

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 07/2013

In the matter between:

THE STATE

VS

CELESTINE EMEKA OKUANI

Neutral citation: *The State v Okuani* (CR 07/2013) [2013] NAHCMD 32 (05 February 2013)

Coram: NDAUENDAPO J and SIBOLEKA J

Delivered : 05 February 2013

Flynote: Criminal law: Contravention of sections 12(1) and 12(4) of the Immigration Control Act 7 of 1993.

Criminal law: A charge in terms of statute must cite the actual elements of the offence contravened as contained in the enabling section. A failure to do so renders the charge defective.

Summary: Accused charged and convicted of entry into Namibia without an unexpired passport bearing a valid visa or authority.

Held: The charge does not allege that the accused failed to produce an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the government of Namibia when ordered to do so by an Immigration officer. This allegation is central for a contravention of section 12(1) of Act 7 of 1993 to arise.

Held: The charge does not also allege that the accused was found in Namibia after having been refused entry. This is a crucial element for contravening section 12(4).

Held: That the exclusion of these pertinent elements enjoined in sections 12(1) and 12(4) renders the charge defective.

Held: In the result the conviction and sentence cannot be allowed to stand.

ORDER

The conviction and sentence are set aside.

JUDGMENT

SIBOLEKA J (NDAUENDAPO J concurring):

[1] The accused appeared in the Karasburg Magistrate's Court on the following charge:

"Immigration Control Act –Entry into Namibia without an unexpired passport bearing a valid visa or authority

Count 1 (in respect of accused 1)

Contravening section 12(1) read with sections 1, 2 and 12(4) of the Immigration Control Act, Act 7 of 1993

In that upon or about the 13 July 2012 at or near Noordoewer in the district of Karasburg the

accused, not being a Namibian citizen or a person domiciled in Namibia, did wrongfully and unlawfully enter Namibia without an unexpired passport

- (a) Bearing a valid visa, or
- (b) An endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia,

or without a document containing
 - (a) a statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and
 - (b) the particulars of such passport.

Penalty clause (see Sec. 12(4)): "... to a fine not exceeding N\$20 000,00 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant."

[2] Section 12(1) of the Immigration Control Act, Act No. 7 of 1993 reads:

"12. (1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia." My own underlining.

[3] The allegation that an Immigration Officer demanded an unexpired passport bearing a valid visa or endorsement from the accused and that he had failed to produce it, should be contained in the charge sheet. The accused's answer thereto would decisively influence the determination of his guilt.

[4] Section 12(4) reads:

- (4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant. My own underlining. The charge is also silent on the above element.

[4.1] The provisions of section 12(1) and 12(4) of the Immigration Control Act, 1993 (Act No. 7 of 1993) must have been cited in the charge in order to create a transgression (an offence). Magistrates and Prosecutors are therefore directed to make sure that the pro forma charge sheets are corrected to have regard to the contents of these two sections.

[5] For the above reasons the conviction and sentence cannot be allowed to stand.

[6] In the result the conviction and sentence are set aside.

A M SIBOLEKA
Judge

N G NDAUENDAPO
Judge

