



CASE NO.: CA 97/2010

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

In the matter between:

NICODEMUS SHIPANGA

APPELLANT

and

THE STATE

RESPONDENT

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

Heard on: 26 September 2011

Delivered on: 26 September 2011 (*ex tempore*)

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant appeared in the Magistrate's Court Ondangwa on charges of arson and assault with the intent to do grievous bodily harm. He pleaded not guilty but in the end was convicted as charged

and with both counts taken together, sentenced to two years imprisonment. Appellant has no quarrel with his conviction and in a document styled "*Notice: Application for fine*" he advances reasons why this Court should substitute the sentence imposed with that of a fine.

[2] The appellant argued his appeal in person whilst Mr. *Matota* appeared on behalf of the respondent.

[3] The notice dated 23 July 2010 was not date stamped when received by the Clerk of the Court (as required) and despite the respondent's protestation that the notice was filed out of time, there is nothing showing that it was filed outside the prescribed time period. The date stamp of 17 August 2010 referred to by the respondent (appearing on certified copies of the appeal record), merely reflects the date on which the copies were certified and not the date on which the notice was filed with the Clerk of the Court. I am accordingly satisfied that the appeal was noted within the required time period and that no condonation is thus required.

[4] It does not appear from the record that after the appellant's notice was received, the Clerk of the Court placed it before the magistrate as required by Rule 67 (3) of the Magistrate's Court Rules. It is possible that because the appellant has couched the "appeal" in the form of an application or request, without noting specific grounds of appeal, the relevant clerk omitted to submit it to the magistrate. This notwithstanding, I am satisfied that even if compliance was given thereto, the magistrate was in no position to substitute

the sentence imposed with another, as he was *functus officio*. To that end there is nothing that could be added and in my view, for the conclusion reached *infra*, there is no need to revert the matter to the magistrate in order to advance additional reasons, explaining the sentence imposed. Besides, the magistrate delivered a well reasoned and detailed judgment on sentence.

[5] The appellant is a layperson who clearly did not fully comprehend what was required from him when noting an appeal and as such failed to state specific and clear grounds on which the appeal is founded. The notice merely contains new information in mitigation about the appellant's personal circumstances relating to his elderly mother and other family members, all financially dependent on him. Appellant addressed the court *a quo* in mitigation and informed the court of his six children of which three were living with the complainant. He furthermore said that he could only pay a fine of N\$500 and had no other valuable assets. *Prima facie* the record and the magistrate's *ex tempore* reasons on sentence, I am unable to find that he failed to exercise his discretion on sentence judiciously and misdirected himself in any manner; thus, there is no basis for this Court to interfere either with the proceedings conducted in the court *a quo* or the sentence imposed.¹

[6] I have alluded to the fact that no grounds of appeal were raised in the notice and where that is the case, then there is no valid appeal before this Court.

[6] In the premises, the matter is struck off the roll.

¹S v *Tjiho*, 1991 NR 361 (HC)

LIEBENBERG, J

I concur.

TOMMASI, J

ON BEHALF OF THE APPELLANT

In person

ON BEHALF OF THE RESPONDENT

Mr. L.S. MATOTA

Instructed by:

Office of the Prosecutor-General