

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case Title: <i>Albert Kahembe v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2022/00026
	Division of Court: Northern Local Division
Heard before: Salionga J et Kessler J	Heard on: 08 June 2023 Delivered on: 06 July 2023
Neutral citation: <i>Kahembe v S</i> (HC-NLD-CRI-APP-CAL-2022/00026) [2023] NAHCNLD 61 (6 July 2023)	
It is hereby ordered that: <ol style="list-style-type: none">1. The Respondent's point <i>in limine</i> is upheld.2. The application for condonation is dismissed.3. The appeal is struck from the roll and considered finalised.	
Reasons for decision:	
KESSLAU J (SALIONGA J concurring): <i>Introduction</i> [1] The appellant appeared on a case in the Ohangwena Periodical court as accused	

2 on charges of (1) Contravening section 18 of the Riotous Assemblies Act 17 of 1956: Conspiracy to commit fraud; (2) Contravening section 7(1) read with s 7(2) of the General Law Amendment Ordinance 12 of 1956: Receiving stolen goods as well as (3) Money laundering in contravention of the Prevention of Organized Crime Act 29 of 2004.

[2] The appellant applied for bail in the court *a quo* with the State opposing same on the following reasons:

1. The seriousness of the offence and the strength of the State's case;
2. Fear of interference with state witnesses/police investigations;
3. That several criminal cases are pending against the Appellant;
4. That the Appellant is likely to continue committing offences while on bail;
5. That it would not serve the interest of the public should the Appellant be granted bail; and
6. That the Appellant is likely to abscond and not stand trial should he be granted bail.

[3] After evidence was presented by both parties, bail was refused by the Magistrate who, after a well-reasoned ruling, in conclusion stated:

1. 'Evidence presented before this court shows that there is enough evidence to link the applicant to the commission of the offences he has been charged with. Regardless of the fact that it is circumstantial at most.
2. The applicant's history of involvement in a multiplicity of similar cases demonstrates that there is a likelihood of a further involvement in further cases.
3. The court is further of the view that illness whilst in custody is not a sufficient ground for the applicant to be released on bail. The need for a special diet may be taken care of whilst in custody.
4. There is evidence on record which shows that the applicant's involvement in multiple cases has greatly contributed to the non-finalization of the cases against him which were/are trial ready.
5. The cases pending against the applicant are a clear indication that he has a propensity to commit offences whilst out on bail.
6. Courts have a duty to protect the image of the administration of justice as they are

responsible for ensuring that people who are repeatedly implicated in the commission of offences are not released back into society without due justice being done.

7. The court is not convinced that any bail conditions can be imposed to rescue any concerns that the respondents might have as they haven't helped prevent the further commission of offences by the applicant who was on bail when he was charged with the offenses in question. [*S v Branco* 2002 (1) SACR 531 (W)]
8. The court is of the view that the applicant has not demonstrated on a balance of probabilities that he is a suitable candidate to be released on bail.
9. The manner in which the offences in question were alleged to have been committed and the value involved does indeed render this case appropriate for this court to invoke the provisions of s 61.
10. On that basis, the court thus invokes the provisions of s 61 and dismisses the applicant's application for bail.'

[4] The appellant then filed a notice of appeal against the refusal of bail which brings us to the proceedings in this court. The grounds of appeal are that the learned Magistrate erred in law and/or in fact:

1. 'In finding that the evidence in the form of the forensic data extraction report and various MTC communication records in respect of the appellant's cell phone number constitutes a strong prima facie case against the appellant;
2. In placing too much weight on circumstantial evidence indicating that the appellant was in the different towns across the country where the financial transactions are alleged to have taken place and as a result same creates a causal link between appellant and the commission of the offence;
3. In placing too little weight on the testimony of the appellant pertaining to the ownership of certain building equipment found at appellant belongs to him and was purchased by him and is not linked to the offence alleged by the state;
4. In finding that interference with investigations were proven based on allegations that the appellant informed his relative prior to appellant's arrest to refrain from providing information to the police regarding the goods seized by the police without tangible evidence indicating actual interference;
5. In finding that the absence of previous convictions in respect of the appellant does not indicate an absence of a propensity to commit offences;
6. In placing too much weight on the evidence of the respondent's witnesses regarding the

alleged “modern way of absconding” which involves the submission of medical certificates as a way to avoid attending court proceedings;

7. In placing too little weight on its own finding that the appellant will not flee the country;
8. In finding that there is an obvious public outcry over conduct pertaining to money of retired people being fraudulently accessed through a variety of unlawful financial transactions country wide and that there is a clear need for public protection from such perpetrators without hearing any evidence confirming same during the hearing of the bail application;
9. In finding that the circumstantial evidence presented shows that there is enough evidence to link the appellant to the commission of the offences he is charged with;
10. In finding that illness whilst in custody is not a sufficient ground for the appellant to be released on bail despite clear evidence that the state is not at all times able to cater for dietary and medical needs of trial awaiting offenders whilst in custody;
11. In finding that bail conditions will not rescue any concerns the respondent may have due to previous bail conditions not preventing the further commission of offences by the appellant who was on bail when charged with the offences in question;
12. In erroneously finding that the appellant committed offences whilst on bail merely by having been charged?
13. In finding that the appellant is not a suitable candidate for bail.’

Point in limine

[5] Respondent raised the point *in limine* that the appeal does not comply with the rules of court¹ in that it was filed late and argued¹ that it should be struck from the roll as the reason provided for filing late is unsatisfactory and additionally that there are no prospects of success on appeal.

[6] While the respondent is submitting that the appeal is late by more than 11 days, counsel for appellant argued it is late by only one day. Being an appeal against the refusal of bail, it is regulated by section 65 of the CPA which in turn refers to the procedure of appeal under section 309 of the CPA. These sections refer to the magistrates court rules which regulate the filing of appeals. Rule 67 indicates that an appeal should be filed within 14 days after the judgment or ruling by the lower court.

¹ Rule 67 of the Magistrate's Court act 32 of 1944 as amended.

These are court days and Saturdays; Sundays and public holidays are excluded.² The period is calculated by excluding the first day and including the last day of the period.³

[7] When applying the above the result is that the appeal was filed one day out of time as was correctly submitted by counsel for the appellant. Counsel for the appellant filed an application for the condonation for late filing of the notice of appeal, addressing the reason and prospects of success.

[8] When considering the application for condonation the requirements are twofold. It consists firstly in deciding on the reasonableness of the explanation for the late filing and secondly the prospects of success on the merits. Gibson J in *S v Nakapela and Another*⁴ stated the following at para 185G-H:

‘In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal.’

Appellant’s reason for late filing

[9] The appellant in the court *a quo* made use of two counsels. The magistrate’s ruling refusing bail was delivered on Friday 17 June 2022 in the absence of both the lawyers. It is unclear why neither of them attended court that day. The reason for late filing was given as the fact that the instructed lawyer on the bail matter left the country and only received an emailed copy on the day the ruling was delivered but after 17h00. Ms Amupolo was waiting for feedback from the instructed lawyer who was in a better position to indicate misdirection by the magistrate whilst the fact that the appellant is in custody made it difficult to consult with him and to file in time.

² Rule 2(2) of the Magistrates Court Act 32 of 1944 as amended.

³ *Kornelius v S* (CA 103/2009) [2011] NAHC 110 (8 April 2011) at para 10; *Hamana v S* (HC-NLD-CRI-APP-CAL-2020/00012) [2020] NAHCNLD 156 (12 November 2020); *Shidangi v S* (HC-NLD-CRI-APP-CAL-2020/00049) [2022] NAHCNLD 10 (15 February 2022).

⁴ 1997 NR 184 (HC).

[10] The reason cannot be accepted as reasonable in the light of the fact that both lawyers failed to comply with the rules of court. Be that as it may, parties were invited to address this court on the prospects of success and I will now turn to the second requirement for condonation *to wit* the prospects of success on the merits of the appeal.⁵

Prospects of success

[11] It is trite law that, in an appeal on the refusal to grant bail, the appeal court is permitted to intervene only when the court on appeal is satisfied that the decision of the presiding officer against which the appeal is brought is wrong.⁶ This court in *S v Timotheus*⁷ confirmed that it is bound by the provisions of s 65 (4) of the CPA when sitting as a court of appeal and the real question is 'whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly'.

[12] The grounds of appeal are somewhat intertwined and overlapping. Those will be dealt with simultaneously.

[13] The 1st, 2nd, 3rd and 9th grounds of appeal are all concerned with whether the evidence linking the accused to the offences constitutes a *prima facie* case against him. Evidence was presented that MTC records will link the appellant to the commission of the offences which were committed in various towns where either the appellant was present at the time or had connections with. The evidence furthermore indicated frequent telephonic communication between the appellant and his co-accused. These were circumstantial in nature however it appear that there are also direct evidence on items found in possession of the appellant which were purchased using stolen funds. The magistrate during the bail application was alive to the fact that it is for the trial court to decide the evidential value of the evidence presented. The magistrate found that a conviction can follow based on circumstantial evidence. This court cannot find that the magistrate erred in this regard and thus there is no prospects of success on the above

⁵ *S v Nakapela and Another 1997 NR 184 (HC)*.

⁶ Section 65 (4) of Act 51 of 1977.

⁷ 1995 NR 109 (HC).

grounds of appeal.

[14] The 4th ground of appeal is alleging a misdirection by the magistrate in finding that interference with investigations were proven based on allegations that the appellant informed his relative prior to his arrest to refrain from providing information to the police regarding the goods seized by the police without tangible evidence indicating same. Considering that the investigating officer testified regarding interference by the appellant with state witnesses, who happens to be related to him and furthermore that hearsay evidence is allowed in a bail application this ground equally does not have any prospects of success.

[15] The 5th and 12th grounds of appeal alleged a misdirection by the magistrate when considering the pending cases of the appellant as a propensity to commit further offences. Evidence presented during the bail application indicates a multitude of pending cases of similar nature against the accused which is a factor that cannot be ignored by the magistrate.⁸ The pending cases were not disputed during the bail application and the magistrate cannot be faulted for considering same. Therefor this ground does not have any prospect of success on appeal.

[16] In final oral submissions before this court, counsel for the appellant indicated that she wish to bring an application to present additional evidence on the fact that these cases are no longer pending. That constituted new facts that should be addressed by the court *a quo* in the form of an application of bail on new facts.⁹ For purposes of this appeal, this court is confined to the record of appeal.

[17] The 6th and 7th grounds of appeal deals with the requirement that an accused should stand his trial and fault the magistrate for placing too much weight on medical certificates used by the appellant previously not to attend court appearances whilst in contrast found that the appellant will not flee the country. Evidence was presented during the bail application that some of these medical certificates presented previously in

⁸ *Onesmus v The State* (CA 01/2013) [2013] NAHCNLD 22 (22 April 2013).

⁹ *S v Miguel and Others* 2016(3) NR 732 HC; *S v Du Plessis and Another* 1992 NR 74 (HC).

various courts were fraudulent in nature. The fact that an accused will flee the country is but one of the factors to be considered in an application for bail. Equally important is the attendance of court as to not frustrate the administration of justice. I cannot find any misdirection from the magistrate on the above and thus there is no prospects of success.

[18] Regarding the 8th ground of appeal it was submitted that the magistrate, by finding that there is a public outcry over conduct pertaining to money of retired people being fraudulently accessed and the need for their protection, was misdirected in that no such evidence was presented during the bail application. Public outcry is not only proven by way of petitions. The evidence was of an number of cases similar in nature registered against the appellant and by applying s 61 of the CPA found that releasing him on bail will not be in the interest of the public or the administration of justice. I cannot find any misdirection in the reasoning by the magistrate and thus this ground has no prospects of success.

[19] The 10th ground of appeal alleged a misdirection by the magistrate on finding that illness whilst in custody is not a sufficient ground for the appellant to be released on bail despite evidence that the state is not at all times able to cater for dietary and medical needs of trial awaiting offenders. The magistrate considered the illness of the appellant in light of the fact that he was taken to hospital by the police and that they are complying with his dietary needs as far as possible. The magistrate found that the needs of the appellant are sufficiently cared for. I cannot find misdirection in the reasoning of the presiding officer and thus there is no prospects of success on this ground.

[20] Regarding the 11th and 13th grounds of appeal that the magistrate committed an error when finding that bail conditions will not rescue any concerns the respondent may have due to previous bail conditions not preventing the further commission of offences by the appellant who was on bail when charged with the offences in question and subsequently finding that the appellant is not a suitable candidate for bail. The similar pending matters of the appellant in various districts were not disputed and thus the magistrate did not err when considering these. The fact that he was on bail whilst

additional cases were added was also not disputed. In my view there is equally no prospects of success on appeal present.

[21] In conclusion when considering the above discussion and findings this court cannot find that there are prospects of success on appeal against the refusal of bail.

[22] In the result:

1. The Respondent's point *in limine* is upheld.
2. The application for condonation is dismissed.
3. The appeal is struck from the roll and considered finalised.

Judge(s) signature:	Comments:
E.E. Kesslau, J	None
J.T. Salionga, J	None
APPEARANCES	
Appellant:	Respondent:
Ms. M Amupolo Jacobs Amupolo Lawyers & Conveyancers Ongwediva	Ms. M. Nghiyoonanye Of the Office of the Prosecutor-General, Oshakati