

REPUBLIC OF NAMIBIA



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

REVIEW JUDGMENT

Case Title: <i>The State v Benjamin Suse</i>	Case no: CR 02/2023
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr. Justice Kessler AJ	Delivered on: 10 February 2023
Neutral citation: <i>S v Suse</i> (CR 02/2023) [2023] NAHCNLD 07 (10 February 2023)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The convictions and sentences are confirmed.2. The order made on 8 July 2022 for the accused to compensate the victim Mubinda Kavapundua an amount of N\$2000 in terms of section 300 of the Criminal Procedure Act, 51 of 1977 as amended is hereby set aside.3. If paid, it should be refunded.	
Reasons for the above order:	

SALIONGA J (KESSLAU AJ concurring):

[1] This matter came on review in terms of section 302 of the Criminal Procedure Act 51 of 1977 as amended. The unrepresented accused appeared in the Magistrates court at Opuwo charged with Assault with intent to do grievous bodily harm and Assault by threat, both counts read with the Provisions of the Combating of Domestic Violence Act 4 of 2003. The victim is the same person in both counts who is also a sister to the accused. Accused pleaded guilty but a plea of not guilty was entered in terms of section 113 (CPA) and the matter went on trial. The accused was correctly convicted and sentenced on both counts

[2] However, in addition to the sentences imposed the court made what constituted a purported compensation order. The order reads that 'in terms of section 300 of the Act 51 of 1977 as amended- Accused hereby ordered to compensate complainant Mubinda Kavapundua an amount of N\$2000.00 prior his release'. (SIC) This purported order was made without any basis laid or proper enquiry made, also without the complainant's knowledge of what is to be paid and without a medical report available. The court further cited a wrong section of the Act when complainant was called to testify in aggravation of sentence.

[3] It is the application of section 300 of the Criminal Procedure Act 51 of 1977 and the citing of a wrong section of the Combating of Domestic Violence Act, 4 of 2003 in aggravation of sentence that I directed a query in the following terms:

- '1. That the Learned Magistrate fully explains the basis/authority upon which an order for compensation was awarded in terms of section 300 of the CPA.
2. Also, that the Learned Magistrate explains whether there was a proper application for an order for compensation.
3. Further that the Learned Magistrate explain what was the relevance of applying section 24 of the Combating of Domestic Violence Act, 4 of 2003 at pre-sentence proceedings?'

[4] In his/her reply the Magistrate responded as follows: 'The learned Magistrate had a proper sight of the Section and it is silent on cases that does not apply to pain and suffering and the reason why the learned Magistrate applied it is because there is no small claims court for the complainant to institute proceedings to sue accused and the complainant is also from a marginalized community, she does not have resource to begin the process with. Furthermore,

many complainants of physical violent cases go uncompensated with lengthy term trauma or permanent scars even though it is not the case here, the learned Magistrate admit the procedure was wrong but the reason to enforce such was right...' (SIC) On the last part of the query the Magistrate although indicating that he/she had difficulty in understanding the query conceded that the correct section that ought to have been applied was s 25(2) and not s 24 of the Combating of Domestic Violence Act, 4 of 2003.

[5] The procedure provided for in terms of s 300 of the Act may only be utilised in order to recover damages when property has been damaged or lost as a result of the crime. This is evident from the express provisions of section 300 of the CPA which provides as follows:

'(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that -

(a) ...

(b) ...

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) (a) An award made under this section -

(i) by a magistrate's court, shall have the effect of a civil judgment of that court...' [Emphasis added]

[6] One of the prerequisites before an award can be made in terms of section 300 is that there must be an application which emanates from the injured person. In a case where the prosecutor brings the application it must be clear that he is acting on such person's instructions. In the present case, although the prosecutor brought up an application, it is not clear whether he was acting on the complainant's instructions. I am in agreement with Didcott J in *S v Liberty Shipping*¹ where he found that: '... it followed that the only damage for which compensation was claimable under s 300 (1) was damage to property, and that the section did not cover any other damage which was suffered and no damage had been done to property in this case.' Against this backdrop it means that personal injury of any kind such as in the present case is not covered under s 300

¹ 1982 (4) SA 281 (D) at 286

of the Act.

[7] The magistrate was of the view that since there was no small claims court for the complainant to institute proceedings to sue the accused; that the complainant is from a marginalized community who does not have resources to begin the process with; that many complainants of physical violent cases go uncompensated with lengthy term trauma or permanent scars she can enforce such right. She conceded that the procedure she followed is wrong but the reason to enforce same was right.

[8] It is trite that a Magistrates court is a creature of statute² and accordingly its powers are limited to those conferred upon it by statute. As it stands in this case, although the magistrate's reason for ordering compensation in her view was right, she was not authorised by the law to order compensation in terms of section 300 of the Act. Whatever is done outside the law despite the justification is *ultra-vires*.

[9] I should point out in passing that the court *in casu* was dealing with an undefended accused who was also entitled to be given an opportunity to be heard. Not only on the issues of liability and compensation, but also as to his ability or affordability to comply with the court order. The magistrate's failure to give the accused an opportunity to be heard is a serious misdirection vitiating the proceedings.

[10] With regards to the last aspect of the query, there is a distinction between s 24 and s 25 of the Combating of Domestic Violence Act, 4 of 2003. Section 24 places a duty on the Public Prosecutor towards the victim and is only relevant before conviction. Whilst section 25 gives the victim the right to address the court during the sentencing proceedings. Unlike the former, the magistrate in applying section 24 instead of 25, though a misdirection itself, in my view does not vitiate the proceeding and the magistrate should just take note of the difference of these two sections. It follows that, the Magistrate's concessions have been properly made in both queries and the order for compensation has to be set aside.

[11] In the result the following order is made:

² S v Dornadus (CC 8/2017)[2017] NAHCNLD 67 (24 July 2017)

<p>1. The convictions and sentences are confirmed.</p> <p>2. The order made on 8 July 2022 for the accused to compensate the victim Mubinda Kavapundua an amount of N\$2000 in terms of section 300 of the Criminal Procedure Act, 51 of 1977 as amended is hereby set aside.</p> <p>3. If paid, it should be refunded.</p>	
<p>J T SALIONGA JUDGE</p>	<p>E E KESSLAU ACTING JUDGE</p>