CASE NO.: CA 28/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

PETRUS NAUYOMA **APPELLANT**

and

THE STATE **RESPONDENT**

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

Heard on: 20.05.2011.
Delivered on: 13.07.2011.

APPEAL JUDGMENT

LIEBENBERG, J.: [1] On 28 April 2008 the appellant was convicted by the Regional Court sitting at Ohangwena on two charges of housebreaking with intent to steal and theft and sentenced him to five and three years imprisonment, respectively.

Although the appellant noted an appeal against both his conviction and sentence, no grounds of appeal against sentence were raised in the Notice of Appeal dated 27 May 2008. Accordingly, the appeal lies only against his conviction on both charges.

[2] Whereas the appeal was filed out of time, appellant sought the Court's indulgence condoning the non-compliance with the Magistrates' Court Rules and simultaneously filed an application for condonation explaining the delay. This Court on application may extend the period of 14 days in which the appeal had to be filed with the clerk of the court and will do so only when good cause is shown (for non-compliance) and where there are prospects of success on appeal. Appellant's application was not supported by an affidavit in which he on oath explains the late filing of his notice of appeal; and the explanation tendered herein is a regurgitation of 'reasons' usually advanced by appellants appearing before this Court, stating that the appeal could not be filed in time because of difficulties experienced in obtaining documents from "the state and non-government organs"; and that the appellant was not familiar with the procedure he had to follow when lodging his appeal. Appellant, who appeared before us in person, submitted that he adhered to the reasons advanced in his application; but added that he did not have writing paper on which he could note his appeal.

[3] The trial court after pronouncing sentence explained to the appellant that if he intended appealing his conviction and sentence, that he had to note the grounds on which the appeal is based and hand same to the clerk of court at Eenhana Magistrate's Court, who would then process the appeal. The time limit of 14 days in which the appeal had to be filed, however, was not conveyed to the appellant.

[4] Mr. *Wamambo,* appearing on behalf of the respondent, submitted that in view of the poor explanation advanced by the appellant explaining the delay, the omission to inform the appellant of the period in which the appeal had to be filed, would make no difference, as no foundation was laid on which the application is based. It was submitted that what is before the Court, is a "blanket explanation" and that appellant failed to show good cause why the Court should condone his non-compliance.

[5] It has been said by this Court that a substantive application should be made, based on facts explaining appellant's non-compliance with the rules; and in the absence thereof, the Court is unable to adjudge the reasonableness of the appellant's actions and whether it satisfies the requirement of good cause shown.[1] The Court in the *Undari* matter (*supra*) held that wilful disregard for the Rules of Court by laypersons in bringing their applications, will not be condoned for the mere reason of them being laymen; as the circumstances of each case had to be scrutinised – including the fact that the appellant is a lay person – when considering whether appellant's explanation showed good cause or otherwise.

[6] I am not persuaded that the explanation advanced by the appellant is at all reasonable and that it meets the requirements referred to above. Appellant, after the trial court had explained to him his right of appeal; where he had to file his notice setting out the grounds of appeal; and that the clerk of the court would prepare the appeal, responded that he understood the explanation given to him. Therefore, the

[1] *Andreas Mumageni v The State,* (unreported) Case No. CA 42/2009; *Naurasara Undari,*(unreported) Case No. CA 113/2009.

excuses advanced by the appellant are without merit. I shall consider the prospects of success later herein.

[7] Regarding the grounds of appeal, Mr. *Wamambo* contended that no proper grounds were stated as required by the rules and found support for his contention by referring us to what has been stated in *S v Kakololo*.[2] In view thereof, so it was argued, the matter should be struck from the roll. It is trite law that where the grounds of appeal, whether based on fact or the law, or both, are not clear and specifically set out in the notice of appeal (Rule 67 (1)), then there is no valid notice; and as such no notice at all, and is a nullity without force or effect.[3]

[8] Ten "grounds" are listed in appellant's notice, none of which it can be said to be a valid ground satisfying the requirements of Rule 67 (1). The only point raised by the appellant in the notice which may constitute a valid ground and as such deserves consideration, is where it is stated that the trial court misdirected itself by relying on inadmissible hearsay evidence**.** Whereas there are no other clear and proper grounds before the Court for purposes of considering the appeal, the Court will limit the appeal to the one ground namely, whether the magistrate in his evaluation of the evidence, misdirected himself; more specifically, whether inadmissible hearsay evidence was erroneously admitted into evidence.

[9] Appellant and his co-accused pleaded not guilty to two charges of housebreaking with intent to steal and theft of goods valued at N$114 091 from Pep Stores Ohangwena, committed during the period 12 – 14 and on 25 June 2004, respectively.

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[2] 2004 NR 7 (HC).
[3] *Gotfried Kuhanga and Another v The State,* (unreported) Case No. CA 57/2002.

In respect of count 2 appellant explained that he had been drinking with friends the previous night and returned home drunk. The following morning he discovered the (stolen) goods in his room, not knowing how it came there; and upon inquiry, was told that it belonged to a certain Lucas who would come to fetch it. At the end of the trial his co-accused was discharged while the appellant was convicted on both counts.

[10] At he beginning of the trial the prosecutor handed up the record of the s 119 proceedings conducted in the district court in which the appellant had pleaded guilty on the second charge. He was questioned pursuant to the provisions of s 112 (1)(b) of the Act and admitted the commission of the offence in all respects. Not only did the appellant partake in the breaking and subsequent theft, but the loot was taken to their (his and Lucas's) house where appellant had to take care of it. Appellant's plea explanation was not challenged and the trial court rightly relied thereon in its evaluation of the evidence.

[11] It is common cause that Pep Stores Ohangwena was twice broken into in June 2004 during which a large quantity of merchandise with a total value of N$114 091 was stolen. Not only did this include a vast quantity of clothing, but also electronics like a DVD; CD Hi-Fi's; radios; VCR's; suitcases; travel bags; bedding and toiletries. The complainant, Ester Alfios, was thereafter summoned to the police station and requested to identify suspected stolen property recovered by them. Except for two items which were not the property of Pep Stores, she identified the rest of the items as those stolen from the shop; which items corresponded with two lists of stolen property compiled by her after both burglaries. Some of the clothing still had the store's price tags on. Goods to the value of N$9 707.34 were recovered. The witness was

furthermore able to point out to the court which of the recovered items were stolen either on the first or second occasion. This obviously would not only establish a connection between the two offences, but would also link the accused with whom part of the stolen goods were eventually found. Appellant did not challenge this evidence.

[12] The evidence of Warrant Officer Rehabeam, the investigating officer in the case, evolved around information obtained from a police informer about goods being sold at Ongonga village, suspected to have been stolen from Pep Stores. Names were also provided (including that of the appellant) and a description of a motor vehicle that allegedly was used by the suspects. It was this information pertaining to the vehicle which led Warrant Officer Rehabeam to appellant's co-accused, being the owner of the vehicle. He was in the company of the appellant and both were arrested. It was decided to park the vehicle at a cuca shop and Warrant Officer Rehabeam then saw the appellant throw a key to a certain Benjamin who, after the key was taken from him, was also arrested as a suspect. Further information obtained from the informer took the investigation to the home of Benjamin's girlfriend where some of the stolen goods were recovered. Benjamin at that stage admitted guilt and implicated the appellant and his co-accused. Appellant, on the other hand, denied having any knowledge of or his involvement in the burglaries committed at Pep Stores.

[13] According to Warrant Officer Rehabeam they then proceeded to the appellant's room which he had pointed out. There the appellant explained that the key of the padlock on the door was not where he had left it earlier and was therefore unable to open his room. Rehabeam then used the key he had earlier taken from Benjamin when thrown to him by the appellant to open the door. Inside three bags full of items

suspected to have been stolen from Pep Stores were found. Amongst clothing; bedding; and toiletries, there were two tape deck/radios; one VCR; one amplifier and one speaker. These goods formed part of those identified by the witness Alfios as having been stolen during *both* burglaries. Upon enquiring as to how the goods ended up in the appellant's room, he told the investigating officer that it was brought there by his co-accused and another person. In cross-examination Warrant Officer Rehabeam denied that appellant had then told him that the goods were brought to his room by one Lucas, as he claimed during the trial.

[14] Appellant testified in defence saying that in July 2004 he attended a barbeque at Oshikango in the company of Benjamin (also a former co-accused who was tried separately after pleading guilty), one Lucas and an unknown boy, where appellant became drunk. After driving home in the company of his friends that night, appellant went home and slept. In the morning he discovered the goods later shown to be stolen. He was told by Benjamin that the goods were brought there by Lucas when appellant was sleeping. He became suspicious but was reassured that it was not stolen. At the time of his arrest he was still waiting for Lucas to come and collect the goods. He said that he informed the investigating officer about the goods in his room and led the police there; but denied any involvement in committing the crimes as he was drunk and asleep when the goods were brought into his room. On his version the key to his room was taken from his pocket by the investigating officer and had not been seized as testified on by Warrant Officer Rehabeam.

[15] In cross-examination appellant gave contradicting evidence pertaining to his whereabouts in June 2004 by saying that he was in Walvis Bay and not at

Ohangwena; that he could not recall where he actually was between 12 – 25 June, but that he was not at Ohangwena. Any one of these versions is in sharp contrast with the appellant's plea explanation following his plea of guilty on count 2 tendered during the s 119 proceedings, in which appellant admitted his involvement in committing housebreaking and theft on 25 June 2004 at Pep Stores, Ohangwena. Appellant's explanation that he was confused when pleading and that his mind was "not in a good condition" because of earlier assaults, is not supported by the facts. Despite claims of having been drunk on the night they went to Oshikango, appellant was capable of giving detailed evidence regarding time; their seating arrangements in the vehicle on the way back; and who assisted him getting onto his bed – all which tend to show that appellant was not as stupefied as he wanted the trial court to believe. In these circumstances appellant's explanation, when considered together with his s 119 plea explanation, is not only improbable, but false beyond a reasonable doubt.

[16] In the *ex tempore* judgment the magistrate rightly relied on the appellant's s 119 plea explanation and although the judgment was mainly devoted to the acquittal of his co-accused, it is clear that the appellant's evidence was outright rejected as false. I am unable to fault the trial magistrate in his conclusion that appellant was involved in committing both offences; accordingly, there is no merit in the contention that the court *a quo* misdirected itself in the evaluation of the evidence. On this ground there are no prospects of success, should the matter go on appeal.

[17] As regards the admission of hearsay evidence by the trial court in its assessment of the evidence, there is nothing in the judgment showing that the trial court misdirected itself in this respect. In the judgment the magistrate specifically excluded

hearsay evidence of the informer implicating appellant and his co-accused and hence, was alive to the rules governing the admissibility of evidence. Appellant did not clearly specify which evidence in his view was inadmissible, but the only other hearsay evidence implicating the appellant, came from the investigating officer who testified about a report made to him by Benjamin, the former co-accused. That report was inadmissible as far as it concerned the appellant, as Benjamin was not a witness to the proceedings. However, there is nothing in the judgment suggesting that the trial court relied thereon when convicting the appellant; and where it was shown in the same judgment that the court was alive not to rely on hearsay evidence, it cannot simply be assumed that it did have regard thereto. The contention accordingly, is without merit.

[18] I am satisfied that appellant's appeal against his conviction on both counts has no prospects of success and the application for condonation is accordingly dismissed.

[19] In the result, the matter is struck from the roll.

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LIEBENBERG, J

I concur.

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TOMMASI, J

APPELLANT	**In person**
ON BEHALF OF THE RESPONDENT	**Mr. N. Wamambo**
Instructed by:	**Office of the Prosecutor-General**