



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 32/2001

In the matter between:

THE STATE

and

CALVIN LISELI MALUMO & OTHERS

IN RE: IN THE APPLICATION BETWEEN _____ (NOTICE OF APPLICATION TO
RECALL)

JOSEPH KAMWI KAMWI (Accused No. 3)	4TH APPLICANT
HERBERT MBOOZI MUTAHANE (Accused No. 5)	5TH APPLICANT
CHRIS PUISANO NTABA (Accused No. 7)	6TH APPLICANT
MUSHE ROSTER LUKATO (Accused No. 18)	7TH APPLICANT
POSTRICK MOWA MWINGA (Accused No. 23)	8TH APPLICANT
NDALA SAVIOUR TUTALIFE (Accused No. 24)	9TH APPLICANT
BRITAN SIMISHO LIELEZO (Accused No. 31)	10TH APPLICANT
JOHN M PANSE LUBILO (Accused No. 50)	11TH APPLICANT
REX LUMPONJANI KAPANGA (Accused No. 63)	12TH APPLICANT
BRENDAN LUYANDA LUYANDA (Accused No. 120)	13TH APPLICANT
DAVIS CHIOMA MAZYIU (Accused No. 16)	14TH APPLICANT
FRANS MUHUPULO (Accused No. 122)	15TH APPLICANT

and

THE STATE, represented by

THE PROSECUTOR -GENERAL

RESPONDENT

Neutral citation: *Kamwi v The State* (CC 32/2001) [2013] NAHCMD 286 (16 October 2013)

Coram: HOFF J

Heard: 07 October 2013; 09 October 2013; 14 October 2013

Delivered: 16 October 2013

Summary: Where an accused person is absent without leave of the court, the court may order that the proceedings continue in his or her absence – Where such accused person again attends the proceedings he or she has a discretion whether or not to examine any witness who testified during the absence of such accused.

Where such accused again attends the proceedings, the proceedings against such accused shall continue from the stage at which such accused person became absent.

The accused person may examine any witness and a court shall postpone the proceedings until the evidence, if any, on behalf of that accused has been led even where there was an extreme lack of co-operation in attending court proceedings by such accused person.

The provision (s 160(1)) that any witness who had testified in the absence of such accused may be examined cannot be interpreted to mean that *all* witnesses may be examined.

Witnesses who gave relevant evidence ie who had implicated an accused or a witness from whom favourable evidence may be elicited, may be examined.

ORDER

This court will thus allow those state witnesses who had testified in the absence of the applicants to be so examined and on the terms indicated hereinbefore.

JUDGMENT

HOFF J:

[1] This is an application to recall 15 state witnesses who had already testified during this trial. Ms Agenbach instructed by the Directorate of Legal Aid appears on behalf of 15 accused persons. At this stage the State's case is closed and the defence case in respect of all the other accused persons except those represented by Ms Agenbach had also been closed.

[2] This application is opposed by the State. The application to recall state witnesses identified 15 persons, the majority of whom are or were members of the Namibian Police Force and members of the Namibian Defence Force. One of these persons is deceased.

[3] In a document with the heading 'Notice of application to recall', it was mentioned that 'the main grounds on which the application for the recall of each and everyone of the witnesses referred to hereinbefore, are based, as to be amplified during the argument to be presented are *inter alia* the following:

'3. To deal with the material witnesses, as already alluded to hereinbefore, with the merits of the case which includes, but is not limited to *inter alia* the following aspects, which are germane to the charges preferred against the applicants, to wit:

- 3.1 the alleged sovereignty of the State, and/or the alleged sovereignty of the Government of the Republic of Namibia in respect of the territory known as the East Caprivi Zipfel;

- 3.2 the treaties and covenants applicable to the Republic of Namibia, as well as the territory known as the East Caprivi Zipfel;
- 3.3 the doctrine of common purpose as alleged against all the applicants which specifically includes, but is not limited to the knowledge of the relevant state witnesses of the specific applicant's whereabouts when the alleged heinous crimes were committed, their alleged involvement in same, as well as applicant's conduct at all relevant times material to the charges preferred;
- 3.4 the existence of the Tripartite Communique dated 25 May 1999, between the Government of the Republic of Namibia, the Government of the Republic of Botswana and the UNHCR, as well as the Tripartite Agreement, subsequently entered into between the parties, as well as the terms thereof, a copy of the letter, which annexed hereto, marked annexure "A";
- 3.5 the knowledge of the relevant witnesses as to the existence of the Tripartite agreement, the terms and conditions thereof, as well as why same was not adhere to in the present prosecution;
- 3.6 to establish, during the cross-examination of the relevant witnesses, the existence or not of the defence of criminal estoppel of which the applicants intend to rely;
- 3.7 to establish the existence of a torture docket, the contents thereof, as well as the versions of the applicants as contained in the torture docket;
- 3.8 the nature and extent of human right abuses perpetrated against the applicants which also infringed with the applicant's right to a fair trial as envisaged in terms of article 12 of the Namibian Constitution.

TAKE FURTHER NOTICE THAT an and all of the applicants' rights are strictly reserved in the interest of justice and fairness to all and the pursuance of a fair trial to recall further witnesses who may be identified during cross-examination of the witnesses mentioned hereinbefore.

And, in general, to establish that the State has no case against the applicants and more expressly to enable the applicants to put their version which has until date, for whatever reason, not been put to the relevant important state witnesses to enable the state witnesses to deal therewith.'

[4] This court was at that stage informed that the application is brought in terms of s 167 of Act 51 of 1977 which provides as follows:

'The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person if his evidence appears to the court essential to the just decision of the case.'

[5] Section 167 must be considered in conjunction with s 186 which reads as follows:

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such a witness appears to the court essential to the just decision of the case.'

[6] O'Linn J in *S v van den Berg* 1996 (1) SACR 19 (Nm) in discussing the provisions of ss 167 and 186 refers with approval at 68 to the case of *R v Omar* 1935 AD where Wessels CJ stated the following:

'If at any stage of the case the Judge thinks a witness ought to be called he may use his discretion to call a witness to give evidence, but when it appears that evidence is essential to the proper decision of the case then the Judge has no discretion – he must call the witness.'

[7] O'Linn J stated at p 70i-j that 'the sections provide for a broad judicial discretion in the first instance, but in the second instance, ie when the evidence to be

elicited *appears to the Court essential* to a just decision in the case, the examination or questioning by the court is *mandatory*'.

and continued at p 71a-b as follows:

'When a presiding officer complies with his or her duties under s 167, whether or not it is a witness called by the court in terms of s 186, such presiding officer must be of necessity put the questions. Further examination and/or cross-examination depends on the cross-examination, depends on the discretion of the presiding officer, which such officer must obviously exercise in a judicial manner.'

[8] This last quotation, in my view, means that, in the first instance, it is the *court* which must question a witness who has been recalled, and secondly, the prosecutor and accused (or his or her legal representative) may thereafter put questions to the witness arising from the questioning by the court.

(See *S v Mseleku and Others* 2006 (2) SACR 237 NPD at 241f-g).

[9] In *Rex v Kirsten* 1950 (3) SA 659 (CPD) Ogilvie Thompson J stated the following regarding the recalling of a witness at 664F-G:

'Normally the Court acts under this section *mero motu*: but in practice it from time to time occurs that the suggestion that the section should be invoked is made either by the Crown or by the defence. When such a suggestion is made, the Court will, before exercising its powers under sec 247, no doubt ordinarily require to have some indication of the general nature of the evidence to be given by the proposed further witness; . . .'

[10] A court may refuse to recall a witness where the request made is made 'frivolously or as part of deliberate delaying tactic' (*S v Kondile* 1974 (3) SA 774 (TK) at 775), however a court's discretion is not confined to such instances but may refuse such an application in order 'to exclude irrelevancies and discourage repetition'. (*S v M* 1976 (4) SA 8 TPD at p 11 A). (See also *S v Kakalolo* 2006 (1) NR 266 at 272).

[11] The purpose of a court's examination should be to elucidate any points that may still be obscure after examination by the parties. (See *Mseleku* (supra) at para [12].

[12] This court has requested both Mr January, who appears on behalf of the State and Ms Agenbach for the applicants to consider the provisions of s 160 of the Criminal Procedure Act, 51 of 1977, and to address this court on the provisions of that section. It must be stated that s 160 must be read together with s 159.

[13] All the accused including the applicants were legally represented when this trial commenced on March 2004 when the accused were asked to plead to the charges. Thirteen accused persons pleaded that in terms of the provisions of s 106(1)(f) of Act 51 of 1977 this court lacks the jurisdiction to try them. This court ruled in their favour and ordered their release on the basis that they had been arrested in neighbouring countries and brought back to Namibia by unlawful means. In a subsequent appeal judgment the Supreme Court overturned this court's finding. (*S v Mushwena and Others* 2004 NR 276 (SC)).

[14] These thirteen accused persons were not satisfied with the ruling of the Supreme Court and indicated that they wished to persist with the jurisdiction challenge. Counsel appearing on behalf of these accused persons withdrew in the face of their persistence with the jurisdiction challenge. These thirteen accused persons indicated to this court that they would absent themselves from the proceedings until such time that they have been provided with a legal representative who was willing to represent them on the jurisdiction issue. This court when the accused persons were in attendance explained to them in detail their right to cross-examination as well as the purpose thereof.

[15] On 15 February 2004 accused no. 71, Mr Martin Tubaundule, with reference to three previous letters written to this court, requested to be excused from the proceedings. This court did not excuse the accused but emphasised the importance

of the presence of an accused person during criminal proceedings and explained the consequence of their absence from the trial.

[16] At some stage the accused were informed that the Directorate of Legal Aid refused to appoint a legal practitioner to pursue the jurisdiction issue. Some of the accused persons indicated that they would not attend the proceedings in future.

[17] On 17 May 2005 the legal representatives of 15 more accused persons withdrew since those accused persons also wished to pursue the jurisdiction issue. All these undefended accused persons remained in attendance of the court proceedings except when the court excused some of them on request and for valid reasons.

[18] On 6 March 2007, accused no. 11, Mr Aggrey Makendano purporting to speak on behalf of all the undefended accused persons brought another jurisdiction application. The State opposed this application. This application related to the issue of territorial jurisdiction in which Mr Makendano submitted the Caprivi region does not form part of the national territory of the Republic of Namibia as identified in Article 1(4) of the Namibian Constitution and called upon the State to prove otherwise. At that stage ninety-one state witnesses had already testified on the merits of the charges against the accused persons.

[19] This court dismissed that application on the basis that a plea that a court lacks jurisdiction to hear a case must be pleaded at the commencement of the trial, or not at all.

[20] Soon after the ruling on 8 March 2007 all the undefended accused persons walked out of the court and did not return. The court directed that the case proceed in their absence. On 12 March 2007 the undefended accused persons were brought to court where this court again explained to them that the proceedings must take place in their presence, it was explained to them when proceedings may take place

in their absence, and the purpose why it is important that they should be present was also explained.

[21] The undefended accused persons informed this court that they are not part of the trial, that they would not cross-examine state witnesses and threatened to disrupt the proceedings should they be forced to sit in court.

[22] On 13 March 2007 the undefended accused persons were at court where it was again explained to them the consequences of their continued absence.

[23] On 8 October 2007 the undefended accused persons were requisitioned but walked out of court during the proceedings. On 10 October 2007 the undefended accused persons were again brought to court but started singing to such an extent that the proceedings could not continue. This court ordered that the proceedings should in terms of s 159(1) of Act 51 of 1977 proceed in the absence of the accused persons.

[24] I now need to consider the provisions of s 159 and 160 but before doing that the provisions of ss 157 and 158 should be referred to. Section 158 provides as follows:

‘Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.’

[25] It is trite law that this section is peremptory and cannot be waived by an accused person or his or her legal representative. (See *S v Roman and Others* 1994 SACR 436 (A)).

[26] Section 157(2) provides that where ‘two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon application of the prosecutor or any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any such accused’.

[27] The reference to s 157(2) will become clear later during this judgment however what needs to be mentioned at this stage is that a court has a discretion to grant or to refuse a separation of trials as it is generally desirable that persons jointly charged with the same offence should be tried together and that a multiplicity of proceedings should as far as possible be avoided. The primary consideration whether to grant or to refuse an application for separation of trials is whether the applicant will suffer prejudice if a joint trial takes place. This in turn is set off by the court against prejudice to the other party or parties if the application is allowed.

[28] I shall now return to the provisions of ss 159 and 160. Section 159 reads as follows:

‘Circumstances in which criminal proceedings may take place in absence of accused.

- (1) If an accused at criminal proceedings conducts himself in a manner which makes the continuance of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in the absence.
- (2) If two or more accused appear jointly at criminal proceedings and-
 - (a) the court is at any time after the commencement of the proceedings satisfied, upon application made to it by any accused in person or by his representative-
 - (i) that the physical condition of that accused is such that he is unable to attend the proceedings or that it is undesirable that he should attend the proceedings; or
 - (ii) that circumstances relating to the illness or death of a member of the family of that accused make his absence from the proceedings necessary; or
 - (b) any of the accused is absent from the proceedings, whether under the provisions of subsection (1) or without leave of the court, the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment

or inconvenience to the prosecution of any co-accused or any witness in attendance or subpoenaed to attend, may-

(aa) in the case of paragraph (a), authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose; and

(bb) direct that the proceedings be proceeded with in the absence of the accused concerned.

(3) Where an accused becomes absent from the proceedings in the circumstances referred to in subsection (2), the court may, in lieu of directing that the proceedings be proceeded with in the absence of the accused concerned, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present, and thereafter, when such accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.'

[29] It must be mentioned that the State never applied in terms of s 159(3) for a separation of proceedings.

[30] Three exceptions to the general rule (s 158) that criminal proceedings may only take place in the presence of accused persons are provided for in this section. Firstly, where the court orders that an accused be removed where he or she conducts himself or herself in a manner which makes the continuance of the proceedings in his or her presence impracticable; secondly, where an accused makes application to be excused from the proceedings and where such application is granted, and thirdly, where the accused is absent without leave of the court.

[31] The power of the court to order that proceedings continue in the absence of an accused is a discretionary one and which will only be used in situations where there is an extreme lack of co-operation on the part of an accused person.

[32] Section 159 stipulates those instances where a court may continue the proceedings in the absence of an accused and s 160 provides certain rights of an accused once such an accused is present in court and provides how proceedings are to be conducted upon the return of such an accused person.

[33] Section 160 provides as follows:

'Procedure at criminal proceedings where accused is absent.-

- (1) If an accused referred to in section 159 (1) and (2) again attends the proceedings in question, he may, unless he was legally represented during his absence, examine any witness who testified during his absence, and inspect the record of the proceedings or require the court to have such record read over to him.
- (2) If the examination of a witness under subsection (1) take place after the evidence on behalf of the prosecution or any co-accused has been concluded, the prosecution or such co-accused may in respect of any issue raised by the examination, lead evidence in rebuttal of evidence relating to the issue so raised.
- (3) (a) When the evidence on behalf of all the accused, other than an accused who is absent from the proceedings, is concluded, the court shall, subject to the provisions of paragraph (b), postpone the proceedings until such absent accused is in attendance and, if necessary, further postpone the proceedings until the evidence, if any, on behalf of that accused has been led.

(b) If it appears to the court that the presence of an absent accused cannot reasonably be obtained, the court may direct that the proceedings in respect of the accused who are present be concluded as if such proceeding had been separated from the proceedings at the stage at which the accused concerned became absent from the proceedings, and when such absent accused is again in attendance, the proceedings against him shall continue from the stage at which he became absent, and the court shall not be required to be differently constituted merely by reason of such separation.

(c) When, in the case of trial, the evidence on behalf of all the accused has been concluded and any accused is absent when the verdict is to be delivered, the verdict may be delivered in respect of all the accused or be withheld until all the accused are present or be delivered in respect of any accused present and withheld in respect of the absent accused until he is again in attendance.'

[34] Mr January, on behalf of the State, submitted that in terms of s 160(1) the previously unrepresented accused persons had the right of election ie they had a discretion to examine witnesses who testified during their absence. This certainly is so if one has regard to the word *may* used in that subsection.

[35] My understanding of the submissions by Mr January is that since the accused persons had elected not to cross-examine state witnesses when given the opportunity to do so and had absented themselves without leave of this court they had in essence already exercised the discretion referred to in s 160(1) and that a stage has now been reached where the applicants in terms of the provisions of s 160(3)(a) need to lead evidence by testifying themselves and/or call witnesses on their behalf.

[36] Mr January further submitted that the provisions of s 160(3)(b) are not applicable since that subsection governs a situation where there is a separation of proceedings because of the continuous absence of the accused without leave of the court.

[37] Ms Agenbach who in her address emphasised the importance of cross-examination and the right to a fair trial submitted that the provisions of s 160(3)(b) are indeed applicable in the present circumstances and submitted that in order not to delay the finalisation of this trial in respect of those accused persons not represented by herself this court should finalise the trial in respect of those accused and after such finalisation continue with the trial against her clients.

[38] I find it difficult, in the circumstances of this case to accept, in spite of explanation by this court of the importance of cross-examination and the importance of being present during the proceedings as well as the view expressed by the

accused persons (who are lay persons) that they did not regard themselves as part of this trial at that stage, that the accused should be denied the right to cross-examine witnesses who had testified in their absence.

[39] The accused persons all face serious charges of high treason, sedition, public violence, murder, attempted murder, amongst others, in circumstances where the State relies on the doctrine of common purpose and on conspiracy to commit these offences. An accused person who is unassisted simply do not have the necessary legal knowledge and court experience to conduct effective cross-examination since such accused person does not know how to cross-examine, how to argue, which evidence is admissible and which not, which factors are important and which not, and does not know how to present evidence. (See *S v Tyebela* 1989 92) SA 22 (A) 31I-32A).

[40] The purpose of cross-examination is to test the veracity of the testimony of a witness and to elicit evidence favourable to the cross-examiner or favourable to the client of the cross-examiner and plays an indispensable role in both criminal and civil proceedings. Cross-examination has been described as an important tool to discover the truth and it is therefore grossly irregular not to allow cross-examination.

[41] In *S v Cele* 1965 (1) SA 82 (A) at 91C-D Williamson JA refers with approval to Wigmore on the subject of cross-examination in his work on *Evidence* (Vol. v para 1367) said the following:

‘the belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses, the mishandlings and the puerilities which are so often found associated with cross-examination have availed to nullify its value.’

[42] Cross-examination is a vital component of a fair trial guaranteed by Article 12 of the Namibian Constitution.

[43] Mr January in his submission that s 160(3)(b) is not applicable in the circumstances argued that the words: 'conclusion of proceedings' as used in that subsection in the normal course of events refer to the stage where there is a conviction and a sentence.

[44] The word 'conclusion' means *inter alia*, according to the New Shorter Oxford English Dictionary, to 'bring to a close or end' or to 'wind up'.

[45] If one has regard to the fact that the word 'concluded' is not only used in s 160(3)(b), but also in s 160(2) as well as in s 160(3)(a) it may also refer, in my view, to circumstances as the present, where the proceedings are still ongoing, ie where there was no conviction or acquittal.

[46] In terms of the s 160(1)(a) the court '*shall*' postpone the proceedings until the evidence, if any on behalf of an accused has been led. The word '*shall*' is normally indicative that the legislator intended a peremptory provision. It appears to me in this regard that this court's discretion has been curtailed. Similarly, the provisions of s 160(3)(b) provide that the proceedings against an accused '*shall*' continue from the stage at which he became absent, and the court '*shall*' not be required to be differently constituted.

[47] Regarding the submission by Ms Agenbach that this court should first finalise the trial against the other accused persons who had already closed their respective cases and thereafter to proceed with the trial against her clients, I cannot agree to, since that in my view is akin to a request for a separation of trials (as governed by the provisions of s 157(2)) and also flies in the face of the general rule that accused persons who are charged with the same charge should be tried together. Sight should not be lost of the purpose and effect of a *separation of trials* (s 157(2)) in contradistinction to a *separation of proceedings* as governed by the provisions of s 160(3).

[48] In my view the provisions of s 160(1) are still applicable at this stage which provide the applicants a discretion whether or not to call witnesses who had testified in their absence.

[49] The provisions s 160(1) are applicable even in the situation, as the present one, where accused persons have misbehaved in court and had absented themselves from the proceedings without the consent of the court.

[50] This may offend against one's sense of fairness and justice that an accused person may be 'awarded' for his extreme lack of co-operation and where the rest of the accused persons who through no fault of their own must endure a further delay in the proceedings, but the provisions of s 160 are clear and unambiguous and to deny the applicants the opportunity to cross-examine witnesses as indicated (supra) will surely amount to a gross irregularity which may vitiate the proceedings against the applicants. (See *S v Moko* 1985 (1) SA 350 (O) at 355E-F).

[51] I have indicated, although this application was launched in terms of the provisions of s 167, that the provisions of s 160 (read with s 159) are of application to the present situation. I do however not exclude the possibility that even in the case where the provisions of s 160 are applicable that for that reason alone the provisions of section 167 or 187 are to be excluded.

[52] I am of the view, that for the reasons mentioned, that the applicants are entitled to cross-examine witnesses who had testified in their absence at this stage.

[53] Section 160(1) provides that an accused person may 'examine any witness' who testified during his absence. This in my view cannot be interpreted that such an accused person may examine *all* witnesses who had testified in his or her absence.

[54] This court has a duty to discourage and a duty to curtail irrelevant cross-examination and the applicants in my view may only examine those state witnesses

who had implicated them in the commission of the offence or those witnesses from whom favourable evidence may be elicited.

[55] It is therefore necessary, as a point of departure, first to identify those witnesses who had testified in the absence of the applicants, and thereafter determine who would be giving relevant testimonies.

[56] In addition, it is necessary for counsel appearing on behalf of the applicants, prior to the examination of a witness, to give an indication to this Court, as well as to the State and to counsel appearing on behalf of the other co-accused persons, the general nature of the evidence each proposed further witness would be cross-examined on, as well as the purpose of such cross-examination.

[57] This court will thus allow those state witnesses who had testified in the absence of the applicants to be so examined and on the terms indicated hereinbefore.

E P B HOFF
Judge

APPEARANCES

APPLICANTS:

I Agenbach

Instructed by Directorate of Legal Aid, Windhoek

FOR THE STATE:

H January

of Office of the Prosecutor-General, Windhoek

FOR THE REMAINDER OF
ACCUSED PERSONS:

P Kauta, P McNally, J Neves, V Kachaka,

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