

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 21/2016

In the matter between:

KAMBWALE ALFONS KAWALI PIENAAR

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Pienaar v S* (CA 21/2016) [2016] NAHCNLD 42 (11 May 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 03 March 2017

Released: 11 May 2017

Flynote: Criminal Procedure – Condonation – Late filing of notice – Explanation reasonable – Condonation granted – Appeal against sentence – Interference by Court

of appeal – Such interference only justified where sentence vitiated by irregularity or misdirection – Sentence essentially falling within discretion of trial Court.

Summary: The appellant was charged with amongst others assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act, Act 4 of 2003. Section 25 stipulates that the court must if reasonably possible notify the complainant or her next of kin of the time and place of sentence to express his/her views on sentence. The complainant was not notified. This is found to be a misdirection. The sentence is set aside and the matter remitted for sentencing in compliance with the Act.

ORDER

1. Condonation for the late filing of the notice of appeal is granted;
2. The appeal against sentence on count 1 Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 is upheld;
3. The sentence of 36 months imprisonment is set aside;
4. The matter is remitted to the magistrate to deal with the matter from sentencing stage on count 1 and to comply with the provisions of the said Act.
5. The magistrate is directed to duly consider the period the appellant served in custody when sentencing him.
6. The appellant remains in custody;
7. It is ordered that the matter be re-enrolled at the earliest possible date in the district court.
8. The Deputy Registrar is directed to cause service of this order on the magistrate who is now stationed at Karibib.

JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] The appellant in this matter was charged with; 1. Assault with intent to do grievous bodily harm read with section 21 of the Combating of Domestic Violence Act, Act 4 of 2003; 2. Malicious damage to property; 3. Assault by threat read with section 21 of the Combating of Domestic Violence Act, Act 4 of 2003; 4. Assault on a member of the police force in contravention of section 35(1) of the Police Act, Act 19 of 1990 read with section 1 of the said Act; Alternatively: Interference with a member of the police force in contravention of section 35(2)(a) of the Police Act, Act 19 of 1990 read with section 1 of the said Act. He pleaded not guilty to all charges. He was convicted and sentenced on charges 1, 2 and the alternative to charge 4.

[2] This appeal is only in respect of sentence on charge 1. The appellant was sentenced to 36 months imprisonment. The charge relates to the appellant having assaulted his wife by beating her with clenched fists all over the body and also by kicking her with booted feet all over the body with intent to do her grievous bodily harm.

[3] Mr Tjiteere is representing the appellant in this appeal and he was one amongst other legal representatives who represented the appellant in the court below. Ms Nghiyonyanye is representing the respondent in this court. The appellant was represented in the court *a quo* throughout proceedings in that court.

[4] Ms Nghiyonyanye raised a point *in limine* that the appellant filed his notice of appeal 4 (four) months out of time and did not provide a reasonable explanation for the delay. She submitted that should this court find the reason for the delay to be satisfactory, that there are no prospects of success on appeal. Her contention is that the appellant was represented in the court *a quo* and that in these circumstances it was not necessary for the magistrate to in detail explain the procedure to appeal.

[5] Mr Tjiteere submitted that it is a procedural requirement that the right to appeal, and, if I may add, how to appeal or follow up review proceedings, should be explained to an accused by the presiding magistrate. He contended that the legal practitioner held instructions to attend to the trial only and not to an appeal. If I understand his argument correctly it boils down to that a presiding officer is not absolved from explaining the rights of appeal or review because an accused is legally represented. Further that there is no duty on the legal practitioner to explain and assist the accused to file a notice of appeal and in the appeal.

[6] I disagree with Mr Tjiteere's contention. Legal practitioners and prosecutors are officers of court and have a duty to assist the court to ensure that justice is done and seen to be done. Moreover, to see to it that any accused receives a fair trial. The rights to appeal and/or review are part and parcel of a fair trial. Legal practitioners further, in my view, have a duty to inform and advise an accused if they are of the view that there are prospects of success. I agree that an instruction to represent any accused has certain limits. I am however not in agreement that the responsibility of a legal representative should be artificially divided into phases in order to determine where that responsibility ends.

[7] Legal practitioners, irrespective of whether they are privately appointed or appointed by the Directorate Legal Aid have a duty to ensure that their clients' constitutional rights are protected. According to the appellant, the magistrate alerted Mr Tjiteere in that the magistrate stated; '...since I am represented by Counsel there was no need for her to explain the procedures pertaining to Appeal.' Despite this Mr Tjiteere who at that stage was the legal representative who should have acted on the remark of the magistrate, approaches this court of appeal and claims that the duty was on the magistrate to explain the right of appeal to the appellant. He is in a sense admitting that he did not react on the remark.

[8] It is a notorious fact that most magistrates are under tremendous pressure to finalize their daily court rolls. I appreciate that they may assume that legal practitioners, as officers of court and paid for their services, would protect their clients' interest and

ensure a constitutionally fair trial for them. It is not acceptable that a legal practitioner, who failed in his duty, shifts the blame on a presiding officer.

[9] In this appeal, the record is silent on whether or not the right to appeal was explained. The appellant in his application for condonation filed an affidavit wherein he states;

- '7. I point out that although I am able to speak English I do not know the legal procedure I had to comply with in order for me to note my appeal.
8. During my sentencing, the Learned Magistrate stated merely that if I was not satisfied with the decision of the Court with regard to conviction and sentence I may note an Appeal. The Learned Magistrate further stated that since I am represented by Counsel there was no need for her to explain the procedures pertaining to Appeal. I therefore note that although I confirm from the counsel represented me (sic) on whether I can appeal, the said Counsel or the Court did not advised (sic) as to how I should go about when noting an appeal.'

[10] The appellant was sentenced on 25 November 2015. He further states that on 30 November 2015 he drafted, what he thought was a notice of appeal to the magistrates court but it was not filed at court by the correctional officers. On the record is a document dated 30 November 2015. It does not reflect a date stamp of the Oluno Correctional Facility and only a date stamp dated 18 January 2016 of the clerk of court Outapi. In this document the appellant prays for a fine and provided reasons why a fine is appropriate.

[11] In the absence of the record reflecting that the right to appeal was explained and what was explained, I find that explanation for the delay reasonable in the circumstances.

[12] The appellant filed a document "Notice of Appeal" dated 02 February 2017 and date stamped 09 February 2017 by the Namibian Correctional Service, Ondangwa. This document reflects that he is appealing against both conviction and sentence. I do not find it necessary to restate the grounds of appeal against conviction as they are, except

for finding them nonsensical. In addition when the appellant was again represented in this appeal, the properly drafted notice of appeal indicates unambiguously that the grounds of appeal are only against sentence on count 1.

[13] The grounds of appeal are set out in the properly drafted Notice of appeal as follow;

- '1. The sentence imposed by the sentencing court is way too severe in that:
 - 1.1 The sentence imposed induces a sense of shock and is grossly inappropriate;
 - 1.2 The court unduly puts emphasis on the punitive factors of sentence:
 - 1.3 The court failed to exercise a certain measure of leniency towards the Appellant.
2. The Court failed to take into account the circumstances of the Appellant in that:
 - 2.1 The Appellant was 36 years old at the time of sentencing;
 - 2.2 at the time of sentencing, the Appellant had already been in Police custody for more than a year;
 - 2.3 he was employed by the Ministry of Safety and Security;
 - 2.4 The Appellant was the sole breadwinner and his wife was unemployed;
 - 2.5 the Appellant is a father of five minor children;
 - 2.6 the Appellant is a guardian of two of his sisters' children as his sister is deceased;
 - 2.7 the Appellant is a guardian of his wife's daughter, born out of wedlock;
 - 2.8 the Appellant was taking good care of his ill uncle;
 - 2.9 the Appellant was taking care of his 67 years old mother.'

[14] I do not find it necessary to deal with the grounds of appeal in view of the finding in conclusion hereunder.

[15] Mr Tjiteere stood by the heads of argument filed by the appellant in person on 01 February 2017. Therein one of the grounds raised was that the magistrate erred in law

and/or the facts not to call the complainant and victim to express her views before sentencing in accordance with the provisions of sections 24 and 25 of the Combating of Domestic Violence Act, act 4 of 2003.

[16] The abovementioned sections in the Combating of Domestic Violence Act, Act 4 of 2003 provide as follow;

'24 Rights of complainant where person is charged with domestic violence offence

It is the duty of the prosecutor in criminal proceedings where a person is charged with a domestic violence offence to consult with the complainant in order-

(a) to ensure that all relevant information has been obtained from the complainant which includes all information relevant to the question whether the accused should be released on bail and whether any conditions should be imposed if the accused is released on bail; and

(b) to provide such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.

25 Complainant's submission in respect of sentence

(1) The court must, if reasonably possible and within a reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.

(2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing

has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.' (my emphasis)

[17] I am of the view that the compliance with the sections is peremptory. More so, in the absence of evidence that it was not reasonably possible to notify the complainant or her next of kin within a reasonable time of the time and place of sentencing. The record is silent on this aspect. I find this omission as a misdirection. The case therefor stands to be remitted to the magistrate to comply with section 25 of the Combating of Domestic Violence Act, Act 4 of 2003.

[18] In the result:

1. Condonation for the late filing of the notice of appeal is granted;
2. The appeal against sentence on count 1, Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 is upheld;
3. The sentence of 36 months imprisonment is set aside;
4. The matter is remitted to the magistrate to deal with the matter from sentencing stage on count 1 and to comply with the provisions of the said Act.
5. The magistrate is directed to duly consider the period the appellant served in custody when sentencing him;
6. The appellant remains in custody;
7. It is ordered that the matter be re-enrolled at the earliest possible date in the district court.
8. The Deputy Registrar is directed to cause service of this order on the magistrate who is now stationed at Karibib.

JUDGE



MA TOMMASI

JUDGE

APPEARANCES:

For the Appellant:

Mr Tjiteere

Of Dr Weder, Kauta & Hoveka Inc.

For the Respondent:

Adv Nghiyoonanye

Of Office of the Prosecutor-General