**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**JUDGEMENT**

Case no: HC-NLD-CRI-APP-CAL-2020/00057

In the matter between:

**KANGALA PETRUS SHETU** **APPELLANT**

v

**THE STATE** **RESPONDENT**

**Neutral citation***:* *Shetu v The State* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021)

**Coram:** SALIONGA J and SMALL AJ
**Heard:** **18 February 2021**
**Delivered:** **1 April 2021**

**Flynote:** Criminal- Appeal against sentence- Assault with the intent to do grievous bodily harm- appellants serving custodial sentences must entrust the correctional services' officials with their notices of appeal and depend on their custodians to file the appeal notices on their behalf. They cannot do so themselves. The relevant correctional services' officials should ensure that notices of appeal handed to them are filed with the Clerk of Court as soon as possible after receipt.

Criminal- Appeal against sentence- Assault with the intent to do grievous bodily harm- Court ordered a copy of this judgment served on the Namibian Correctional Service Commissioner-General-to ensure that procedures and guidelines are developed to prevent unnecessary delays as they do presently.

Criminal- Appeal against sentence- Assault with the intent to do grievous bodily harm-A full explanation of the right to and the way to appeal for a conviction and sentence in a lower court in line with the guidelines set out by Tomassi J and concurred to by Liebenberg J in *Kornelius v S* (CA 103/2009) [2011] NAHC 110 (8 April 2011) paragraph 10 once more approved.-Such explanation correctly informs a sentenced accused of his rights to appeal and how to appeal but also is of special assistance to this Court when considering whether it should condone a late filing of a notice of appeal.

Criminal- Appeal against sentence-Sentencing process is not satisfied by rubberstamping varying sentences of direct imprisonment on offenders for crimes in abstract labelled serious-Paying lip service to a mitigating factor that must be considered, results in an improper exercise of the sentencing jurisdiction-Sentencing is not an act of vengeance but an act of correction and of dispensing justice.

Criminal- Appeal against sentence-The approach that a court should punish all perpetrators of violent crimes severely is simplistic and directly in conflict with one of the most important, indispensable principles in every civilised criminal justice system, namely the individualisation of a sentence.

**Summary: T**he appellant was arraigned before the Magistrate's Court on a charge Assault with the intent to do grievous bodily harm. Appellant a 27-year-old male and first offender used a burning piece of wood to hit the complainant once, causing a severe burn wound on the right eye. Although this is a serious assault on a woman, no evidence was lead indicating that this wound left a permanent scar, disfigured the complainant, or caused permanent damage to her eye. The Court a quo sentenced the Appellant to 48 months direct imprisonment.

The Court held that the Court a quo did not consider alternative sentences; in passing referred to the fact that appellant was an unsophisticated cattle herder and a first offender and essentially concluded that all gender-based assaults require direct imprisonment. By not properly individualizing the sentence, the court a quo imposed a startlingly inappropriate sentence that induces a sense of shock.

The appeal against sentence is accordingly upheld the court a quo's sentence is substituted with a sentence of 48 months imprisonment of which 24 months is suspended for five (5) years on condition that the accused is not convicted of assault with the intent to do grievous bodily harm committed during the period of suspension.

The appeal against sentence is accordingly upheld.

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**ORDER**

(1) The late filing of the notice of appeal is condoned

(2) The appeal succeeds.

(3) The sentence imposed is set aside and substituted by the following sentence: 48 months imprisonment of which 24 months is suspended for five (5) years on condition that the accused is not convicted of assault with the intent to do grievous bodily harm committed during the period of suspension.

(4) The sentence is antedated to 11 September 2019.

(5) The Registrar is instructed to serve a copy of the judgement on the Namibian Correctional Service Commissioner-General.

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**JUDGMENT**

SMALL AJ: (SALIONGA J Concurring)

Introduction

[1] This is an appeal against sentence. Appellant was arraigned before the Ohangwena Magistrate's Court in the district of Eenhana on a charge of Assault with the intent to do grievous bodily harm. The charge preferred against the Appellant alleged: 'In that upon or about the 29th day of June 2018 and at or near Ehoma Village in the district of Eenhana the said accused did wrongfully, unlawfully assault David Sarah Liwanifeni by hitting her with a burning fire [wood] on her face and body with intent to do the said David Sarah Liwanifeni grievous bodily harm'

[2] The appellant on 10 September 2019 tendered a guilty plea and was thereafter questioned in terms of section 112 (b) of Act 51 of 1977. He admitted that he on 29 June 2019 at Ehoma village in the district of Eenhana beat the complainant Sara David his cousin once with a burning firewood on the right eye. After stating that the complainant burned him first on his leg and he reacted the court a quo entered a plea of not guilty as it seemed that the appellant suggested that he defended himself when he hit the complainant.

[3] After the complainant Saara David, Hambeleleni Paulus and the appellant gave evidence, the Court a quo convicted appellant on 11 September 2019 and sentenced him to 48 months imprisonment.

[4] Appellant appearing in person, is appealing against his sentence only. The Respondent is represented by Mr Gaweseb.

Notice of appeal, late filing of notice of appeal and application for condonation

[5] In his notice of appeal appellant alleges that he was a first offender at the age of 27 and submitted that a fine was appropriate in the circumstances of the case. In his heads of argument, he submitted that the sentence was therefore startingly inappropriate and induces a sense of shock. Referring to *S v Kashire*[1] in this regard Mr Gaweseb took a point in limine and submitted that the appeal should be struck from the roll as appellant's notice of appeal was filed well out of time. He submitted that appellant's application for condonation does not contain an acceptable and

[1] *S v Kashire* 1978 (4) SA 166 (SWA) at 167H and section 309(2) of the Criminal Procedure Act 51 of 1977.

reasonable explanation for the delay and an averment that there are reasonable prospects of success on appeal.

[6] The appellant filed his notice of appeal and application for condonation with prison authorities at the Oluno Correctional Facility on 12 December 2019. Magistrate's rule 67(1) required that the last day for filing a notice of appeal with the Clerk of Court was 1 October 2019.[2] He thus filed these notices with Oluno Correctional Facility three months after the imposition of his sentence. This notice eventually found its way to the Eenhana Clerk of Court on 14 February 2020. The filing at the Clerk of Court, where the rules prescribe it to be filed to set the appeal process in motion, is five months after the imposition of the sentence and about four and a half months outside the prescribed period of 14 days. Three months of the delay was caused by the appellant. The rest of the delay must be attributed to the relevant officials in Oluno Correctional Facility.

[7] In his application for condonation, the appellant explains that he could not draft the notice of appeal himself. He eventually found someone who could assist him, but what he calls the machine, was out of order for almost a month and a half. The device referred to apparently is the photocopier at the Oluno Correctional Facility. Being detained, he could not explain the delay occasioned by the officials who had to ensure the delivery of the notice of appeal to the Clerk of the Court Eenhana.

[8] The Court has previously[3] expressed its displeasure with a tendency apparent within the correctional facilities located within the jurisdictional area of the Northern Local Division of the High Court of Namibia. This related to the careless handling of notices of appeal by the personnel of these facilities. As was stated before, appellants serving custodial sentences must entrust the correctional services' officials with their notices of appeal and depend on their custodians to file the appeal notices on their behalf. They cannot do so themselves. The relevant correctional

[2] The rule requiring filing of the notice of appeal being done 14 court days [excluding the first and including the last] after the date of sentence.

[3] *Lazarus v S* (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (03 December 2020) and *Aron v S* (HC-NLD-CRI-APP-CAL-2019/00095) [2020] NAHCNLD 173 (08 December 2020).

services' officials should ensure that notices of appeal handed to them are filed with the Clerk of Court as soon as possible after receipt.

[9] In *Lazarus v S* the notice of appeal was filed at the clerk of court 22 court days after it was received by the authorities in whose custody the appellant was. In *Aron v S* it was filed 44 court days after it was received by the authorities. This Court ordered that a copy of both these judgements be served on the Heads of the Correctional Facilities located within the criminal jurisdiction area of the High Court of Namibia, Northern Local Division. [4]

[10] In this matter, the notice of appeal was once again filed 64 ordinary days and 44 court days after it was received by the authorities in whose custody the appellant was. It needs to be reiterated and understood that accused convicted in lower courts have the right to appeal to the High Court against their convictions and sentences. At the very least, these appeals may have merit and certainly should be considered by the High Court as soon as is reasonably possible. A further delay in filing the notices by officials at the applicable Clerk of Court prolongs the period needed to facilitate the appeal being prepared placed before the High Court.

[11] Unfortunately, the Namibian Correctional Service Regulations published in terms of the Correctional Service Act 9 of 2012 under Government Notice 331 in Government Gazette 5365 of 18 December 2013 do not provide for appeals by inmates or a convicted person from lower courts to the High Court of Namibia.

[12] This appeal and the manner officials from Oluno Correctional Facility dealt with the notice of appeal and application for condonation took place before serving the two judgements described above on that facility's head. I consider this matter necessary to direct the Registrar to serve a copy of this judgment on the Namibian Correctional Service Commissioner-General. Hopefully, that will ensure that procedures and guidelines are developed to prevent unnecessary delays as they do presently.

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[4] Both the judgements *Lazarus v S* (supra) and *Aron v S* (supra) were served on the Head of the Oluno Correctional Facility on 14 December 2020. The aforesaid judgments were respectively served on the Head of Evaristus Shikongoo Correctional Facility on 21 and 25 January 2021.

[13] Appellant's explanation as to his part in the delay resulting in the late filing of the notice of appeal sounds a bit wordy. I must consider that the Court a quo explained his right to appeal and the period in which he must do it very cursorily and not in line with the guidelines set out by Tomassi J and concurred to by Liebenberg J in *Kornelius v S*[5] in paragraph 10[6], which states:

'[10] What follows is meant to be helpful guidelines to the judicial officers when explaining the right to appeal to an unrepresented accused. The accused should be informed of his right to appeal to this Court; and that he may do so on his own or assisted by a legal practitioner, be it one of his own choice or appointed by the Directorate of Legal Aid; In respect of the procedure the accused should be advised that he/she:

- should note the appeal in writing; (Rule 67 (1));
- may approach the clerk of Court for assistance to write out the notice of appeal if unable to do so due to a physical disability or illiteracy (Rule 67(2));
- could obtain a copy of the record from the clerk of the Court and if not able to afford payment for same then the magistrate may be approached with a request that it be provided free of charge or at a reduced fee (Rule 66(9));
- should set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based (Rule 67(1));
- should stipulate in the notice of appeal whether the appeal is against the conviction or sentence or both the conviction and sentence;
- should affix a date to the notice of appeal;
- should lodge the notice of appeal with the clerk of Court within 14 days from date of conviction and sentence (Court days i.e Saturday, Sunday and public holidays excluded; and calculated by excluding the first day and including the last day); (Rule 67 (1) & Rule 2(2));
- if for some reason he/she is unable to note the appeal within the prescribed time limits, he/she should apply, in writing, to this Court for extending the period by, explaining under oath, the reasons for the failing to comply with the stipulated period; (Section 309 (2) of the Criminal Procedure Act, 1977 (Act 51 of 1977); and to state reasons why there are prospects of success on appeal;
- should, without delay, file the application for extending the time limit with the clerk of Court.

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[5] (CA 103/2009) [2011] NAHC 110 (8 April 2011) at para 10.

[6]

- may amend the notice of appeal and file such amended notice with the clerk of the Court within seven (7) days after being informed by the clerk of Court that the magistrate had furnished his statement envisaged in rule 67 (3).'

[14] A full explanation as set out hereinbefore not only in my opinion correctly informs a sentenced accused of his rights to appeal and how to appeal but also is of special assistance to this Court when considering whether it should condone a late filing of a notice of appeal. In the absence of a reasonable explanation for the delay, the promising prospects of success on appeal can tip the scales for granting the application for condonation and consideration of the appeal's merits. What is needed is an objective consideration of all the facts. Thus, a slight delay and a good explanation may help compensate for prospects of success that are not so strong. Or the importance of the issue and strong chances of success on appeal may compensate for a long delay. [7]

[15] Although our Courts must maintain the principle that notices of appeal should contain clear and specific appeal grounds, some leniency should be given to a layperson drawing up a notice of appeal while serving a custodial sentence. This was indicated by Van Niekerk J (Ueitele J concurring) in S v Ashimbanga [8] when they declined to strike a matter from the roll when they were able to discern what the Appellant was taking issue with. I agree with the principle of the exception and wish to state that cases should be considered on a case-to-case basis, with the general rule still being that notices of appeal should contain clear and specific grounds of appeal.

[16] The grounds of appeal in this matter may be that the trial court did not give adequate weight to particular facts presented in mitigation. And that the trial court should have imposed, or at least considered a fine, a shorter custodial sentence or a partial suspended custodial sentence before sentencing the appellant, a 27-year-old

[7] *S v Nakale* 2011 (2) NR 599 (SC) paragraphs 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) paragraph 10; *Nghuulondo v The State* (CA 72/2014) [2014] NAHCMD 373 paragraph 4 (08 December 2014*); S v Arubertus* 2011 (1) NR 157 (SC) at 160). *S v Wasserfall* 1992 NR 18 (HC) at 19I-J.

[8] 2014 (1) NR 242 (HC) paragraphs 3-5.

first offender, to forty-eight months direct imprisonment in the circumstances of this case.

[17] The State was able to file heads of argument on the merits of the appeal and was therefore not really prejudiced by the lack of clarity in appellant's notice of appeal.[9]

*Appeal against sentence*

[18] An appeal court can only consider mitigating factors that existed when the Court a quo imposed its sentence. An appellant cannot raise new mitigating factors not mentioned in the trial court for the first time on appeal. If not raised before the trial court, an appellant can hardly suggest that it was not considered.[10]

[19] It is trite that punishment falls within the ambit of the discretion of the trial court and that a Court of Appeal should not readily interfere unless there is a good cause. There will be good cause where the sentence is vitiated by irregularity or misdirection or where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such a conclusion, the Court must be satisfied that the sentencing court did not exercise its discretion regarding sentence, judicially.[11].

[20] In this case, the appellant was convicted of assault with the intent to do grievous bodily harm. The appellant used a burning piece of wood to hit the complainant once, causing a severe burn wound on the right eye. Although this is a serious assault on a woman, no evidence was led indicating that this wound left a permanent scar, disfigured the complainant, or caused permanent damage to her eye.

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[9] *S v Ashimbanga* (supra) paragraphs 5.

[10] *Rex v Verster* 1952 (2) SA 231 (A); *Rex v Zurnamer* 1951 (3) SA 418 (C) 423F-G.

[11] *S v Ndikwetepo and Others,* 1993 NR 319 (SC) at 322F-J; *S v van Wyk,* 1993 NR 426 (HC) at 447G-448B; *S v Ivanisevic and Another,* 1967 (4) SA 572 (A) at 575F-G*; S v Shapumba* 1999 NR 342 (SC); *S v Rabie* 1975 (4) SA 855 (A) *S v Tjiho* 1991 NR 361 (HC) at 362A-B and Paulus v The State (CA40/2015) NAHCMD 211 (11 September 2015).

[21] Appellant, like many appellants appearing before this Court on appeal, clearly believes that only their personal circumstances are to be considered by a court sentencing them. Although important, it is only one of the three facets a sentencing court considers.

[22] In deciding what a just and appropriate punishment would be in the circumstances of a given case, the so-called triad [12] of factors, namely the accused's personal circumstances, the offence committed, and society's interests, are all considered.[13]

[23] Punishment should fit the criminal and the crime, be fair to society, and be blended with a measure of mercy if circumstances warrant it.[14] However, the facts of a case might require emphasizing one or more at the expense of others.[15]

[24] Unless it is clearly wrong, a court of appeal will not readily differ from a trial court's assessment of the factors to be regarded or the value to be attached to them.[16]

[25] The Court a quo referred to S v Bohitile[17] and reiterated that society needs to root out the evil of domestic violence and violence against women. It stated that sentences should reflect Namibian courts' determination to give effect to and protect the constitutional values of the inviolability of human dignity and the equality between men and women. He also suggested that some men view women as objects or punching bags and that this cannot be allowed. He concluded that sentences for

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[12] *S v Zinn* 1969 (2) SA 537 (A)..

[13] *S v Seas* 2018 (4) NR 1050 (HC).

[14] *S v Rabie* 1975 (4) SA 855 (A) at 862G – H.

[15] *S v Van Wyk* 1993 NR 426 (SC) at 448D-E (1992 (1) SACR 147 (NmS) at 165I-J.

[16] *S v Van Wyk* supra at 448A-B*; S v Fazzie and Others* 1964 (4) SA 673 (A) at 684; *S v Berliner* 1967 (2) SA 193 (A) at 200D.

[17] 2007 (1) NR 137(HC).

these crimes should resonate with a message that this conduct will not be tolerated and that courts will punish the perpetrators accordingly.[18]

[26] Although I agree with these general views expressed, courts should keep in mind that each sentence must be individualized to ensure an appropriate sentence. A proper exercise of the sentencing discretion requires duly considering other possible penalties before arriving at the appropriate one. This sentencing process is not satisfied by rubberstamping varying sentences of direct imprisonment on offenders for crimes in abstract labelled serious. Direct imprisonment is not the only appropriate punishment for corrective and deterrent purposes in this case. Straight imprisonment, in most cases, is only justified if the accused needs to be removed from society to protect the public and the seriousness of the individual case warrants it.[19] Fully or partially suspended imprisonment sentences in many instances can also serve the offence's nature and the public's interests.[20]

[27] The alternatives are either a fine or a partially suspended sentence. A fine was not appropriate in the circumstances of this case. A suspended sentence or partially suspended sentence of imprisonment has two beneficial effects. It first prevents the offender from going to jail or going to jail for an excessively long period. Secondly, he has the suspended sentence or the suspended part thereof hanging over him. If he behaves himself, he will not serve the suspended sentence or a portion thereof. On the other hand, if he subsequently commits a similar offence, the Court can put the suspended sentence into operation.[21]

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[18] *S v Bothitile* 2007 (1) NR 137 (HC) paragraph 21.

[19] *S v Scheepers* 1977 (2) SA 154 (A) at 159A-C applied in *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[20] *R v Persadh 1944* NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[21] *R v Persadh* 1944 NPD 357 at 358; S v Goroseb 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 11.

[28] A court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so or that it ought to have assessed the value of these factors differently from what it did. A shockingly inappropriate sentence, in many instances, results from an excessive reliance on one or more of the factors to be considered when sentencing. That places the judgment in the category in which the appeal court can consider the sentence afresh.[22]

[29] As must be apparent, not every misdirection entitles a Court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.[23]

[30] When it comes to sentencing, courts properly exercising their discretion impose appropriate sentences. An appropriate punishment would have resulted if the court a quo judicially and adequately considered that the accused was a first offender at the time. Proper consideration of this fact and the other circumstances then lead a court to what is appropriate in every given case. Paying lip service to a mitigating factor that must be considered, results in an improper exercise of the sentencing jurisdiction.

[31] Gender based violence against women is serious and have become a severe threat in our communities. The Courts should not overlook the seriousness of a crime.[24] However, the crime itself is only one of the factors to be considered in an appropriate sentence. Offenders of serious crimes should still be treated fairly. Although competent, custodial sentences and its length should always be justified,

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[22] in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[23] *S v Pillay* 1977 (4) SA 531 (A) per Trollip JA at 535D-G and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[24] *Dausab v S* (HC-MD-CRI-CAL-2018-00038) [2019] NAHCMD 42 (6 March 2019) paragraph 7.

not only by the commission of the offence but by such other factors that would render it the most appropriate sentence in a particular case. Sentencing is not an act of vengeance but an act of correction and of dispensing justice.

[32] The trial court over-emphasised the view that, generally, a court should punish perpetrators of violent crimes severely. This approach does not mean that every offence that qualifies as a violent crime inevitably deserve a severe sentence. Such an approach is simplistic and directly in conflict with one of the most important, indispensable principles in every civilised criminal justice system, namely the individualisation of a sentence. One had to guard against the new attitude, which was beginning to filter through even to the courts, namely that everybody must be treated identically.[25]

[33] In *S v Williams and Others* [26] the approach was explained as follows:

'While those principles have remained eternal truths with regard to the purposes of punishment, the justice and penal systems have been evolving towards a more enlightened and human implementation of those principles. In keeping with international trends, there has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.' [27]

[34] By disregarding other sentences or not carefully considering other possible sentences, the Court a quo approached the matter as if only direct and a longish period of imprisonment is appropriate in the circumstances of this case. This resulted in an inappropriately long sentence which induces a sense of shock in the circumstances of this case. This Court is thus at large to impose an appropriate sentence.

[35] In the result it is ordered that:

(1) The late filing of the notice of appeal is condoned

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[25] *S v Mokgiba* 1999 (1) SACR 534 (O) 553E-554C.

[26] 1995 (2) SACR 251 (CC) paragraph 66.

[27] *S v Williams and Others* 1995 (2) SACR 251 (CC) at 269e - g (1995 (3) SA 632 at 651G - 652B): *S v V* 1972 (3) SA 611 (A) at 614D.

(2) The appeal succeeds.

(3) The sentence imposed is set aside and substituted by the following sentence: 48 months imprisonment of which 24 months is suspended for five (5) years on condition that the accused is not convicted of assault with the intent to do grievous bodily harm committed during the period of suspension.

(4) The sentence is antedated to 11 September 2019.

(5) The Registrar is instructed to serve a copy of the judgement on the Namibian Correctional Service Commissioner-General.

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D. F. SMALL

ACTING JUDGE

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J SALIONGA

JUDGE

APPEARANCES

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|---|---|
| APPELLANT: | Mr. Kangula Petrus Shetu (in person)<br>Oluno Correctional Facility |
| RESPONDENT: | Mr Gaweseb<br>Office of the Prosecutor-General, Oshakati |