

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**HILARIA NDIITODINO KALIMBO**

**Petitioner**

and

**THE STATE**

**Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** **IN CHAMBERS**

**Delivered:** **14 September 2021**

**Summary:** The petitioner was convicted in the Regional Court of murder read with the Domestic Violence Act 4 of 2003 and of concealment of a birth contrary to Ordinance 9 of 1962. A sentence of direct imprisonment of 15 years was imposed in respect of the murder charge.

The petitioner, who was unrepresented at the time, filed a notice of appeal in the High Court against the sentence on 29 March 2018 in person. On 5 September 2019, the current legal practitioner for the petitioner filed an amended notice of appeal. This amended notice of appeal was against both the conviction and the sentence. On 28 January 2020 the matter was enrolled for hearing in the High Court before Salionga J and January J. It appears that a notice of withdrawal of the initial appeal was filed on the e-justice system. At the hearing, the State raised a point *in limine*. Salionga J accepted that the notice of withdrawal was uploaded on e-justice on 5

September 2019, but appears to have held the wrongly dated notice against the petitioner and struck the matter from the roll as the second notice of appeal was not served on the clerk of the regional court without this point being raised with counsel for the appellant.

The petitioner then brought an application for leave to appeal against the judgment striking the appeal from the roll as she was never apprised of the fact that the appeal court had a problem with the service of the notice of appeal on the magistrate (clerk of the magistrate's court). This application for leave to appeal was heard on 25 September 2020. Counsel for the petitioner sought condonation for the late filing of her heads of argument. This was condoned. However in the judgment of 9 October 2020 this aspect was again dealt with *in limine* and January J upheld this point and struck the application for leave to appeal from the roll. As a result, the petitioner approached this court petitioning the Chief Justice to grant her leave to appeal.

Upon enquiry from January J he conceded the irregularities, namely that counsel for applicant was not granted the opportunity to address the court on the non-service of the notice of appeal on the clerk of the court and that he could not revisit his ruling to condone the late filing of the heads of argument in his judgment as by then he was *funtus officio* in that regard.

*Held* that this court may *mero moto* review irregularities that come to its notice in terms of s 16 of the Supreme Court Act.

*Held* that the judgments *a quo* are set aside based on the conceded irregularities and the matter is referred back for the appeal to be dealt with on the merits.

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## REVIEW JUDGMENT

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FRANK AJA (MAINGA JA and HOFF JA concurring):

[1] The petitioner was convicted in the Regional Court of murder read with the Domestic Violence Act 4 of 2003 and of concealment of a birth contrary to Ordinance 9 of 1962. A sentence of direct imprisonment of 15 years was imposed in respect of the murder charge.

[2] The petitioner who was unrepresented at the time filed a notice of appeal against the sentence on 29 March 2018 in person. Nothing further happened as a result of this notice of appeal as the current legal practitioner filed an amended notice of appeal about a year and half later on 5 September 2019. This amended notice of appeal was against both the conviction and the sentence.

[3] On 28 January 2020 the 'matter appeared for hearing in the High Court' according to the petitioner. I assume this was for the appeal that was noted. From the copy of the judgment in respect of this hearing it is also evident that it was an 'Appeal Judgment'. The bench of the High Court on appeal was Salionga J and January J. It appears that a notice of withdrawal of the initial appeal was filed on the e-justice system on 5 September 2019 but dated 19 July 2019.<sup>1</sup>

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<sup>1</sup> *Kalimbo v S* (HC-NLD-CRI-APP-CAL-2019/00033) [2020] NAHCNLD 40 (12 March 2020), para 2.

[4] As appears from the judgment of Salionga J for the court (the appeal judgment) a point *in limine* was raised by the State. The point is stated as follows in the judgment:

‘On top of the initial notice of appeal against the sentence, the appellant filed another notice of appeal. There is no indication from the appellant as to what is the state of the initial notice of appeal.’<sup>2</sup>

[5] Salionga J accepts that the notice of withdrawal was uploaded on the e-justice on 5 September 2019 but seems to hold it against the petitioner that this notice was wrongly dated 19 July 2019 and not 19 August 2019 and then the *coup de grace* is delivered by Salionga AJ as follows:

‘As if this was not enough, [the wrong date on the notice of withdrawal] a second notice of appeal was not lodged with the clerk of the magistrates’ court of Eenhana . . . . Counsel in the heads of argument did not try to explain this anomalies even though same was filed after the respondent filed his [presumably heads of argument]. This was inexplicable why a notice of appeal was not lodged as required by law. These provisions were crafted in peremptory language as non-compliance has a consequence and cannot be condoned.’<sup>3</sup>

[6] The result was that the point *in limine* (which had nothing to do with non-service on the magistrate) was upheld and the appeal was ‘struck and considered finalised’.

[7] The point raised in this regard by the petitioner is that counsel for the petitioner was never apprised of the fact that the appeal court had a problem with the service of

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<sup>2</sup> Appeal judgment, para 3.

<sup>3</sup> Appeal judgment, para 6.

the notice of appeal on the magistrate (clerk of the magistrate's court) and this issue could thus not be addressed by counsel.

[8] The record of the proceedings of 28 January 2020 supports the contention of the petitioner and it seems that the issue of the non-service of the notice of appeal did not feature at all in the proceedings that day. I am thus satisfied that an irregularity occurred. However the matter was not dealt with on the merits and it was open to the petitioner to re-enrol the matter with proof of service and to seek reinstatement of the appeal. In essence, to seek condonation for the failure to serve on the magistrate timeously and to have the appeal heard. This is especially so where the magistrate's reasons now appears to be at hand.<sup>4</sup>

[9] The petitioner then brought an application for leave to appeal against the judgment striking the appeal from the roll. This application for leave to appeal was heard on 25 September 2020. Counsel for the petitioner sought condonation for the late filing of her heads of argument. This was opposed and this issue only was dealt with *in limine* and in his judgment of 9 October 2020 January J upheld this point and struck the application for leave to appeal from the roll.<sup>5</sup>

[10] The complaint in respect of the leave to appeal judgment is that it is contrary to a ruling made at the hearing of the appeal. As appears on p 12 of the transcription of the hearing January J in no uncertain terms granted condonation for the late filing of the heads of argument. The record indicates as follows:

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<sup>4</sup> Petition p 4 para 4 (4.2).

<sup>5</sup> Para 10 of the leave to appeal judgment.

'Ruling: Yes. In relation to the late filing of the heads of argument, the court is granting condonation and is prepared to hear the merits of the application.'

[11] In my view it is clear that for January J to, after his ruling, go back to the point *in limine* and reverse his ruling constituted an irregularity. Because of his ruling he was bound to consider the merits of the leave to appeal application. Here the same issue arises, namely is the striking of the leave application a final order or can it be revisited as the merits of the matter was not dealt with.

[12] Subsequent to the receipt of the petition the view of the judges *a quo* was sought in respect of the alleged irregularities. January J responded conceding that the issue of non-service of the notice of the appeal on the clerk of the court was not raised by counsel nor was counsel alerted to this issue and hence that an irregularity was established in this regard in respect of the appeal judgment. He further concedes the irregularity alleged relating to the application for leave to appeal, namely that he could not revisit his ruling to condone the late filing of the heads of argument as he was *functus officio* in this regard once he had made his initial ruling.

[13] As the irregularities are conceded, it serves no purpose to grant the petitioner leave to appeal against the two judgments based on the irregularities as the result of the intended appeal would be a foregone conclusion. Furthermore, as the intended appeal will not resolve the merits of the attack against the conviction and sentence imposed but will only result in the matter being referred back to the court *a quo* to deal with the merits, justice will be better served if the judgments *a quo* are set aside

based on the conceded irregularities and the matter is referred back to be dealt with on the merits. The magistrate's reasons are now on record and there is no reason why the initial appeal should not be dealt with on the merits.

[14] The above result is sanctioned by s 16 of the Supreme Court Act<sup>6</sup> which allows this court to *mero moto* review irregularities that comes to its notice. As is evident from what is stated above the irregularities committed in this matter are common cause and the judgments *a quo* stands to be reviewed and aside.

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

- (a) The 'Appeal judgment' in the High Court of 12 March 2020 in *Kalimbo v The State* is reviewed and set aside.
- (b) The 'Leave to Appeal Judgment' in the High Court of 9 October 2020 in *Kalimbo v The State* is reviewed and set aside.
- (c) The appeal lodged by Hilaria Ndiitodino Kalimbo against her conviction and sentence in the Regional Court per the notice of the appeal dated 5 September 2019 is to be set down for hearing on its merits by the Registrar of the High Court (Northern Local Division) as expeditiously as possible.

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<sup>6</sup> Act 15 of 1990.

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**FRANK AJA**

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**MAINGA JA**

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**HOFF JA**

**APPEARANCES**

**APPLICANT:**

J Amupolo

Of Jacobs Amupolo Lawyers &



Conveyancers, Ongwediva

RESPONDENT:

No appearance