

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPEAL JUDGMENT**

**CASE NO: CA 38/2017**

In the matter between:

**FILLIPUS KAAMBULWA**

**APPELLANT**

**VS**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kaambulwa v S* (CA 38/2017) [2017] NAHCMD 239 (23 August 2017)

**Coram:** SIBOLEKA J and UNENGU AJ

**Heard on:** 04 August 2017

**Delivered on:** 23 August 2017

**Flynote:** Criminal law: Appeal against sentence – a material misdirection must exist before the discretion of Court a quo is interfered with – the same not

apparent on this matter – appeal dismissed.

**Summary:** The complainant, a Grade Eleven female student was walking from the shop with her two friends on the evening of the day of the incident. The left side wheels of the appellant's taxi that approached them from behind had left the road, nearly running over Thomas, one of the complainant's friends. They went to the appellant who was their neighbor's taxi driver to ask him why he was driving the way he did. He punched the complainant several times in the face and fractured her left side jaw.

Held: Violence against women whether out or within a domestic setting remains a very serious crime that has to be tackled with an iron fist.

Held: The injury was very severe - the appeal is dismissed.

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### **ORDER**

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In the result I make the following order:

The appeal against sentence is dismissed.

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### **APPEAL JUDGMENT**

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SIBOLEKA J (UNENGU AJ concurring):

[1] The appellant appeared before the Magistrate's Court, Windhoek, on a charge of assault with intent to do grievous bodily harm. He pleaded not guilty, and after the trial he was convicted as charged and sentenced to two years imprisonment. The victim is a Grade Eleven female student who sustained a fractured jaw during the assault. The appellant is not satisfied with the sentence imposed on him, hence the appeal before this court.

[2] The appellant filed his notice of appeal some few days out of the prescribed fourteen days. However, this court condoned his failure to file an application of condonation for such late filing and proceeded to hear arguments on the merits of the matter.

[3] The grounds are as follows:

- “3.1 The learned Magistrate erred in that he failed to adequately explain the rights of the Applicant, who was unrepresented, with regard to the factors to be considered in mitigation of sentence. The Applicant was therefore not placed in a position to meaningfully participate in advancing mitigating factors.
- 3.2 The learned Magistrate erred in law and in fact in that he failed to take into account adequately that the Applicant was a first time offender.
- 3.3 The learned Magistrate erred in law and fact in that he overemphasized the seriousness of the offence and the interests of society when no evidence to that effect was presented. The learned Magistrate overly relied on mere assertions, to that effect by the prosecutor.
- 3.4 The learned Magistrate erred in law and fact in that he failed to take into account adequately the personal circumstance of the Applicant namely:
- (a) He is an unemployed father of one 4 year old child with an unemployed mother both of whom depend, for their livelihood, on the Applicant.
  - (b) He is youthful, at only 28 years of age and therefore is capable of reform.
- 3.5 The learned Magistrate erred in law and fact in that he meted out a sentence of 2 years direct imprisonment when a shorter period with an option of a fine was appropriate in the circumstances.
4. The appellant will therefore demonstrate that the sentence meted out against the appellant was wrong and excessive in the circumstances and the learned Magistrate, with respect, committed a series of errors in evaluating the factors in mitigation and aggravation of sentence.”

[4] From the evidence, the facts of the matter are as follows:

On the evening of the day of the incident, the complainant, another lady of the

name of Asteria and Thomas lita were walking from the shop back home. The appellant, a taxi driver of their neighbor came from behind. The left side wheels of his taxi were not on the tarred road such that the complainant had to pull Thomas away to avoid him from being run over/bumped by the appellant's taxi.

[4.1] They went to the appellant's residence and found him eating. They asked him why he was driving the way he did. He put the plate of food down and slapped the complainant. She slapped back at him. It was from here that the appellant started punching the complainant three to four times with fists. Thomas and another person stopped him. He got into his car to drive away, but the complainant opened one of the car's doors telling the appellant he cannot just drive away like that after assaulting her the way he did. The appellant got out and again resumed punching the complainant till she fell down crying.

[4.2] The matter was reported to the police the following day. The doctor who attended to the complainant referred her to the x-ray where it was found that she had sustained a fracture on the left jaw and was wired on both the upper and lower jaw. The complainant was a Grade Eleven student. The injury she sustained from the assault resulted in her missing three months schooling period and she did not pass her grade. She had to be transferred to Grade Twelve.

[4.3] Because she was heavily medicated, the doctor had to book her off for three months. She dropped Accounting for another subject. For two months she had to see the doctor for a daily pain killer injection and her jaws had to be cleaned up every two weeks.

[5] From the start of the appellant's appearance in the Court a quo as per the record of proceedings, he was informed of his legal rights. He made a choice to conduct his own case. His rights at various stages of his trial were also explained to him. The appellant was asked after each of these various rights were explained to him, whether he understood and he confirmed he did. When the

prosecution case was opened the appellant was informed to listen very carefully to the various witnesses that would be called by the prosecution in order to be able to ask them questions on aspects where he felt lies have been told to Court. The appellant said he understood the right and he hence proceeded to ask questions to those witnesses called against him.

[5.1] At the end of the prosecution case the appellant was informed of his right to take the witness stand and testify in his own defence and to call witnesses to support his case. He said he understood the explanation and he elected not to testify and not to call witnesses in support of his case.

[5.2] At the end of the trial the matter was determined solely on what the two prosecution witnesses placed before Court as well as the medical examination report conducted on the injuries of the complainant. The appellant was out on N\$500 bail during his trial. The record shows that he was warned and informed of the dates when he should again come to Court. The consequences of being arrested and bail money provisionally declared forfeited to the State if he stayed away was also explained to him up to the end of the matter.

[6] The crux of the appeal is that the Court a quo did not adequately explain the right to mitigation before imposing sentence on the appellant. I will quote verbatim the complete record of proceedings relating to mitigation and it is as follows:

"COURT: Accused you are informed that you have the right to put mitigating factors before Court. Mitigating factors are factors of your personal circumstances which you put forward before Court in order to allow the Court to arrive at an appropriate Sentence. Accused do you understand? You can testify from where you stand or you can testify under oath and further you are informed that evidence under oath carries more weight than a mere address from the Accused dock, do you understand? Further you are informed you have the right to remain silent however you can call Witnesses to testify. In other words you have a right to call Witnesses to testify in mitigation on your behalf.

Accused do you understand what the Court is explaining to you, do you understand?

ACCUSED: I do understand Your Worship.

COURT: Yes the Court will proceed, just listen. And further you are informed you can testify from where you stand or testify under oath do you understand? Accused what do you elect to do?

ACCUSED: I will address the Court from where I stand Your Worship.

COURT: Accused do you have any Witness to call or do you intent to call any Witness?

ACCUSED: I have no Witnesses to call. I will address the Court Your Worship.

COURT: Accused how old are you?

ACCUSED ADRESSES COURT IN MITIGATION BEFORE SENTENCE: 28 Your Worship.

COURT: Are you married?

ACCUSED: No Your Worship.

COURT: Do you have kids?

ACCUSED: One child.

COURT: How old?

ACCUSED: 4 years Your Worship.

COURT: Accused are you employed?

ACCUSED: I am not employed Your Worship.

COURT: How do you make a living?

ACCUSED: Your Worship my brother is a building contractor, when he get a job I assist him.

COURT: Now how much money do you make from such?

ACCUSED: From five hundred Namibian Dollars (N\$500 00) down Your Worship.

COURT: How do you like to be punished by the Court?

ACCUSED: I am asking the Court a fine Your Worship.

COURT: How much fine can you afford?

ACCUSED: From one thousand Namibian Dollars (N\$1 000-00) down wards Your Worship.

COURT: Now how much fine can you afford?

ACCUSED: Four hundred and fifty Namibian Dollars N\$450 00) Your Worship.

COURT: Accused is there anything else you would like to bring to the attention of the Court?

ACCUSED: That is all Your Worship.

COURT: Accused is that all?

ACCUSED: Yes Your Worship. “

[7] In considering sentence, the trial Court took the following factors into account:

That the appellant was a first offender at the age of 28.

He was single, had one child aged four years.

He was unemployed, he however assisted in some construction work where he earned N\$500.

Assault with intent to do grievous bodily harm was serious and prevalent in the district.

The assault was serious, it violated the dignity of the appellant, an innocent defenceless school going girl.

The complainant was assaulted with fists and she sustained a broken jaw. It was in the interests of society that the accused (appellant) should receive an appropriate sentence.

The trial Court took into account the (accused) appellant's personal circumstances and the crime. It reasoned that it should not only deter the appellant but should also do the same to would be offenders.

Also taken into account were the circumstances of this case, and the theories of punishment such as deterrence, and retributive. The trial Court finally came to the conclusion that a sentence of two (2) years imprisonment was appropriate in the circumstances of this case.

[8] From the above it is very clear that the trial Court satisfactorily explained the right to mitigation to the undefended accused (appellant) who replied at various stages of the mitigation that he understood what the Magistrate explained to him. Here after the record of proceedings shows how the Magistrate started to enlist all the relevant traditionally required information from the undefended accused (appellant) before sentence.

After all these questions the trial Court still asked the appellant:

“Court: Accused is there anything else you would like to bring to the attention of this Court?

Accused: That is all Your Worship.

Court: Accused is that all?

Accused: Yes Your Worship. ”

[9] In view of all the above observations I reject the contention by the appellant’s counsel that rights to mitigation were not properly explained to him or that he was not in a position to meaningfully participate in advancing his mitigating factors. I have no reason to interfere with the sentence the trial Court in view of the reasons it has placed on record.

[10] The sentence of two (2) years imprisonment is in accord with the degree of violence the appellant meted out on the complainant, that resulted in a fractured jaw.

[11] In the result I make the following order:

The appeal against sentence is dismissed.

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A M SIBOLEKA  
Judge

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E P UNENGU  
Acting Judge



## APPEARANCES

APPELLANT : Mr N. S. Enkali  
Directorate of Legal Aid

RESPONDENT : Mr S. Nduna  
Office of the Prosecutor-General, Windhoek