

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

LEAVE TO APPEAL JUDGMENT

Case Title: <i>The State v Alfeus Shivute Amutoko</i>	Case No.: HC-NLD-CRI-APP-SLA-2021/00004
	Division of Court: Northern Local Division
Heard before: Honourable Ms. Justice Salionga J	Heard on: 23 March 2021 Delivered on: 08 April 2021
Neutral citation: <i>S v Amutoko</i> (HC-NLD-CRI-APP-SLA-2021/00004) [2021] NAHCNLD 37 (08 April 2021)	
IT IS ORDERED THAT: The application for leave to appeal against the learned magistrate's <i>mero motu</i> decision to recuse himself from the matter is granted.	
Reasons for the above order:	
SALIONGA J : [1] This is unopposed application for leave to appeal in terms of section 310 (1) read with section 310 (2) of the Criminal Procedure Act, 51 of 1977 against the learned regional magistrate's <i>mero motu</i> recusal. At the hearing of this application the transcribed record was not yet available.	

[2] The accused pleaded not guilty to two charges of rape in contravening section 2(1) (a) of Act 8 of 2000 and kidnapping in the regional court for the division of Oshakati, held at Ondangwa.

[3] At the end of the State's case Ms Boois for the respondent addressed the court on the application for a discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977.

[4] Mr. Iyambo for the state requested for a postponement which application was opposed by Ms Boois.

[5] The court a quo granted the postponement which Ms Boois did not take well. She erratically remarked that "Best friends always grant remands." The presiding officer asked Ms Boois to retract the remarks she had made. Although Ms Boois confirmed to have made the said remarks, she refused to retract.

[6] This prompted the learned regional magistrate to *mero motu* recuse himself from trying the matter; claiming that his integrity and independence is being questioned. He also referred to some exchanges made between himself and the learned counsel for the respondent during her address on section 174 discharge application.

[7] This court has on numerous occasion reiterated and made clear the test for recusal. To be more specific in re: Review judgement by Siboleka J et Usiku J CR 57/2016 delivered 16 September 2016 the Supreme Court in referring to various case law on recusal restated the test as follows, 'whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case. The test is objective and the onus of establishing it rests upon the applicant¹.'

¹ President of the Republic of South Africa and other v South African Rugby Football Union and other supra at 175 B-C

[8] *In casu* the learned magistrate *mero motu* recused himself from this matter without inviting the parties to address the court as to whether he should recuse himself or not. (See *S v Munuma* 2013 (4) NR 1156 (SC)). He also failed to resolutely inscribe the authority of the court in ensuring/seeing that justice is done.

[9] Considering the test, applicable in recusals I am of the view that another court may have a different view and that the applicant has prospects of success in this application.

[10] Accordingly, the following order is made:

The application for leave to appeal against the learned magistrate's *mero motu* decision to recuse himself from the matter is granted.

Judge's signature	Note to the parties:
J T Salionga Judge	
Counsel:	
Applicant	Respondent
Mr Shileka Office of the Prosecutor -General	Ms Boois B B Boois Attorneys Ongwediva