question of a mere formality. An applicant must, on the papers, fully canvass the issue by making relevant allegations on the issue, stating in clear and unambiguous terms why it is claimed that the applicant has reasonable prospects of success. It does not suffice in my view, to merely make reference to the notice of appeal and pray that same be incorporated as having been part of the affidavit filed in support of the application for condonation. There should, as I have said, be depositions under oath as to why it is contended that the applicant has prospects of success and this is part of the burden that the applicant for condonation must discharge before condonation can be granted.

[24] It is not acceptable, correct nor fair for an applicant for condonation to merely make loosely assembled allegations and expect the court to do research for that party and in the process plough through the entire record to find for itself what may have been in the applicant's contemplation when he merely alleged he had reasonable grounds of success. Parties are expected to assiduously make their respective cases and to assist the court in making what will hopefully be the correct decision in their favour.

[25] Having regard to the papers filed of record before me, I am of the view that the applicant assumed a relaxed approach to condonation and thus, failed to show that he has prospects of success on appeal. We cannot, in the circumstances find that this is a proper case in which to grant an application for condonation for lack of effort, necessary information and pertinent allegations. I am of the considered view

that one of the necessary requirements has not been sufficiently dealt with or satisfied by the applicant herein.

[26] In the premise, I make the following order:

1. The points *in limine* are upheld.
2. The application for condonation for the late filing of the appellant's amended notice of appeal is refused.
3. The appeal is struck from the roll and regarded as finalised.

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P CHRISTIAAN  
ACTING JUDGE

I agree,

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N N SHIVUTE  
JUDGE

## APPEARANCES

APPELLANT:

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RESPONDENT:

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