



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 46/2019

In the matter between:

THE STATE

and

HERBERT MUYENGA

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1121/2018)

Neutral citation: *S v Muyenga* (CR 46/2019) [2019] NAHCMD 221 (03 July 2019)

Coram: NDAUENDAPO, J and UNENGU, AJ

Delivered: 03 July 2019

Flynote: Review in terms of s 20 (1) of the High Court Act 16 of 1990 – Review of uninterminated proceedings of lower court where gross irregularity has been committed – Section 304 (4) of the Criminal Procedure Act 51 of 1977 not applicable – Section only applicable to terminated proceedings of lower Court – Gross irregularity occurred in the proceedings as a wrong accused person was put in the

dock and tried on 8 April 2019. The proceedings set aside and matter remitted to the Rundu Magistrate's Court for the matter to start *de novo*.

Summary: This matter was submitted by the magistrate of the Rundu Magistrate's court with a request to set aside the proceedings of 8 April 2019. A wrong accused person, Albert Muyenga instead of Herbert Muyenga appeared in the matter and evidence of two state witnesses was heard. The mistake was only discovered on the day to which the matter was postponed for continuation of trial. The proceedings of 8 April 2019 were accordingly set aside and the matter remitted to the magistrate's court of Rundu for the hearing to start *de novo*.

That being the case, the court *held* that s 304 (4) of the Criminal Procedure Act 51 of 1977 does not deal with unterminated lower court proceedings and is therefore, not applicable.

Held further that gross irregularity occurred in the conduct of the proceedings of 8 April 2019 by putting a wrong accused person in the dock, therefore, the review procedure provided for in s 20 (1) of the High Court is followed to review the irregularity.

ORDER

- a) The whole proceedings in the matter conducted on 8 April 2018 are hereby set aside.
 - b) The matter is remitted to the Magistrate's Court Rundu to proceed with the trial *de novo* with Herbert Muyenga as the accused person.
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REVIEW JUDGMENT

UNENGU, AJ (NDAUENDAPO, J concurring):

[1] This matter was submitted for special review seemingly following the provisions of s 304 (4) of the Criminal Procedure Act¹ (herein referred to as the CPA), by the magistrate's court for the District of Rundu under cover of a letter hereunder:

'Honorable reviewing Judge,

1. On the 08.04.2019 the public prosecutor called the name of accused person 3 times inside the court. The court orderly went outside and called out the name of the accused person 3 times. After a few minutes a court orderly brought the accused person from the holding cells.
2. The prosecutor called out his name again and the accused confirmed that he was the one.
3. The charge was out to him and one witness was lead. At the end of the testimony of state witness, the public prosecutor applied for the matter to be remanded to another date because the witnesses were not before court.
4. The court then remanded the matter and extended the accused bail. At this accused indicated that he was in custody and that he was not given bail.

The court then inquired who he was and he said his names are Albert Muyenga.

The accused person in the matter is Herbert Muyenga.

May the reviewing Judge nullify these proceedings.'

[2] It is clear from the magistrate's letter quoted above that a wrong person in the person of Albert Muyenga was put in the dock on 8 April 2019 when the trial of matter resumed and two state witnesses testified against him instead of Herbert Muyenga who was absent.

¹ Act 51 of 1977 as amended.

[3] However, s 304 (4) of the CPA, provides for review of terminated proceedings from lower court but does not provide for the High Court to review irregularities committed in untermiated proceedings as in the present matter.

[4] Section 20 (1) of the High Court Act,² provides for grounds of review of proceedings of lower court and states as follows:

'(1) The grounds upon which the proceedings of any lower court may be brought under review before the High Court are:

- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial offer;
- (c) gross irregularity in the proceedings;
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[5] In this matter, gross irregularity occurred in the proceedings because a wrong accused person was put in the dock and tried on 8 April 2019 as per para 2 of the judgment above. Therefore, it is just and fair to set aside the whole proceedings of the matter conducted on 8 April 2019 and to remit it to the Magistrate's court Rundu for the trial to proceed with Herbert Muyenga as the accused.

[6] In the result, I make the following order:

- a) The whole proceedings in the matter conducted on 8 April 2018 are hereby set aside.
- b) The matter is remitted to the Magistrate's Court Rundu to proceed with the trial *de novo* with Herbert Muyenga as the accused person.

² Act 16 of 1990.

E P UNENGU
Acting Judge

N NDAUENDAPO
Judge