

CASE NO.: CA90/2009

IN THE HIGH COURT OF NAMIBIA  
In the matter between:

**ANDREAS ITEMBU**

versus

**THE STATE**

**CORAM:**

Heard on:

Delivered on:

*tempore*)

**APPELLANT**

**RESPONDENT**

MULLER, J *et* NDAUENDAPO, J

24 September 2010

24 September 2010 (*Ex*

### **APPEAL JUDGMENT**

**MULLER, J:** [1] The appellant was convicted of Robbery with Aggravating circumstances on 02 July 2009 and sentenced to 5 years imprisonment, of which one year was conditionally suspended.

[2] The State submitted comprehensive heads of arguments and the submissions therein were confirmed by Ms Moyo at the hearing of the appeal. The Appellant appeared in person and did not submit any heads of arguments.

[3] The State took a point in limine to the effect that the Appellant's Notice of Appeal was out of time and that there is no proper application for condonation before us. The Court heard arguments on the point in limine at the commencement of this hearing from the Appellant after this issue was explained to him.

[4] The factual situation in respect of the Appellant's Notice of Appeal and application for condonation for the late filing thereof is as follows:

- a) The Appellant was sentenced on 02 July 2009;

b) In terms of Rule 67(1) of the Magistrate's Court Rules a Notice of Appeal must be filed within 14 days of the date of sentence;

At the end of the Appellant's trial and after he had been sentenced on 02 July 2009, the Magistrate duly informed the Appellant of his rights in respect of review and appeal. He was specifically informed that he has the right to appeal and if he intends to do so he must file a Notice of Appeal within 14 days with the Clerk of the Court setting forth his grounds of appeal. He was further informed that if the Notice of Appeal is out of time, an application for condonation should be filed stating the grounds why his appeal is out of time;

The Appellant indicated that he understood the Magistrate's explanation and does not require any further explanation;

The case was remitted to a Judge of this Court for review and the Judge confirmed on 03 September 2009 that the proceedings were conducted in accordance with justice;

c) On 10 August 2009 the Appellant addressed a letter in handwriting to the Clerk of the Court with the heading: "*Application for leave to late appeal*". That document contains several pages of what are apparently grounds or submissions why he was wrongly convicted; g) The record furthermore contains a handwritten document with the heading: "*Application for condonation to leave for late appeal*". This document is undated and reads as follows (undedited):

*"Shortly after my conviction and sentencing, I firstly consulted a legal representative Mr Steyn who is stationed at Walvis Bay to fill in an application for leave Notice of Appeal within reasonable period of time, unfortunately, to some misunderstands about the nature of the case, he withdrawn. That technicality has then caused a delay, since I has to seer another legal representative to substitute Mr Steyn. Since all the other lawyer that I consulted are demanding higher*

*prices for their legal services. I therefore decide to appeal on my own".*

[5] The Notice of Appeal is undoubtedly out of time and does not comply with the requirements of the said Rule 67(1). It is evident that the Appellant also recognised that, because he clearly made reference to it in his belated Notice of Appeal.

[6] The case law in respect of an application for condonation is clear. In *S v Kashire* 1978 (4) SA 166 (SWA) Lichtenberg AJ said the following at 167 H:

*"The proper procedure for the late filing of a Notice of Appeal is by way of an application, supported by an affidavit made by the accused (the present applicant)..."*

The Appellant did not make any supporting affidavit. He only wrote the letter with the contents quoted earlier herein.

[7] In that letter the Appellant refers to consultations with a legal representative, a certain Mr Steyn, who withdrew and with other unnamed legal representatives. No explanation or any further details of what these consultations entailed are provided. Furthermore, none of these legal representatives made any affidavit providing any explanation why the Notice of Appeal was out of time.

[8] Condonation cannot only be granted just for the asking thereof. An Applicant seeks the indulgence of the Court and has to be absolutely honest with it. In the case of the *S v Abraham Ruhumba*, case no. CA 103/2003, an unreported judgment of Damaseb AJ, as he then was, delivered on 20 February 2004, the following was said in this regard on p5:

*"It is a notorious fact that applications for condonation of late filling of appeals and leave to appeal by prisoners are not in vogue; such that this court is*

*inundated with applications of this kind. A fortiori an applicant that comes to this court seeking condonation must provide as sufficient information as possible to enable the court to decide whether or not the reasons for the delay are acceptable. Such applications must be bona fide".*

He later said at p6:

*"In terms of Section 309(2) of Act 51 of 1977, the court of appeal is competent to condone the applicant's failure to file a notice of timeously, if the applicant provides an acceptable explanation and his prospects of success on appeal are reasonable .....prospects of success on appeal only become a consideration if the reason for the delay is acceptable. If the reason for the delay is unacceptable, it matters not that the prospects on appeal are reasonable except in the rare case where there has been a complete failure of justice, or the verdict of the lower court is so repugnant and perverse that the court on appeal cannot, in all conscience; allow it to stand. Such instances are bound to be rare".*

[9] It is trite that the onus rests on an applicant applying for condonation to provide satisfactory explanation(s) to the court for his/her default, as well as that he/she has good prospects of success on appeal. If the applicant fails on the first requirement, the second does not even come into play and the applicant is out of court. (See *S v Nakapela and Another* 1997 NR 184(HC) at 185G-H).

[10] In this matter the Appellant's application is not in order, because no supporting affidavit had been filed and the Appellant failed to provide a satisfactory reason for its

delay in giving Notice of Appeal in time. The Appellant consequently falls over the first hurdle and the so-called application for condonation has to be refused.

[11] In the result, the application for condonation is refused and the appeal is struck from the roll.

**MULLER, J**

I agree

**NDAUENDAPO, J  
ON BEHALF OF THE APPELLANT:**

**IN PERSON**

**ON BEHALF OF THE RESPONDENT:**

**MS MOYO**

**Instructed by:**

**OFFICE OF THE PROSECUTOR GENERAL**