

REPUBLIC OF NAMIBIA



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

Case Title: S v Luvualu Bruno Kizonzi Accused	CR NO: 25 /2022 Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 16 May 2022
Neutral citation: <i>S v Kizonzi</i> (CR 25/2022) [2022] NAHCNLD 51 (16 May 2022)	
The order: 1. The conviction of contravening section 29 (1) and (5) read with sections 1 and 8 of the Immigration Control Act, Act 7 of 1993 is set aside and substituted with a conviction of contravening section 29 (5) read with s 29 (1), 1 and 8 of Act 7 of 1993. 2. The sentence is confirmed.	
Reasons for the above order:	

Salionga J (Kesslau AJ concurring):

[1] The matter is before this court on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).

[2] The accused was charged under the Immigration Control Act 7 of 1993: –Overstaying/Remaining in Namibia after expiration of visitor’s entry permit or temporary residence permit in contravening section 29 (1) and section 29 (5) of the Immigration Control Act, Act 7 of 1993.

[3] The particulars of the charge are that on 12th March 2022 at or near Okahao Town in the district of Outapi the accused being a foreign national did wrongfully and unlawfully overstay/remain in Namibia for 12 days after the expiration of his/her Visitors entry permit or Temporary residence permit on the 28th day of February 2022 issued to him on 3rd day January 2022 and contained in his /her Angolan passport no N2075770.

[4] Section 304 (2) of the CPA requires reasons from a trial magistrate to be sought, however, I am not inclined to do that considering the number of judgments¹ by this court on the same issue. I have decided to write the judgment without requesting for reasons.

[5] It is apparent from the record that the accused was erroneously charged with the contravention of section 29(1) of the Immigration Control Act, Act 7 of 1993 which section, does not constitute or create an offence.

[6] The court in *S v Egumbu*² expressed sentiments that magistrates must verify that the statutory references are consistent to the charge label and particulars. The accused in casu pleaded guilty to this charge and admitted to have come to Namibia on a visitor’s permit which got expired and resulted in his overstaying. It goes without saying that the citing of a wrong section was an oversight on the part of the State which the magistrate overlooked.

¹ *S v Pena* (CR 58/2020) [2020] NAHCNLD 148 (16 October 2020); *S v Nghitenanye* (CR 83/2020) [2020] NAHCNLD 484 (23 October 2020)

² *S v Egumbu* (CR 10/2019) [2019] NAHCMD 11 (24 January 2019)

[7] The correct provision for this offence is a contravention of section 29(5) of the Immigration Control Act, Act 7 of 1993. In my view, the charge put and the resulting conviction of an accused of contravening section 29 (1) of Act 7 of 1993 is not in accordance with justice. For the aforesaid reasons no prejudice will be suffered if the conviction is substituted with that of a contravention of section 29(5) of the Act.

[8] Therefore, I made the following orders:

1. The conviction of contravening section 29 (1) and (5) read with sections 1 and 8 of the Immigration Control Act, Act 7 of 1993 is set aside and substituted with a conviction of contravening section 29 (5) read with s 29(1), 1 and 8 of Act 7 of 1993.
2. The sentence is confirmed.

J. T. SALIONGA
JUDGE

E. E. KESSLAU
ACTING JUDGE