REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2020/00014

In the matter between:

SIMON AMUTENYA TEOFELUS **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Teofelus v S* (HC-NLD-CRI-APP-CAL-2020/00014) [2022] NAHCNLD 44 (22 April 2022)

Coram: MUNSU AJ *et* KESSLAU AJ
Heard: **4 and 11 February 2022**
Delivered: **22 April 2022**

Flynote: Criminal Appeal - Procedure – Requirement that evidence be under oath – Court a quo not rendering assistance to the appellant – Matter remitted back with directions.

Summary: The appellant was convicted for Robbery with aggravating circumstances. He was sentenced to 17 years imprisonment. He appeals against

both conviction and sentence. His notice of appeal was filed out of time. In his application for condonation he states that he appealed in time and that the delay was occasioned by the correctional authority that filed the notice of appeal late. The date on the notice of appeal indicates that the appellant completed same in time. In light of the issues raised in the appeal, the respondent withdrew its point *in limine.*

In the court a quo the state led evidence of five witnesses. At the close of the state case, the appellant indicated that he wished to testify. The court allowed him to give his account of the matter without placing him under oath. In its judgment, the court reasoned that the appellant did not testify.

Held; that the law provides that - no person shall be examined as a witness in criminal proceedings unless he is under oath.

Held further; that where an accused testifies without an oath or affirmation having been administered to him, an irregularity occurs and is of such a grave nature that a failure of justice occurs.

Held further; that it was incumbent on the court to assist the appellant once he expressed his intention to testify in order for him to understand the reason why he was supposed to take the oath.

Held further; that the failure on the part of the court to assist the appellant rendered his intention to testify meaningless. The appeal could not be decided on the merits because of the irregularity that occurred.

In the result, the matter was remitted to the trial court with directions.

ORDER

---

1. The Respondent's point in *limine* is dismissed.
2. Both the conviction and sentence are set aside.

3. The matter is remitted back to the Regional Court of Oshakati for the trial magistrate to proceed according to the guidelines stated in paragraph 13 of this judgment.
4. In the event that the appellant is convicted, the trial court should take into account the part of sentence already served.
5. The matter is to appear in the Regional Court of Oshakati on 05 May 2022.
6. The appellant is remanded in custody.

JUDGMENT

MUNSU, AJ (KESSLAU, AJ concurring):

Introduction

[1] The appellant was convicted in the Regional Court of Oshakati on a charge of Robbery with aggravating circumstances. On 03 May 2019, he was sentenced to 17 years imprisonment. He appeals against both conviction and sentence.

[2] The appellant conducted his own defence in the Regional Court, and he appears as a self-actor in this appeal. His notice of appeal is dated 16 May 2019 well within time. However, it was only filed with the Clerk of Court on 07 June 2016 outside the prescribed 14 days. The respondent raised this as a point *in limine.* In his application for condonation, he explains that he appealed on 10 May 2019 which is within the prescribed period and that the delay was caused by the correctional authority that submitted his notice of appeal late. In light of the issues raised in the appeal, the respondent withdrew its point *in limine.*

[3] During the hearing of the appeal, we requested the respondent to address the court on whether the appellant was desirous of testifying in the Regional Court and whether it could be said that he testified, and if not, the effect thereof on the entire proceedings.

[4] In the court a quo, the state closed its case after calling five witnesses. The learned magistrate proceeded to explain the appellant's rights at the close of the state case. Suffice it to capture the proceedings verbatim:

'COURT: Accused person listen and listen very carefully, the Public Prosecutor has now closed the State's case and they will not call anymore witnesses. You now have the opportunity to put your case before court, should you wish to do so. You have the right to give Evidence yourself. If you decide to give yourself under oath, the State Prosecutor have the right to cross-examine you and the Court will put questions to you. Irrespective of whether you give Evidence or not you always have the right to call witnesses to come and testify on your behalf. They will also be cross-examined by the Prosecutor and the Court may put questions to them. You are not obliged to give Evidence or call Witnesses, you may choose to present no Evidence and remain silent. You must bear in mind if you do so that the Court will only then consider the case solely on the Evidence presented thus far. And remember any explanation you gave during the plea stage does not amount to any Evidence. Do you understand that explanation?

ACCUSED: Your Worship I have no Witnesses to call. Your Worship I would like to testify in short. (*my underlining*).

COURT: Move to the Accused dock (*sic*).

ACCUSED: Your Worship I would like just to testify from the Accused dock as I am standing. (*my underling*)

COURT: You said you have no witnesses to call?

ACCUSED: That is correct Your Worship I have no Witnesses to call.

COURT: Yes tell us. (*my underlining*).

ACCUSED: Your Worship this is just strange to me just to find myself in this case. I do not know how did it happen. That is all Your Worship.

COURT: Since you are not under oath there is nothing I can do. Yes State submission?'

[5] The matter was then postponed for closing submissions.

[6] In a well-reasoned judgment, the learned magistrate stated among others, the following, on the issue:

'…The State then closed its case and Accused person elected not to testify under oath but to address the Court from the Accused dock…'

[7] Further, he went on to say:

'…In the instant matter the accused did not testify or call witnesses in support of this assertion. The only Evidence before Court is that of the State.…' (*my underlining*).

[8] It is evident from the foregoing that the appellant was willing to testify. Section 162 of the Criminal Procedure Act 51 of 1977 (CPA) provides that:

'(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form-

"I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God."'

[9] The manner in which the learned magistrate handled the defence case is problematic. Firstly, he allowed the appellant to 'tell the court' without placing him under oath. Where an accused testifies without an oath or affirmation having been administered to him, an irregularity occurs and is of such a grave nature that a failure of justice occurs.[1] Secondly, after allowing the appellant to 'tell the court', the learned magistrate went on to reason in his judgment that the appellant did not testify. What then was the reason for allowing the appellant to 'tell the court'? Thirdly, after the appellant was afforded an opportunity to 'tell the court', the state was not afforded an opportunity to cross-examine him after giving his account. Section 166 of the CPA entitles the prosecutor to cross-examine any witness, including an accused, called on behalf of the defence at criminal proceedings.

[1?] *S v Hendricks en'n ander* 1995 (1) SACR 37 (C).

[10] Having expressed his intention to testify, it was incumbent upon the court to assist the appellant in order to understand why he was required to testify under oath and the consequences for failure to do so. One may add that, all that the law requires is that evidence should be under oath. This happens once an oath or affirmation is administered.

[11] Mr. Sibungo for the respondent correctly submitted that the failure to swear in the appellant after he indicated his intention to testify constitutes an irregularity with the effect that all that which the appellant stated became inadmissible. He went on to submit that the irregularity taints the proceedings thereby entitling this court to exercise its powers on appeal. He implored the court to set aside the conviction and sentence and direct the court a quo to proceed with the trial from the stage the state closed its case.

[12] In order to determine whether the State managed to discharge its onus of proving the guilty of the appellant beyond reasonable doubt, regard is to be had to the evidence presented before court. This includes the evidence presented by the State and that presented by the appellant. The appellant intended to testify, however, there is no admissible evidence tendered by him. The failure to do so cannot be ascribed to him but to the lack of assistance rendered to him by the court. The effect is that his intention to testify was rendered meaningless - an irregularity that vitiates the proceedings as from that stage. The irregularity only occurred from the stage after the close of the state case. As such, there is no reason to interfere with the proceedings up until the close of the state case.

[13] Considering the irregularity that occurred, we are unable to decide the appeal on the merits and will remit the matter to the trial court with a direction that the matter proceed from the stage as at the close of the State case. The trial court is implored to bring to the attention of the appellant, the findings of this court. Further, the appellant should be informed that the evidence presented by the state is unaffected and stands. His rights at the close of the state case will then be explained. In its discretion, the trial court may entertain the issue of bail.

[14] In the result it is ordered that:

1. The Respondent's point *in limine* is dismissed.
2. Both the conviction and sentence are set aside.
3. The matter is remitted back to the Regional Court of Oshakati for the trial magistrate to proceed according to the guidelines stated in paragraph 13 of this judgment.
4. In the event that the appellant is convicted, the trial court should take into account the part of sentence already served.
5. The matter is to appear in the Regional Court of Oshakati on 05 May 2022.
6. The appellant is remanded in custody.

_____

D. C. MUNSU

ACTING JUDGE

I agree,

_____

E. E. KESSLAU

ACTING JUDGE

APPEARANCES

APPELLANT:	Mr. S. A. Teofelus (In Person) Evaristus Shikongo Correctional Facility, Tsumeb.
RESPONDENT:	Mr. R. S. Sibungo Of the Office of the Prosecutor-General, Oshakati.