

REPUBLIC OF NAMIBIA



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

LEAVE TO APPEAL
REASONS

Case Title: <i>Kaita Bruno Kaita v The State</i>	Case No: CC 9/2021
	Division of Court: High Court Northern Local Division
Heard before: Honourable Lady Justice Salionga	Heard: 8 September 2023 Delivered: 2 October 2023 Reasons: 3 October 2023
Neutral citation: <i>Kaita v S</i> (CC 9/2021) [2023] NAHCNLD 102 (03 October 2023)	
The order: <ol style="list-style-type: none">1. The point <i>in limine</i> is upheld.2. The application for condonation is refused.3. The leave to appeal is hereby struck off and considered finalized.	
Reasons for the above order	
SALIONGA, J [1] This is an application for leave to appeal to the Supreme Court in terms of s 316 of the Criminal Procedure Act 51 of 1977. [2] The applicant was convicted in this court following a plea of guilty on a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. On	

19 November 2021 he was sentenced to 34 years' imprisonment.

[3] His notice of appeal is dated 27 August 2022. It was accompanied by an application for condonation of the late filing of his notice of appeal together with an affidavit explaining his reasons for the delay.

[4] Although the application was received by the Ministry of Safety and Security on 18 October 2022, the Registrar only received it on 4 November 2022. No doubt that the leave to appeal was filed out of the prescribed time limit, about nine months after the applicant was sentenced.

[5] It was submitted on behalf of the respondent that the applicant's explanation for the late filing of his application for leave to appeal is not reasonable and acceptable when regard is had to the duration of the delay. It was further submitted that the applicant has not shown that he has reasonable prospects of success on appeal.

[6] In respect of the explanation for the delay, applicant submitted that although he was represented by a lawyer at trial, someone else stood in for him to note the sentence. That lawyer did not inform him about the leave to appeal process. The applicant being an illiterate person has no knowledge on how to lodge an appeal. It was his further submission that he was also quarantined for more than 2 weeks after he was sentenced.

[7] Section 316 (1) of the Criminal Procedure Act 51 of 1977 provides that:

'An accused convicted of an offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.'

[8] It is apparent from the submission and documents submitted that applicant failed to show that his explanation for the delay is neither reasonable nor acceptable as his claim or allegations was not substantiated by affidavit or any proof. Notwithstanding the aforesaid, the parties were allowed to address the court on the second leg of prospects of success on appeal based on the grounds set out in the notice of appeal.

Prospects of success on appeal.

[9] Applicant listed about 20 grounds in his notice. Most of these grounds are interrelated and some are not grounds at all as they are either conclusions made or a repetition of mitigating factors. I am not going to deal with them seriatim, however I will only deal with the main grounds as it becomes necessary in this application for leave to appeal.

[10] The grounds of appeal are that the judge misdirected herself in that:

10.1 The sentence imposed against the Applicant was too harsh and shockingly inappropriate as applicant is a first offender.

10.2 The judge failed to consider applicant's youthfulness at the time of committing the offence and imposed a sentence which eliminates any hope of ever meeting loved ones in society during applicant's life time.

10.3 That the judge forgot to consider that where applicant pleaded guilty to the charge as a sign of acknowledging his wrongdoings, the sentence to be imposed must be blended with a measure of mercy.

10.4 The judge overemphasized the seriousness and prevalence of the crime at the expense of the applicant's personal circumstances and mitigating factors and overlook the element of mercy which is an integral element of justice, and punished him to the point of breaking him which was cruel treatment and inhuman as a result.

10.5 The judge failed to take into account that applicant is a first offender as he has no previous conviction.

[11] In the instant matter, some of the grounds overlap while some are conclusions reached by the draftsman and some of them are phrased in general terms. That results in the application being ambiguous, and incapable of properly informing the respondent what

case it has to meet in opposing the appeal. The effect of grounds of appeal that are not clearly and specifically laid out or that are conclusions, are fatal and are nullity. The principle is firmly established in our case law.¹ The court will attempt to figure out the crux of the grounds, to the extent that it is able to, and where more than one paragraph can be taken together, they will be dealt with as one ground.

[12] Notwithstanding the above, this court is alive to the fact that applicant is without legal representation and that applicant is not familiar with procedural requirements pertaining to appeals. In this case I believe no prejudice is suffered if condonation is granted. The issue whether application for leave to appeal ought to be granted or not must be decided on the merits and whether there are prospects of success on appeal. Although the court cannot take this proposition too far as to cover situations where a peremptory statutory provision has not been complied with, the parties in this matter were allowed to argue the merits of the appeal.

[13] The respondent's counter argument is that those factors complained of as having been ignored or not considered by the trial court had in fact been given sufficient weight in light of the established facts and authorities relied upon as per the trial court's judgment on sentence.

[14] With regard to the first ground, that the sentence imposed was too harsh and shockingly inappropriate, I disagreed with the submissions. The trial court considered the triad factors, struck a balance between the divergent interests of the applicant and that of society. It went further to weigh up these factors against the gravity of the offence and found that the sentence of 34 years imprisonment was suitable in the circumstances.

[15] The ground in which applicant contended that the judge failed to consider applicant's youthfulness at the time of committing the offence and imposed a sentence which eliminates any hope of ever meeting loved ones in society during his life time will be considered with applicant's contention that the trial court did not consider a number of mitigating factors, namely that he pleaded guilty and that he does not have previous conviction.

¹ *Gofried Kuhanga and Another v S* Case No CA 57/2002 delivered 18 November 2004 (HC) (unreported), *Tjiriange v State* (CA 86/2016)[2016] NAHCMD 390 (17 January 2017).

[16] Reading from the judgment on sentence, the applicant's personal circumstances were considered and evaluated at length. Accused was found to have a history of violence against the deceased, who was his girlfriend. The mother of the deceased testified in court on how abusive the accused was towards the deceased. That on that fateful day she recalled how accused was first assaulting the deceased with sticks and she intervened. Thereafter accused apologized to her and promised not to do it again. It was just after a while that she heard something falling and only to find her child murdered by a person she hosted in her house. The court was alive to the fact that the sentence to be imposed should be blended with a measure of mercy when it sentenced the applicant to 34 direct imprisonment. Applicant further did not apologize to the family of the deceased. He did not even give the reason as to why he callously murdered the deceased. He stated to the court that he is sorry for himself and in my view, a mere mentioning of the word remorse is not enough. A genuine remorse should be construed through the actions or steps taken by the applicant.

[17] Regarding the applicant's ground that this court approached the sentence in a spirit of anger because the judge was of the same gender with the deceased, I refute the submission as baseless and without merit. Murder committed by a man on a woman should not be treated lightly. (See *S v Van Staden* (KS 21/2016 [20217] ZANCHC 21 (20 March 2017) and *S v Bohitle* 2007 (1) NR 137 (HC)). The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to that effect, require that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment. The court in the present matter meted out the sentence after a fair and well- balanced exercise between the interest of the accused and that of society.

[18] Lastly, on the ground that the court failed to impose a sentence that could be imposed in similar crimes, it is settled law that similar sentences should be imposed for similar crime with or subject to exceptions according to the circumstances of each case. The following are some of the cases to demonstrate that notion. In *S v Kasimeya*², a 34 year old accused who was convicted of killing his girlfriend by chopping her with a panga and axe, spent 4 years in custody awaiting trial, pleaded guilty and was sentenced to life

² *S v Kasimeya* (05/2015) [2018] NAHCNLD 29 (06 April 2018).

imprisonment. Again, in *S v Jacob*³ an accused who pleaded guilty to killing his girlfriend by chopping her with a panga more than 26, times was sentenced to 35 years imprisonment.

[19] Having properly considered the grounds of application for leave to appeal enumerated by the applicant against the sentence imposed, the reasons for the delay with those indicated in the judgment on sentence, this Court is not satisfied that applicant had reasonable prospects of success on appeal. This application for leave to appeal stands to be struck from the roll.

[20] Consequently, the following order is made:

1. The point *in limine* is upheld.
2. The application for condonation is refused.
3. The leave to appeal is hereby struck off and considered finalized.

Judge's signature	Note to the parties:
Salionga J	Not applicable.
Counsel:	
Applicant	Respondent
Kaita Bruno Kaita In person Of Evaristus Shikongo Correctional Facility, Tsumeb	V Shigwedha Of Office of the Prosecutor General, Oshakati

³ *S v Jacob* (CC 6 of 2011) [2012] NAHC 42 (24 February 2012)