

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2019/00075

FILLIPUS DHIGININA KANKONDI

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kankondi v S* (HC-NLD-CRI-APP-CAL-2019/00075) [2020] NAHCNLD 110 (20 August 2020)

Coram: SALIONGA J and DIERGAARDT AJ

Heard: 9 July 2020

Delivered: 20 August 2020

Flynote: Appeal- conviction and sentence-material irregularities made by the court a quo-failure to give an analysis of the evidence-failure to advance reasons as to why the magistrate made a conviction-Appeal succeeds- Conviction and sentence set aside.

Summary: The appellant was charged with contravening regulation 50(1) of Government Notice 53 of 2007 read with Act 22 of 1999 as amended failing to display a license disc. He pleaded not guilty and was tried in the Oshakati District Court. The appellant was convicted and sentenced on this charge in the Magistrates Court of Oshakati.

The appellant was sentenced to 100 days imprisonment or to a fine of N\$1000 on 26 July 2019 and filed his own appeal against the conviction and sentence on 5 August 2019.

The court held after evaluating the evidence and considering the arguments that the magistrate was wrong in his conclusion and find it necessary to interfere in the conviction and sentence.

Further held that the appeal against conviction and sentence succeeds and both sentence and conviction are set aside.

ORDER

1. The appeal against conviction and sentence succeeds;
 2. The conviction and sentence passed on the appellant are hereby set aside.
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APPEAL JUDGMENT

DIERGAARDT, AJ (SALIONGA J concurring):

Introduction

[1] The appellant was charged with contravening regulation 50(1) of Government Notice 53 of 2007 read with Act 22 of 1999 as amended failing to display a license disc. He pleaded not guilty and was tried in the Oshakati District Court. The appellant was convicted and sentenced on this charge in the Magistrates Court of Oshakati

[2] The appellant was sentenced to 100 days imprisonment or to a fine of N\$1000.00 on 26 July 2019 and filed his own appeal against the conviction and sentence on 5 August 2019. The appellant is a self-actor and the respondent is represented by Ms Petrus.

[3] Appellant in his Notice of Appeal against conviction tabulated 18 grounds. I will not deal with each and every allegation verbatim, however all the grounds from the notice of appeal, can be briefly summarized as; The learned magistrate added false evidence to the record and allegedly intentionally omitted accused evidence in the form of photos. The magistrate further refused accused copies of his driver's license and identity card to be handed in during the trial. The Learned Magistrate also refused to recuse himself. He failed to inform the appellant of his right to call witnesses during mitigation. The magistrate overlooked the evidence by the defense and the state submissions and the record does not reflect the true account of the proceedings.

[4] The trial Magistrate in his reasons denied all the points raised in the appellant's notice of appeal and maintains that the accused was accorded a fair trial and full consideration were had to all evidence as adduced by all the parties involved.

Point in Limine

[5] Ms Petrus raised a point *in limine*, in that a notice of appeal constitutes the very foundation on which the appellant's case must stand or fall, she further states that there were no clear and or specific grounds of appeal set out in the notice of appeal as required by rule 67(1) of the Magistrates Court Rules. She submitted that an improper notice of appeal constitutes an invalid appeal.

[6] In the case of *Tjiriange v State* (CA 86/2016) [2016] NAHCMD 390 (17 January 2017), the court stated that:

'The court is alive to the fact that the appellant is acting in person and that the notice of appeal filed by him should thus be construed generously in the light most favourable to the

appellant.¹ However, the court cannot take this proposition 'too far, as to cover situations where a peremptory statutory provision has not been complied with'.² This cannot be said to be the case in this matter.

[7] The Appellant has managed to present to this court grounds of appeal of the perceived irregularities witnessed by himself during his trial. These grounds may not be perfect in law, but they remain grounds nonetheless. The point *in limine* stands to be dismissed.

AD CONVICTION

[8] The charge against the appellant relates to an incident that occurred on 5 July 2018, where the appellant failed to display his license disc. In his defense the license disc was hanging from the windscreen as one of the employees had washed the car earlier that morning and the disc fell off. Sgt Ben Carlos indicated to the court a quo that when he approached the appellant's vehicle there was no license disc on display and that the appellant took the license disc from his glove compartment.

Applicable law

[9] This court in *S v Mwambazi 1990 NR 353* said the following at 365E-G:

'Proceedings of any magistrate's court can be brought before the High Court of Namibia by way of appeal or by way of review, depending on the nature of the complaint. Where an accused complains about his conviction or sentence, he should approach the High Court by way of appeal, but where his complaint is about an irregularity involved in arriving at the conviction, the best procedure is to bring his complaint by way of review. Should he wish to bring an appeal as well as review proceedings, he can do so simultaneously and both can be set down before the same Court on the same day. The complaint need not, however, arise from mere high-handedness by the magistrate; a bona fide mistake which denies the accused a fair trial is also an irregularity. *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551.*'

¹*Boois v State (CA 76/2014) [2015] NAHCMD 131 (8 June 2015) at para 2.*

²*Boois v State (CA 76/2014) [2015] NAHCMD 131 (8 June 2015) at para 4.*

[10] In *Likoro v S* (CA 19/2016) [2017] NAHCMD 355 (08 December 2017) Liebenberg J said:

‘Where on appeal the trial court’s factual findings and associated credibility findings have been challenged, an appeal court will not readily disturb the findings of a trial court on credibility and on questions of fact. The rationale behind this rule is that the trial court has the advantage of seeing and hearing the witnesses and being steeped in the atmosphere of the trial, an advantage the appeal court simply does not have. Only where the trial court’s conclusion is clearly wrong would the appellate court be duty bound to interfere.’

[11] It must be stressed that in an appeal an appellant is confined to the four corners of the record, but in review proceedings the aggrieved party traverses matters not appearing on the record³..’ In *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581 Mason J said:

‘But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.’

Grounds of appeal

[12] It is against the above-mentioned background that the appellant proceeded with the appeal against conviction and sentence and not review. Appellant attacked the conviction on the ground that, firstly, it is directed against the manner in which proceedings were conducted (procedurally); and secondly, the court’s evaluation and findings on the facts. The first challenge turns on the manner in which the trial was conducted by the magistrate, not receiving and considering evidence to its fullest extent, an omission that resulted in a conviction.

[13] In my view the appellant’s heads of argument some of his points are an elaborative formulation of the grounds of appeal articulated. It overlapping or repeated, I do not intend dealing with some of these grounds seriatim.

³ *Schwartz v Goldschmid* 1914 TPD 122.

[14] The first ground of appeal states that false evidence was added to the court record. This ground can be read together with the third and seventh ground. Magistrate Namweya in his reasons to court indicated that the 99c that was added to the fine was an error. Third and seventh grounds where the magistrate refused to take in the identity document and driver's license of the appellant is favorable to the willful refusal of court a quo, the appellant does not dispute identity and therefore it is not a ground to be considered. The appellant raised the issue of his name not spelled correctly and the court a quo ought to have corrected the said spelling of the appellants name and they missed the said opportunity. The appeal court would have preferred that the trial magistrate accepted the opportunity and changed the names of the appellant to reflect his true name. It is clear that the appellant does not dispute that he was indeed the accused who appeared on the wrong names before the Magistrate and thus it is not a ground to be considered.

[15] The second ground where the appellant states that the magistrate failed to receive the photographs as evidence. The magistrate stated that it was a fallacy and if it was admitted as evidence it would not have added probative value to the case. The court is not satisfied with the reason adduced by the magistrate, if the photographs related to the cause of action and could have assisted the appellant in his defense there is no way the magistrate can conclude without due consideration of the photographs that they are of no probative value.

[16] The fourth ground- It is clear from the record and the reasons by the Magistrate that the record does not reflect an application for recusal at any stage of proceedings and the appeal court cannot take this ground any further.

[17] The fifth ground: The record reflects at page 45 that rights to mitigation were read to the appellant and he opted not to call any. The Appeal Court cannot take this ground any further as well.

[18] The sixth ground is unfortunately not for the appeal court to consider, the demeanor and conduct of the witnesses at trial can only be witnessed by the trial judge and unfortunately the appeal court does not have the advantage of that, it is further unfortunate because there are no reasons advanced by the Trial magistrate of why he deemed the witnesses unreliable.

[19] Grounds eight to eighteen can be effectively dealt with as follows-The appeal court is aware that it is not necessarily crucial to go word for word on the submissions made by either parties, it is however necessary to put the reasons in writing of why a presiding officer arrived at a certain conclusion.

[20] *Ex-tempore* judgements are recognized in our law, however the said *ex-tempore* judgments must be reduced into writing for the following reasons:

1. Where the court deals with two mutually destructive versions the court must state why the court prefers one version to the other,⁴
2. The accused is entitled to know why he was convicted on a specific charge.
3. It is necessary when matters come on appeal for the appeal court to know why and how the magistrate arrived at his or her conclusion.

[21] In casu the state called two witnesses and the defence called three witnesses. The state witnesses corroborated each other's versions on the point that the license disc was not affixed to the windscreen and that it was removed from the glove compartment. The version of the accused on the other hand was that the disc was hanging between the windscreen and the dashboard. He called a witness, Alfeus Nambahu in support of his case. This witness confirmed that he washed the accused car and accidentally removed the licence disc but affixed it with bubblegum on request of the accused. The accused also called a witness Helena Indongo who was a

⁴See *Alugodhi v State* (CA 19-2014) [2015] NAHCNLD 3 (23 January 2015).

passenger in his car on the day of the incident. She corroborated the accused version that there was in fact a license disc on the windscreen when the accused was pulled off by the traffic officer, Sgt Ben Carlos. She testified that the licence disc was pulled off from the windscreen by the traffic officer and he further asked why the disc was not placed well. She testified that the second witness was not present when the disc was retrieved.

[22] In my view it was imperative for the presiding magistrate to give reasons why he preferred the version of the state to that of the accused. As an Appeal Judge I attempted to go through the record to seek for reasons. I observed that the record was not in order as expected for an appeal, in fact the record was in disarray to such an extent that I am of the view that the Magistrate could in all honesty not have signed the certificate of accurate report. I tried to decipher what transpired in the court a quo with difficulty. I found no submissions by the state on record, only closing submissions provided for by the accused. On page 99 of the record what I believe is regarded as a Namcis printout under the heading "Judgment" the Magistrate makes reference to a written record but I could not find a written record of proceedings for 26 July 2018. The Magistrate on p44 of the typed record also refers to reasons that are allegedly on the written record. Shockingly no such reasons could be found in any part of the record. I would then have been expected from the Magistrate to at least furnish reasons for his judgment when the notice of appeal was presented to him but still the magistrate was silent and his response was a mere denial to the grounds of appeal.

[23] The lack of reasons for judgment is a material error on the part of the Magistrate and which renders consideration for the eighteen ground.

AD SENTENCE

[24] The appellant's only ground in terms of the sentence is that the fine amount was changed from N\$1000 to N\$1000.99. This was cleared up by the trial magistrate and the court is satisfied that it was a mere typographical error.

[25] After evaluating the evidence and considering the arguments I find the magistrate was wrong in his conclusion and I find it necessary to interfere in the conviction and sentence.

[26] In the result the following order is made:

1. The appeal against conviction and sentence succeeds;
2. The conviction and sentence passed on the appellant are hereby set aside.

A Diergaardt
Acting Judge

I agree,

J T Salionga
Judge

APPEARANCES:

FOR THE APPELLANT: Mr P Kankondi
Of Ongwediva

FOR THE RESPONDENTS: Ms S Petrus
Of The Office of the Prosecutor General,
Oshakati