

REPUBLIC OF NAMIBIA



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

REVIEW JUDGMENT

Case Title: <i>The State v Kaukewa Gabriel</i>	Case No: CR 5/2023
High Court NLD Review No: 252/2022	Division of Court: Northern Local Division
Heard before: The Honourable Lady Justice Salionga J et The Honourable Mr Justice Kessler AJ	Delivered on: 15 February 2023
Neutral citation: <i>S v Gabriel</i> (CR 5 /2023) [2023] NAHCNLD 10 (15 February 2023)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. In terms of section 312 of the Criminal Procedure Act 52 of 1977, the matter is remitted to the Eenhana Magistrate's Court for questioning afresh by another magistrate and to bring this matter to its natural conclusion.3. In the event of a conviction, the magistrate, for purposes of sentence, must take into consideration the period which the accused has already served.	

Reasons for the order:

SALIONGA J (KESSLAU AJ CONCURRING):

[1] This matter came before me on review in terms of section 302 (1) of the Criminal Procedure Act 51 of 1977 (CPA). The unrepresented accused appeared in the magistrate's court for the district of Eenhana, held at Ohangwena in the district of Oshakati on a charge of Housebreaking with intent to steal and theft. The accused pleaded guilty, was questioned in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA) and the court was satisfied that the accused had admitted all the allegations contained in the charge for count 1 and was therefore found guilty as charged.

[2] The state did not prove any previous conviction. The magistrate instead of availing the accused an opportunity to mitigate before sentence, unexpectedly questioned the accused person again after a finding of guilty as charged. The record of proceedings indicates that the accused was convicted twice notwithstanding the fact that there was only one count of house breaking with intent to steal and theft. It is the procedure implored by the trial magistrate that prompted me to query the Magistrate in the following terms:

'1. The record of proceedings indicates that the accused was found guilty twice for the same offence- On what legal basis was that done? Explain.'

[3] A reply to the above query was received from the office of the Divisional Magistrate indicating that the trial Magistrate had in the meantime left the service of the Judiciary as Magistrate. However to the above query he shared the following sentiments:

'2. I have read through the reviewing judge's remarks and reviewed the proceedings and have indeed discovered that it is indeed true that the record reflects that accused was convicted twice for the same offence albeit under seemingly different sets of facts:

3. The first part of the conviction seems to relates one accused who entered the room through the window and the second conviction seems to relate to breaking of the padlock and entering the house through the door:

4. This is not withstanding the fact that there is only one charge of house breaking with intent to

steal and theft: without a doubt this procedure is not founded...:' (SIC)

[4] I share the same sentiments expressed by the Divisional Magistrate in that the procedure adopted by the trial Magistrate is not provided for in our jurisprudence. I should pause here to mention that the facts admitted during the initial questioning differed materially from those admitted in the subsequent questioning. The charge sheet annexure is silent on that save for alleging that accused did unlawfully and intentionally break and enter the house. The accused during the first questioning admitted to have entered the room through the window, however during the second questioning he admitted to have broken the padlock and entered the house through the door. Again when asked what happened to the items in question accused during the first questioning replied that he sold the goods but in the second questioning he stated that the items were at the police station. That makes it difficult for this court to determine on which allegations the accused was found guilty and ultimately sentenced on.

[5] Our legal system entails that the trial or criminal process must be conducted in accordance with the rules and principles of the law of Criminal Procedure Act¹. Thus it is important that an unrepresented accused should be guided as far as it is necessary because the court in terms of section 112 is to a large extent dependent upon the information given to court by the accused which is likely to bring a conviction without evidence. In casu the accused who pleaded to a single charge, was questioned twice whereby the court in both instances was satisfied that the accused admitted all the elements of the offence charge and found him guilty as charged.

[6] In my view, the procedure implored was tainted with an irregularity or illegality which is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. Therefore the proceedings adopted in this matter is irregular, has the potential to prejudice the accused and cannot be allowed to stand.

[7] In the result,

1. The conviction and sentence are set aside.

¹ Act 51 of 1977

2. In terms of section 312 of the Criminal Procedure Act 52 of 1977, the matter is remitted to the Eenhana Magistrate's Court for questioning afresh by another magistrate and to bring this matter to its natural conclusion.
3. In the event of a conviction, the magistrate, for purposes of sentence, must take into consideration the period which the accused has already served.

J. T. SALIONGA
JUDGE

E. E. KESSLAU
ACTING JUDGE