



CASE NO.: CA 111/2009

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

MARTIN NANDAGO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: September 17, 2010.

Delivered on: September 17, 2010.

Reasons released on: September 27, 2010

APPEAL JUDGMENT

LIEBENBERG, J.: [1] Appellant appeared in the magistrate's court at Ondangwa on a charge of housebreaking with intent to steal and theft; to which he pleaded guilty. When the appellant did not admit the *quantum* in cash the complainant claimed to have been stolen, the court entered a plea of not guilty whereafter the complainant

testified that the amount of N\$10 400-00 in cash was stolen from her hut and not only an amount of N\$400-00, which the appellant admitted having taken. In the end the accused was convicted as charged and sentenced to a term of thirty six months imprisonment. The appeal lies only against sentence.

[2] Although the matter was finalised on May 7, 2009, the appellant's "*Notice: Application for Fine*" was drafted more than one month later and, according to the date stamp, received by the Namibian Prison Service at Oluno, only on July 14, 2009. Appellant's notice is therefore out of time.

[3] Ms. *Mainga* appeared *amicus curiae* for the appellant and we are indebted to her for her assistance to the Court in that regard. Mr. *Lisulo* appeared for the respondent.

[4] Respondent raised a point *in limine* that appellant's "notice" does not satisfy the requirements set out in the Rules of Court and in the absence of any application by the appellant for condonation of his non-compliance, the matter stands to be struck. Ms. *Mainga* conceded and after the Court verified the concession made on his behalf with the appellant, the matter was struck from the roll. What follows are the reasons for the order made by the Court.

[5] Appellant's purported "notice of appeal" is flawed in two respects; firstly, it was filed out of time and is not supported by an application for condonation and secondly, it falls far short of setting out "*clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based: ...*" (Rule 67 (1) of the Magistrates' Courts Rules).

[6] It is settled law that the grounds set out in the appellant's notice of appeal forms the foundation on which the case of the appellant must stand or fall (*S v Kakololo* 2004 NR 7 (HC)). Strict compliance with the Rules of Court must be observed to ensure the efficient administration of justice for all concerned. In the present notice of appeal the appellant did not raise *any* ground on which his appeal is founded; but instead, made a request to have his sentence of imprisonment substituted with a fine. Although *prima facie* it may appear that the basis of the appellant's appeal is that the court *a quo* should have imposed a fine and not a custodial sentence, it cannot be said

that the notice contains clear and specific grounds of fact or law and that the magistrate misdirected himself in any manner. The present notice is not proper and does not nearly satisfy the provisions of the Rules of Court.

[7] It was said that the consequences of a notice of appeal which does not comply with the provisions of Rule 67 (1) is not a valid notice of appeal and as such it was no notice at all and a nullity without force or effect (See *Gotfried Kuhanga and Another v The State* (unreported) Case No. CA 57/2002 delivered on 2004.11.18). When applying the aforementioned principles to the present notice of appeal it is evident that it is not a valid notice and as such a nullity without force or effect. On this score counsel on both sides were in agreement. In the result, the appeal was struck from the roll.

LIEBENBERG, J

I concur.

TOMMASI, J

ON BEHALF OF THE APPELLANT

Ms. N.Mainga

Instructed by:

Amicus Curiae

ON BEHALF OF THE RESPONDENT

MR. D. Lisulo

Instructed by:

Office of the Prosecutor-General