

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

Case No. CR 22/2022

In the matters between:

THE STATE

v

NICANOR MARTHA LIPULENI

ACCUSED

(High Court reference No.: 348/2021)

THE STATE

v

ERASTUS TUHAFENI

ACCUSED

(High Court reference No.: 306/2021)

THE STATE

v

MOSES MWAETAKO

ACCUSED

(High Court reference No. 351/2021)

THE STATE

v

ELIZABETH NYANGA

ACCUSED 1

TOMAS KONDJENI ANDREAS

ACCUSED 2

(High Court reference No. 350/2021)

Neutral citation: *S v Lipuleni and others* (CR 22/2022) [2022] NAHCNLD 47 (26 April 2022)

Coram: SALIONGA J *et* KESSLAU AJ

Delivered: 26 April 2022

Flynote: Criminal Procedure- Automatic review in terms of s302 (1) of the Criminal Procedure Act- Guilty plea in terms of section 112 (1) (a) of the CPA- Framing of sentences- Suspended sentences – incomplete, vague, and not specific - Community service orders lack details – Corrected on review.

ORDER

In High Court reference case numbers 348/2021; 306/2021; 350/2021 and 351/2021:

1. The convictions are confirmed.
2. The sentences are amended to read as follows:

In State v Nicanor Martha Lipuleni (High Court reference no 348/2021)

3. N\$1500 (One Thousand Five Hundred) or 3 (three) months imprisonment wholly suspended for a period of 5 (five) years on condition that (1) accused is not convicted of assault common committed during the period of suspension and that (2) accused completes/performs 100 hours community service of

cleaning at Uupili Combined School under the supervision of Uitaris Shimwooshili working from 08h00-15h00 on Mondays to Fridays excluding weekends, school and public holidays starting from 4 August 2021.

In State v Erastus Tuhafeni (High Court reference number 306/2021)

4. N\$ 2000 (Two Thousand Namibia Dollars) or 6 (six) month's imprisonment wholly suspended for a period of 3 years on two conditions: (1) that the accused is not convicted of theft committed during the period of suspension. (2) The accused performs community services of cleaning at Okongo Police Station under the supervision of Lisias Mwatala working from 08h00 -17h00 on Mondays to Fridays excluding weekends and public holidays starting on 12 July 2021.

In State v Elizabeth Nyanga and Tomas Kondjeni Andreas (High Court reference number 350/2021)

5. Each accused is sentenced to N\$2000 (Two thousand Namibia Dollars) or 4 (four) months imprisonment wholly suspended for a period of 3 years on two conditions: (1) that each accused is not convicted of contravening regulation 7(4) r/w sub-regulations (2) and (3) of G/N 91 of 2021 GG 7522 as amended read with s 29 (1), (2), 1 and 2 of the Public and Environmental Health Act 1 of 2015 committed during the period of suspension. (2) each accused performs 100 hours community services of cleaning at Uuhahe Combined School under the supervision of Gerson Yatamumua working from 08h00- 15h00 on Mondays to Fridays excluding weekends, school and public holidays starting on 4/08/2021.

In State v Moses Mwatako (High Court reference number 351/2021)

6. N\$3000 (Three thousand Namibia dollars) or 4 (four) months imprisonment wholly suspended for 5 years on two conditions: (1) that the accused is not

convicted of contravening regulation 7 (4) r/w sub-regulation (2) and (3) of GN 91/2021 (GG 7522) as amended read with section 29 (1) (2), 1 and 2 of the Public and Environmental Health Act 1 of 2015 committed during the period of suspension and (2) that accused performs 120 hours community service of cleaning at Oshikunde Constituency Office under the supervision of Kamati Jesaya working on 08h00-17h00 on Mondays to Fridays excluding weekends and public holidays starting on 2 August 2021.

JUDGMENT

SALIONGA J (KESSLAU AJ concurring):

[1] The above enumerated cases were submitted before this court on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended (CPA).

[2] The accused person in High Court reference no 348/2021 (State v Nicanor Martha Lipuleni) was convicted in the District Court of Eenhana on a charge of common assault. He was sentenced to a fine of N\$1500-00 (One Thousand five hundred Dollars) or Three (3) months imprisonment wholly suspended for 5 years on two conditions: (1) firstly that the accused is not convicted of common assault during the period of suspension. (2) secondly that accused undergoes 100 hours of community services at Uupili Combined School under the supervision of Uitaris Shimwdo-shili working from 08h00-15h00 from Mondays to Fridays excluding weekends, school and public holidays starting on 4/08/2021.

[3] In High Court reference number 350/2021 (State v Elizabeth Nyanga & Tomas Kondjeni Andreas) both accused persons were charged with contravening regulation 7 (4) r/w regulations 1, 2 and 7 of GN 7522 of 2021 r/w Act 1 of 2015- Selling liquor in contraventions of Public-Health COVID Regulation 7(4) of Government Notice 7522 of 2021 r/w section 1, 2, 29 (1) and 29 (2) of Act 1 of 2015 –Public and Environmental

Health Act 1 of 2015. Each accused was sentenced to N\$ 2000 or 4 (four) months imprisonment wholly suspended for 3 (three) years on two conditions: (1) firstly that each accused is not convicted of any offence related to the contravening the Health Regulation 7(4) of G/N 7522 and (2) secondly each undergoes 100 hours community services at Uuhahe Combined School under the supervision of Gerson Yatamumua working from Monday to Friday from 08h00 15h00 excluding weekends, school and public holidays starting on 4/08/2021.'

[4] In High court reference number 306/2021 (State v Erastus Tuhafeni) the accused was charged and convicted of theft in the same district of Eenhana by the same magistrate. The accused was sentenced to N\$ 2000 or 6 (six) month's imprisonment wholly suspended for a period of 3 years on two conditions: (1) that the accused is not convicted of theft during the period of suspension. (2) He undergoes 150 hours of community services at Okongo police station under the supervision of Lisias Mwatala working from 08h00-17h00 from Monday to Friday excluding weekends and public holidays starting on 12 July 2021.'

[5] While in High Court reference number 351/2021 (State v Moses Mwatako) the accused person was charged and convicted of contravening regulation 7 (2) r/w regulations 1, 2 and 7 of GRN 7522 of 2021 r/w Act 1 of 2015- Selling liquor without a licence. Accused was sentenced to N\$ 3000 or 4 months imprisonment wholly suspended for 5 years on two conditions: (1) firstly that the accused is not convicted of contravening regulation 7 (2) r/w 1 ,2 and 7 of GN 7522 of 2021 and any other regulation under the Act 1 of 2015 of GG 7342 as amended during the period of suspension and (2) that accused undergoes 120 hours of community services at Oshikunde Constituency Office under the supervision of Kamati Jesay working from 08h00-17h00 from Monday to Friday excluding weekends and public holidays starting on 2/08/2021.

[6] In each case the accused persons were convicted on the strength of a guilty plea in terms of section 112(1) (a) of the CPA. In these matters the reviewing court observed that the convictions in all cases are in order. However, it was the framing of the conditions of suspension of sentences that this court has a problem with. Further noted,

is the fact that the sentences on review cover sheets differ from the ones on the original records and the accused in both High Court reference numbers 350/2021 (State v Elizabeth Nyanga and Tomas Kondjeni Andreas) and 351/2021 (State v Moses Mwatako) were charged under the wrong Government Notice Numbers.

[7] When queried, the magistrate conceded that the wholly suspended sentences depicted on the review cover sheets were incomplete. In that they omitted the word 'committed' and the community orders lack details in terms of the type of work to be performed or rendered which the magistrate regrettably missed.

[8] Section 297(1), of the Criminal Procedure Act 51 of 1977 as amended provides as follows:

'297. (1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion -

(a)

or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph

(a)(i) which the court may specify in the order; or

(c) ...'

[9] Apart from the conditions of suspension omitting the word 'committed', the sentences on review cover sheets are incomplete. Some of them did not specify the period within which the suspension will last, they are vague and not specific and all community service orders lack details in terms of the type of work to be performed or rendered. In the result they read differently from the ones on the original records.

[10] One of such conditions referred to in paragraph (a) (i) (cc) of section 297(1) of the CPA, is the rendering of some service for the benefit of the community. They are the orders specified by the magistrate in both sentences as a condition for the suspension of the sentence. Therefore, as the learned magistrate chose to suspend the sentences in all cases following the provisions of subsection 1(b) read with subsection 1(a) (i) (cc) of the

CPA, the type of service accused should render to the community need to be specified. This court in *S v Rabie*¹ a case which was applied and endorsed in *S v Kangondjo*² articulated well how a community service order is formulated and made. In that matter, a medical doctor who was found guilty of dealing in rough and uncut diamonds was punished to a fine with an alternative of a period of imprisonment. In addition to that, was ordered to render community service at the Katutura State hospital's casualty section for a period of two years after hours and during weekends-public holidays included without remuneration.

[11] The orders on the review cover sheets in their present form do not address the issues elaborated in the above paragraphs as to the type of work or service the accused persons were supposed to render to the community. Considering the fact that all the sentences imposed were suspended, accused will suffer no prejudice at all if the conditions of suspension are completed and rectified/corrected on the review cover sheets to read as the ones in the original handwritten record. Furthermore, the condition of suspension reflected in High Court reference numbers 348/2021; 306/2021; 350/2021 and 351/2021 have to be corrected to include the word 'committed.'

[12] Again at the time of preparing this judgment, I have noticed that the Government notice that was to be read with the regulation contravened in the High Court ref numbers 350 and 351/2021 were wrongly cited. The record indicates Government Notice number 7522 but the correct one is 91//2021 of GG 7522 read with section 29 (1) (2) 1 and 2 of the Public and Environmental Health Act 1 of 2015. The magistrate correctly found that accused persons contravened the Regulations and in my view no prejudice will be suffered if the wrongly cited Notice is to be corrected.

[13] Therefore, the following orders are made:

In High Court reference case numbers 348/2021; 306/2021; 350/2021 and 351/2021:

1. The convictions are confirmed.

¹ *S v Rabie* 1990 (1) SACR 616 (SWA).

² *S v Kangondjo* (CR 35/2012)[2013] NAHCMD 153 (7 July 2013).

2. The sentences are amended to read as follows:

In State v Nicanor Martha Lipuleni (High Court reference no 348/2021)

3. N\$1500 (One Thousand Five Hundred) or 3 (three) months imprisonment wholly suspended for a period of 5 (five) years on condition that (1) accused is not convicted of assault common committed during the period of suspension and that (2) accused completes/performs 100 hours community service of cleaning at Uupili Combined School under the supervision of Uitaris Shimwooshili working from 08h00-15h00 on Mondays to Fridays excluding weekends, school and public holidays starting from 4 August 2021.

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4. N\$ 2000 (Two Thousand Namibia Dollars) or 6 (six) month's imprisonment wholly suspended for a period of 3 years on two conditions: (1) that the accused is not convicted of theft committed during the period of suspension. (2) The accused performs community services of cleaning at Okongo Police Station under the supervision of Lisias Mwatala working from 08h00 -17h00 on Mondays to Fridays excluding weekends and public holidays starting on 12 July 2021.

In State v Elizabeth Nyanga and Tomas Kondjeni Andreas (High Court reference number 350/2021)

5. Each accused is sentenced to N\$2000 (Two thousand Namibia Dollars) or 4 (four) months imprisonment wholly suspended for a period of 3 years on two conditions: (1) that each accused is not convicted of contravening regulation 7(4) r/w sub-regulations (2) and (3) of G/N 91 of 2021 GG 7522 as amended read with s 29 (1), (2), 1 and 2 of the Public and Environmental Health Act 1 of 2015 committed during the period of suspension. (2) each accused performs 100 hours community services of cleaning at Uuhahe Combined School under

the supervision of Gerson Yatamumua working from 08h00- 15h00 on Mondays to Fridays excluding weekends, school and public holidays starting on 4/08/2021.

In State v Moses Mwatako (High Court reference number 351/2021)

6. N\$3000 (Three thousand Namibia dollars) or 4 (four) months imprisonment wholly suspended for 5 years on two conditions: (1) that the accused is not convicted of contravening regulation 7 (4) r/w sub-regulation (2) and (3) of GN 91/2021 (GG 7522) as amended read with section 29 (1) (2), 1 and 2 of the Public and Environmental Health Act 1 of 2015 committed during the period of suspension and (2) that accused performs 120 hours community service of cleaning at Oshikunde Constituency Office under the supervision of Kamati Jesaya working on 08h00-17h00 on Mondays to Fridays excluding weekends and public holidays starting on 2 August 2021.

J. T. SALIONGA

JUDGE

I agree,

E. E. KESSLAU
ACTING JUDGE