

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

Case No.: CR 9/2019

In the matters between:

THE STATE

v

LOVISA KAMENYE

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (50/2019)

THE STATE

v

ABIATAL SIMON ANGULA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (51/2019)

THE STATE

v

GEORGE MOSES

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (53/2019)

THE STATE

v

NAHENDA SAMUEL

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (54/2019)

THE STATE

v

KRONELIUS TOMAS

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (55/2019)

THE STATE

v

NAKALE JONAS

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (56/2019)

THE STATE

v

AMADHILA HISKIEL

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (57/2019)

THE STATE

v

LUNAUTI JOHN

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (62/2019)

THE STATE

v

KASHINYENGA TOMAS MUTOOKOSHA

ACCUSED

(HIGH COURT NLD REVIEW CASE REF NO: (85/2019))

THE STATE

v

NGHINDISHANGE GIDEON & ANOTHER

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (86/2019)

THE STATE

v

MBANGO SAMUEL NANGOMBE

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (84/2019)

THE STATE

v

KAADHEMBA AUNE

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (82/2019)

THE STATE

v

IPUMBU PAULUS SHAANIKA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (83/2019)

Neutral citation: *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019)

Coram: JANUARY J and SALIONGA J

Delivered: 26 March 2019

Flynote: Criminal Procedure – Review – Record – Not proofread – Magistrate and clerk of court should take proper care when preparing records – Magistrate has final and ultimate responsibility.

Summary: These 13 cases are before me for automatic review. In most of the cases the proceedings appear to be in accordance with justice. The manner in which the records were submitted is a concern. The magistrate's date of appointment is not provided. Case records are incomplete. It appears that the magistrate did not proofread the records. Documents not relevant to a particular case are included in some records of the proceedings.

ORDER

1. Magistrates and clerks of court are directed to ensure:
 - 1.1 that records, especially typed records are correct, comply with the guidelines set out above, the cases referred to; and '*Chapter XII and XIII of the Codified Instructions: Clerk of the Criminal Court*';
 - 1.2 that their date of appointment reflects on the reviewable case record;
 - 1.3 that irrelevant documents are not included in the reviewable case record;

- 1.4 they send matters for review within the prescribed time limit in accordance with section 303 of the CPA.
2. The Office of the Registrar is directed to bring this judgment to the attention of the Magistrate's Commission.

JUDGMENT

JANUARY J (SALIONGA J concurring):

INTRODUCTION

[1] All these 13 cases were sent for automatic review by the same magistrate having sat at Okahao and Outapi respectively. It is commendable that the cases were sent for review within a reasonable period of time after finalization thereof between 15 January 2019 and 31 January 2019 although not within the specified time of one week stipulated by section 303 of the Criminal Procedure Act, Act 51 of 1977 (the CPA). In my observation, it happens that cases for review are sent long after the prescribed time limit.

[2] The cases reflect common mistakes and errors. I have decided to deal with all of them in one judgment. I encountered some of the mistakes also in other previous review cases and dealt with them with a remark to the specific magistrate. One of the cases herein was received by my sister, Salionga J and is included in this judgment.

THE REVIEW CASES

[3] Cases from magistrate's courts are subject to review in accordance with section 302 of the CPA. The section provides amongst others as follows:

302 Sentences subject to review in the ordinary course

'(1) (a) Any sentence imposed by a magistrate's court-

(i) which, in the case of imprisonment (including detention in a reform school as defined in section 1 of the Children's Act, 1960 (Act 33 of 1960), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii) which, in the case of a fine, exceeds the amount of R500 if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds the amount of R1 000, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer . . .'

[4] There is a difference in reviewable matters depending on the experience of the magistrate, the period of imprisonment and the amount of the fine imposed. A reviewing judge must be informed of the period of substantive rank of magistrates who presided in reviewable matters.¹ Provision is made on the J15 charge sheet to state the date of appointment. In the 13 cases that I received for review, only one of them reflects a date of appointment. However, the name of a different magistrate than the one that tried the case reflects on the typed record. Magistrates must ensure that the records are correct and their dates of appointment are correctly reflecting on review case records.

[5] It is further evident that the magistrate did not proofread the final typed record to ensure that no incomplete or incorrect record is sent on review. I will deal with the cases individually to emphasize the point.

[6] High Court Review case no 50/2019, *S v Lovisa Kamenye*, the proceedings appear to be in accordance with justice and I approved it as such. The magistrate did not state a date of appointment. The review cover sheet and J15 reflect the sentence for crimen injuria read with section 21 of the Combating of Domestic Violence Act 4 of 2003 as: 'N\$2500.00 or 8 months imprisonment of which N\$1000.00 or 3 months is suspended for a period of 5 yars (sic) on condition that the accused is not convicted of a similar offence committed duiring (sic) the period of suspension.'

[7] There are numerous judgments emphasizing that the condition 's not convicted of a similar offence' without specifying the offence, as it is vague, should not be used and that the condition should be clear by stating the specific offence that an accused

¹ See: *S v Shivute* and several other cases 1991 NR 433 (HC).

should not be convicted of. In this case, however, the sentence in the record reflects correctly 'not convicted of a similar offence of *Crimen injuria* committed during the period of suspension'. (Own Emphasis)

[8] High Court Review case no 51/2019, *S v Abiatal Simon Angula*. The proceedings appear to be in accordance with justice and I approved it. The magistrate did not state a date of appointment. The last page of the record, however, is a signed review cover sheet for the case of Lovisa Kamenye, a different case that I dealt with in paragraph 6 and 7 above.

[9] High Court Review case no 53/2019, *S v George Moses* appears to be in accordance with justice and was approved. No date of appointment is stated. The accused is George Moses with case no 488/2018. He was convicted and sentenced on one charge of malicious damage to property. The typed record includes a second charge of malicious damage to property. This annexure however reflects the accused as Shapumba Dominikus Nembiya a different accused with different case no 298/2016. The annexure is irrelevant to this case now on review.

[10] High Court Review case no 54/2019, *S v Nahenda Samuel* does not appear to be in accordance with justice. Accordingly I refused to approve it. No date of appointment is stated. The accused first pleaded guilty before magistrate Mikiti on 16 November 2017 and was sentenced. According to the record he again pleaded on 26 October 2018. The accused pleaded not guilty to the first charge. A contravention of section 38(1)(l) of Act 7 of 1996, the Arms and Ammunition Act-Negligent discharge or placement of a fire arm; and guilty on the second charge. A contravention of section 2 of Act 7 of 1996, the Arms and Ammunition Act-Possession of a fire arm without a license. A plea of guilty was entered in relation to the second charge.

[11] According to the charge sheet and review cover sheet, the accused was sentenced on the first charge to N\$3000 or 12 months imprisonment of which N\$1500 or six months is suspended for 5 years (sic). On the second charge, the accused was sentenced to N\$2000 or ten months imprisonment of which N\$1000 or five months is suspended for 5 years consecutively. I raised a query to the magistrate in the following terms.

1. The case record is incomplete and in shambles.
2. According to the case record the accused is Nahenda Samuel who pleaded guilty before magistrate Mikiiti on 16/11/2017. He was sentenced on the same date on p4, 5 and 6. This accused's age is 36 years old.
3. Page 3 reflects an accused with the name of Tjilukaku Simeon whose case was postponed to 16/11/2017 on 24/01/2017. This document is not at all relevant to this case.
4. The handwritten record and typed record reflects Nahenda Samuel as the accused who again pleaded guilty on 26/10/2018. A plea of not guilty was entered in relation to charge 2. The accused was convicted and sentenced on 31/01/2019. The accused was 18 years old.
5. The magistrate must explain what he meant by adding 'consecutively' on the second sentence.
6. In mitigation the record reflects an accused Abiatal Simon aged 42 years old. This document is clearly part of a record of a different case and is irrelevant to the case of Nahenda Samuel.
7. The magistrate must explain and clarify the confusion.

Kindly provide answers as soon as possible.'

[12] Furthermore in both sentences part of it was suspended 'on condition that the accused is not convicted of a similar offence'. I have already dealt with this issue above.

[13] More disturbingly in this case, the record reflects mitigation of a different accused in mitigation of sentence. The accused in this matter is Nahenda Samuel and the charge sheet reflects his age as 17 years. The record reflects in mitigation the name of Abiatal Simon, aged 42 years with five children aged 22, 8, 5, 9 and a 1 year old. The mitigation of Abiatal Simon is clearly part of a different case and irrelevant for the case of Nahenda Simon.

[14] In High Court Review case no 55/2019, *S v Kronelius Tomas*, the review cover sheet and J15 charge sheet reflect that the accused was charged and convicted of assault with intent to do grievous bodily harm. The public prosecutor however amended the charge to common assault read with Act 4 of 2003, the Combating of Domestic

Violence Act. The accused pleaded guilty to it and was convicted as charged. The proceedings appear otherwise to be in accordance with justice and I approved it. No date of appointment was indicated.

[15] The proceedings in High Court Review case no 56/2019, *S v Nakale Jonas*, appears to be in accordance with justice. No date of appointment was indicated.

[16] In High Court Review case no 57/2019, *S v Amadhila Hiskiel* the proceedings appear to be in accordance with justice and I approved it. The typed J15 charge sheet however reflects the name of a different magistrate than the one who dealt with the case, with a date of appointment, 19 August 2013.

[17] High Court Review case no 62/2019, *S v Lunauti John* was approved by my sister Salionga J and appears to be in accordance with justice. I agree with her. No date of appointment is stated. The accused is Lunauti John. Surprisingly, another handwritten case record of an accused, Mandume Litha, is attached to the record of proceedings of Lunauti John. The handwritten record has an appointment date of the magistrate who dealt with that case.

[18] The attached proceedings are also reviewable but the record is without a review cover sheet. From this record it is evident that the presiding magistrate in the case of *S v Mandume Litha*, of the mistakenly attached case, was K O Muyeghu with appointment date 19 August 2013, the same date referred to in paragraph 16 above. He/she is a different magistrate than the magistrate whose records of proceedings are on review.

[19] The binding of the case record of High Court Review case no 85/2019, *S v Kashinyenga Tomas Mutookosha* does not comply with 'Chapters XII and XIII of the Codified Instructions: Clerk of the Criminal Court' issued by the Permanent Secretary for Justice. The first typed page reflects the commencement of proceedings on 10/11/19, a date still in future. The pages are not numbered and not in sequence of dates when the accused appeared in court. The handwritten record is stapled in between typed parts of the record with pages stapled together making it almost impossible to follow the record in sequence. No date of appointment of the magistrate is indicated. I have not approved the proceedings. The magistrate must ensure the proper binding of the record.

[20] In High Court Review Case no 86/2019, *S v Nghindishange Gideon and another*, the J15 charge sheet does not reflect a date of appointment. The handwritten record is bound in between typed parts of the record with pages stapled together in between. I have not approved the proceedings. The matter is remitted for the magistrate to see to it that a proper record is sent on review.

[21] The J15 in High Court Review Case no 84/2019, *S v Mbango Samuel Nangombe*, does not reflect a date of appointment. The handwritten record is bound in between the typed record with pages stapled together. The accused in the matter was represented by a legal practitioner. The matter is therefore not reviewable in terms of section 302(3)(a) of the CPA. The typed J15 reflects "with evidence" whereas the accused pleaded guilty in terms of section 112(2) of the CPA.

[22] In High Court Review case no 82/2019, *S v Kaadhamba Aune*, no date of appointment reflects on the J15. The handwritten record is bound in between the typed pages of the record with parts of the record stapled together. The J15 charge sheet and review cover sheet do not reflect the condition of suspension of a portion of the sentence as reflected in the record of proceedings. In both instances they reflect "is not convicted of a similar". I dealt above with this aspect. I did not approve the proceedings. The case record should be properly bound and corrected before it is resubmitted.

[23] High Court Review case no 83/2019, *S v Ipumbu Paulus Shaanika*, does not reflect a date of appointment of the magistrate on J 15. The handwritten record is bound between typed pages of the record with pages stapled together. I did not approve the proceedings. The correct record should be resubmitted.

[24] The J15 charge sheets in most of the cases were not completed to reflect whether the cases were finalized with or without evidence. On some of them it reflects 'with evidence on the typed ones whilst an accused pleaded guilty and was convicted on his/her plea.

THE LAW

[25] I agree and endorse what Van Niekerk J pronounced in *S v Kamudulunge* 2007 (2) NR 608 (HC) in relation to charges as summarized in the headnote at p 433 at G-H:

'Headnote: Kopnota

The clerk of the court who prepares the cases for review and the magistrate who takes final responsibility for the preparation of the record should take more care when these tasks are executed. The prosecutor should take care that the information on the charge-sheet corresponds with an annexure to the charge-sheet. Alternatively he/she should draw the line through the initial charge indicated on the charge-sheet and write 'As per annexure A!.'

[26] Likewise I agree with justice Levy J (as he then was) that:

'Section 302 provides protection for undefended accused. As the seniority of the presiding officer plays an important role in the determination of whether a particular matter is subject to review in terms of s 302 this information pertaining to the magistrate's seniority should be brought to the attention of the Reviewing Judge. This is never done and the review form does not provide for any such information. It is necessary that such information should accompany any review and the Ministry of Justice is requested to consider this aspect² . . .' (my emphasis)

[27] This aspect was in the meantime considered by the Ministry of Justice and the pro-forma J15 charge sheet was amended to provide for the date of appointment. Despite that, magistrates do not provide the information on their dates of appointment.

[28] I agree with the sentiments expressed and find it persuasive by referring to two foreign judgments in an attempt to persuade magistrates and prosecutors to see to it that justice is done and assist reviewing judges' expeditiously without denying justice to those concerned. They are pronounced in *S v Nyumbeka* 2012 (2) SACR 367 (WCC) a reportable judgment.

'The functions of a Magistrate go beyond merely adjudicating matters in court. Magistrates have a duty in terms of the Constitution and the law to make sure that the orders of their court and matters relating thereto are implemented and given effect to.

² *S v Shivute & Several other cases* 1991 NR 433 (HC) Headnote.

They should not sit idly and take it for granted that the administrative component and the clerk of the court at the various Magistrates offices will implement and give effect to their orders. They should supervise and make sure that effect is given to it...

[21] When imposing a reviewable sentence, Magistrates should check:

- i. That it had been entered in the review register;
- ii. That the full record had been properly typed, where it had been a handwritten and transcribed, where there was a mechanical recording of the proceedings;
- iii. That all the evidence presented at the trial are included, and where it is not available, try and reconstruct, such evidence from the handwritten notes, with the assistance of all parties concerned.
- iv. That all documents and annexures are attached to the record;
- v. That no incomplete or incorrect record should be sent on review, because this will lead to delays as has happened in this matter. Should this happen, the Magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially, Section 303 of the Criminal Procedure Act. (my emphasis)

[22] Whilst the preparation of a record for a review and an appeal is primarily a function of the Clerk of the Court, it is ultimately the function of the Magistrate to see to it that a proper record is send to the High Court.

The clerk of the Court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law and should follow up after having checked the register, as to why reviews are delayed...

[23] The credibility of the justice system will be severely tarnished if effect is not given to court orders. Magistrates who are the coal face of the justice system, should ensure that this is done. This does not only apply to reviews but also to all other matters, whether of a criminal, civil or *quasi-judicial* nature.'

[29] The second persuasive judgment is *S v Nomvula Linah Tsabalala*, an unreported judgment from the High Court of South Africa, Free State Division, Bloemfontein, Review No: 102/2015, Delivered on 05 May 2016. This court accepted and reiterated the approach in the case of *S v Nyumbeka* 2012 (2) SACR 367 (WCC) (referred to

above) and concluded that the ultimate responsibility is on the magistrate to see to it that a proper record is sent to the high court. I agree with the approach and endorse it.

[30] In this jurisdiction, Damaseb JP also dealt with the issue of records in appeal matters in the unreported case of *Coetzee v S* (CA 52/2009) [2011] NAHC 72 (11 March 2011). In that case the record was in shambles. The learned Judge stated that the record of proceedings must be prepared in accordance with '*Chapter XIII of the Codified Instructions: Clerk of the Criminal Court*' issued by the Permanent Secretary for Justice to create certainty about proceedings in fairness to an accused and the State. He further held that the ultimate responsibility rests on the presiding magistrate to ensure that the record is a correct reflection of proceedings that took place before him or her. In my view the approach is likewise applicable to reviews.

[31] '*Chapter XII of the Codified Instructions: Clerk of the Criminal Court*' (the copy that was available for my perusal) deals with reviews from paragraph 159 to paragraph 176. I noticed that the Codified instructions mistakenly refers to the relevant sections of the Act which I presumed to be the Criminal Procedure Act, Act 51 of 1977 (the CPA) as being sections 328 and 329. This is incorrect. The relevant sections are 302 and 303. It is further incorrect that a review should be forwarded to the registrar within 30 days. Section 303 stipulates the time to be within a week.

[32] Paragraph 160 reads as follows:

'160. When a magistrate imposes a reviewable sentence, he or she must record the word "Reviewable" at the top of the charge sheet (case record) and note the date of his or her appointment as a magistrate beneath his or her signature at the bottom of the charge sheet. The fact that the sentence is reviewable must also be noted by the magistrate imposing the sentence in the remarks column of the criminal record book. The clerk of the court must record the review case number in the remarks column of the criminal record book in red ink and the magistrate checking the court record book must check each entry to ensure that every reviewable sentence is noted and followed up to ensure that the record is forwarded to the registrar of the High Court within 30 days which is the time limit set by section 329 of the Act.'

(my emphasis)

[33] Paragraph 166 stipulates as follows:

'Arranging and binding of review case records

166 (1) Arrangement

The original case record and copies must be arranged in the following order:

- (a) Original covering sheet (12-0/0012):
- (b) Charge sheet (control document if charge started as a summons or notice) displaying the police station, CR – number, fingerprint number, etc.;
- (c) Annexure(s) containing detailed charge(s), if any;
- (d) A certified typed record of the case record;
- (e) The original case record (that part recorded by hand);
- (f) Copies of documentary exhibits, if any;
- (g) Statements or arguments, if any, handed in by the accused in terms of section 329 of the Act;
- (h) Reasons for sentence or remarks by the presiding magistrate in terms of section 329 of the Act;
- (i) A copy of the guarantee (if any) and court fine receipt (if any)

(2) Binding

(a) The review case record must be arranged as described in subparagraph (a) above and bound with pink office tape through two holes punched on the left hand side of the record.

(b) The first copy of the covering sheet (Form 12 – 0/0012) must be **pinned** on top of the bound record for use by the registrar of the High Court.'

Significantly is that there is no mention of staples

[34] In the result:

1. Magistrates and clerks of court are directed to ensure:

1.1 that records, especially typed records are correct, comply with the guidelines set out above, the cases referred to; and '*Chapter XII and XIII of the Codified Instructions: Clerk of the Criminal Court*';

1.2 that their date of appointment reflects on the reviewable case record;

- 1.3 that irrelevant documents are not included in the reviewable case record;
 - 1.4 they send matters for review within the prescribed time limit in accordance with section 303 of the CPA.
2. The Office of the Registrar is directed to bring this judgment to the attention of the Magistrate's Commission.

JANUARY
JUDGE

I agree

SALIONGA
JUDGE