REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-MOT-GEN-2018/00010

In the matter between:

GIVEN KOMPOLI AKATAMA	**APPLICANT**

and

COMMISSIONER-GENERAL: RAPHAEL TUHAFENI HAMUNYELA	**FIRST RESPONDENT**
MINISTER OF SAFETY AND SECURITY CHARLES NAMOLOH	**SECOND RESPONDENT**
OLUNO CORRECTIONAL FACILITY OFFICER IN CHARGE: V ARMAS	**THIRD RESPONDENT**
COMMISSIONER NATIONAL RELEASE BOARD RAYMOND VAN ROOYEN	**FOURTH RESPONDENT**

Neutral citation: *Akatama v Hamunyela* (HC-NLD-CIV-MOT-GEN-2018/00010) [2019] NAHCNLD 45 (9 May 2019)

Coram: CHEDA J

Heard: **27 March 2019**

Delivered: 9 May 2019

Flynote: In an application for release on parole applicant must show that a hearing was held and a determination made before he/she can approach the court for relief.

Summary: Applicant had served half of his sentence. He applied for his immediate release on the basis that the prison authorities had not recommended his parole hearing. The court cannot usurp the functions of the prison authorities and release him before the determination by the said authorities. Application was dismissed.

Held: The court cannot interfere with parole process before the prison authorities have made their own decision about the prisoner.

ORDER

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1. The application for late noting of filing documents and non-compliance with the rules of court is condoned;

2. The application is dismissed; and

3. There shall be no order as to costs.

JUDGMENT

CHEDA, J:

[1] This is an application for immediate release from Oluno Correctional Facility.

[2] Applicant is serving an eight year prison term at Oluno Correctional Facility, while the four respondents are cited in their various official capacities as they are either directly or indirectly charged with the administration of justice in general and Oluno Correctional Facility in particular.

[3] Applicant is a self-actor while all respondents are represented by Mr Tibinyane of the Government Attorney's Office.

[4] Applicant was convicted of criminal offences and was sentenced to eight years and six months imprisonment by a magistrate sitting at Katima Mulilo magistrate court. It is his argument that he has to date served more than half of his sentence. In his view he is entitled to release on parole. It was his argument that he is entitled to liberty in terms of Article 10 of the Namibian Constitution which reads, thus:

'Article 10 Equality and Freedom from Discrimination
(1) All persons shall be equal before the law.
(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

[5] He was sentenced on 11 December 2014 and as of 11 June 2018 he had already served half of his sentence. It is also his argument that the offences of house breaking and theft and escape from lawful custody are non-schedule offences. It is further his argument that a parole hearing should have been held three months before his release. He also argued that he should have been released on 10 March 2019, but, he was not because the prison authorities did not recommend a parole hearing. In his affidavit filed of record he prays that his conviction and sentence be set aside and he be released immediately. I do not see how this is possible under this application. This court cannot do so as it is not sitting as an appeal court. This argument is therefore misplaced.

[6] Applicant being a self-actor failed to comply with rules pertaining to the filing of an application. I used my discretion and condoned his short comings with regards to compliance. This is in light of the importance of this matter to him as it touches on his

liberty, a right protected by our constitution. Further to this, it is his argument that the third respondent should put in place mechanisms to process his parole proceedings without further delay. This argument lacks merit because the court cannot force the prison authorities to hold a parole hearing as this is their discretion.

[7] Mr Tibinyane for respondents has argued that a prisoner's release is the discretion of the Parole Board and the court should not generally interfere with that process. What he omitted to state, though, is that the courts are not absolutely barred from interfering, but, are empowered to interfere in limited circumstances of which irregularity is one of them.

[8] The parole process is regulated by the Correctional Services Act, Act 9 of 2012 (hereinafter referred to as "the Act"). This act vests the power to release an offender in the hands of the National Release Board (hereinafter referred to as "the Board".) the said powers are found in section 105 which reads thus:

'(III) Functions of the National Release Board
105 (1) Subject to section 112(10), the National Release Board must whenever necessary-
(a) Make recommendations to the Commissioner-General as to –
(i) the release on full parole or probation of an offender serving sentence of imprisonment of *five years or more* for any of the scheduled crimes or offences.' (own emphasis)

[9] Further, section 106 of the Act clearly lays down guidelines as to factors that should be taken into account when considering a prisoner's eligibility for release. The fact that an offender has served half his sentence does not automatically entitle him to a release. *In casu*, it is his argument that the prison authorities should have recommended his release, but, no recommendation was made. In my respectful view, the fact that the prison authorities have not made a recommendation, is not a justification for applicant to ask the court to stampede them into a decision or jump into its functions and release him. The prison authorities' function is purely administrative and the court is not empowered to interfere or usurp its powers before it has pronounced itself on the parole process. There is a very thin dividing line between what this court can and cannot do on that which is purely an administrative matter. What

should be born in mind is that a parole process does not guarantee his release from prison. The fact that he has served half his sentence only qualifies him to be a candidate for parole determination.

[10] The court should warn itself against the danger of unnecessarily stepping over this line. I take comfort and fully associate myself with remarks by Masuku J *in Tjikunga v Ministry of Safety and Security* (HC-MD-CIV-MOT-GEN-2017/00229) [2018] NAHCMD 402 (6 December 2018) wherein he stated '. . .the correctional services is vested with the exclusive power to rehabilitate and reform offenders and, they are the only competent authority to assess and determine if offenders are indeed referred to requisite levels and are accordingly ready to take up their place in society again.' It is clear, therefore, that applicant is asking the court to usurp the powers of the prison authorities under circumstances which are tantamount to interference. In as much as the court may interfere with the executive and indeed any other tribunal's findings, it cannot do so where no decision has not yet been made. The parole process should be allowed to run its course without undue interference.

[11] I find that applicant has failed to convince the court that he should be released immediately. In the result the following is the order of court:

1. The application for late noting of filing documents and non-compliance with the rules of court is condoned;

2. The application is dismissed; and

3. There shall be no order as to costs.

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M Cheda
Judge

APPEARANCES

APPLICANT:	Mr Akatama in person Oluno Correctional Facility, Ondangwa
RESPONDENTS:	Mr Tibinyane Government Attorneys, Windhoek