REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Mubyana Kamanda*	**Case No: Katima Mulilo B25/2021** CR 26/2022
High Court MD Review No: 1240/2021	**Division of Court:** Main Division
Heard before: Judge Shivute *et* Judge January	**Delivered on:** 08 APRIL 2022
Neutral citation: *S v Kamanda* (CR 26) [2022] NAHCMD 178 (08 APRIL 2022)	
The order: 1. The convictions and sentences are set aside; 2. The matter is remitted in terms of section 304(2) *(c)* (v) with a directive that the instruction of the Prosecutor-General should be complied with and the matter be brought to its natural conclusion; 3. If convicted, the magistrate should consider the sentence of imprisonment that the accused has already served.	
Reasons for order:	

January, J (Shivute J concurring)

[1] This is a review matter submitted from Katima Mulilo magistrate's court in terms of section 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused is a Zambian national.

[3] He appeared of contravening section 4(1) *(b)* read with section 1, 8, 9, 13, and 14 – dealing of controlled wildlife products, the dealing of which is unlawful in terms of Schedule 1 of the Controlled Wildlife Products and Trade Act 9 of 2008. The charge alleges that on or about the 11 of February 2020 at or near Super Sport Area in the district of Katima Mulilo the accused did wrongfully and unlawfully deal in any controlled wildlife products, to wit: 20 x hippopotamus tusks valued at N$45 000.00, the possession of which is unlawful in terms of Schedule 1.

[4] The accused was further charged of contravening section 7 of the Immigration Controlled Act, Act 7 of 1993; in that on or about 10 January 2020, at or near Wenela Border Post in the district of Katima Mulilo, the accused was asked to produce his passport or proof that he is entitled to be in Namibia, where after it was discovered that the accused did wrongfully and unlawfully resided in Namibia without proof that he presented himself to an immigration officer at a port of entry and satisfy such officer that he is entitled to enter and be in Namibia, now therefore, the accused is guilty of Contravening section 7 of Act 7 of 1993.

[5] The accused was asked to plead in terms of section 119 of the Criminal Procedure Act 51 of 1977 (the CPA). He pleaded guilty to both charges, was questioned in terms of section 112(1) *(b)* of the Act, where after the proceedings were stopped. The matter was then sent for the decision of the Prosecutor-General.

[6] The decision of the Prosecutor-General in terms of section 122(2) *(i)* is that the

accused was to be charged of: Count 1; contravening section 4(1) (a) read with sections 1, 4(2) (a), 8, 9, 12, 13, and 14 – Possession of any controlled wildlife product, the possession of which is unlawful in terms of schedule 1 of the Controlled Wildlife Products and Trade Act, no. 9 of 2008 as amended by Act 6 of 2017 and count 2; contravening section 34(1) read with sections 1, 24, 26, 27, 28, 29, 34(2) 34(3) and 35 of the Immigration Control Act 7 of 1993. – Found in Namibia without being in possession of a permit.

[7] After the decision of the Prosecutor-General was received, the record of proceedings reflects as follows:

'PP: Set today for plea. Ready to put the charges.

Crt: Are you still conduct *(sic)* your own defence in the matter?

Accd: Yes

PP: Reads the allegations as per annexure "B"

Crt: Did you understand the charge?

Accd: Yes to count 1

Yes to count 2

Crt: How do you plea *(sic)*?

Accd: Guilty – count two *(sic)*

Guilty – count two

PP: He has already tendered a guilty plea in terms of section 119 to the same charges, we are applying that court to confirm those answers it will constitute the same offence

Crt: Do you have any objection with your answers being confirm *(sic)* again on this charges?

Accd: No objection

Crt: Your answers are confirmed for count one and two during the 119 plea question *(sic)* and you are found guilty as charged for count one and two. Do you understand?

Accd: I understood.

PP: He is first offender for both count, may kindly mitigate his sentence *(sic)*'

[8] He was sentenced on count 1 to a fine of N$ 80 000.00 or in default of payment

4 years imprisonment.

[9] On count 2 the accused was sentenced to a fine of N$ 3000.00 of in default of payment 8 months imprisonment. These sentenced were to run consecutively from another. The accused was further declared a prohibited immigrant in terms of section 2(1) *(a)* [presumably section 2(A) of Act 9 of 2008]. The 20 tusks found in the accused possession were ordered to be forfeited to the state.

[10] A query was directed to the magistrate in the following terms:

1. 'The accused pleaded in the section 119 of the CPA proceedings to 1: A contravention of section **4(1) *(b)*** of the Controlled Wildlife Products and Trade Act 9 of 2008 as amended i.e**. Dealing in controlled wildlife products** and 2: A charge of contravening section 7 of the Immigration Control Act 7 of 1993 i.e**. Failure to present oneself to an immigration officer before entering Namibia.**

2. The Prosecutor-General's (the PG) decision reflects that the accused should have been arraigned: 1. Contravening section **4(1) *(a)*** of the Controlled Wildlife Products Act 9 of 2008 as amended i.e. **Possession of any controlled wildlife products** and: 2. Contravening section 34(1) read with other relevant provisions of the Immigration Control Act 7 of 1993-**Found in Namibia without being in possession of a permit.**

3. Whereas it is clear that the charges to which the accused pleaded in terms of section 119 of the CPA and the charges in accordance with the Prosecutor-General's decision differ materially, how does the magistrate justify the convictions as charged without any amendment to the charges in accordance with the PG's decision? The public prosecutor certainly did not have the authority to amend the decision of the PG.'

[11] The magistrate responded that there was an oversight with the record. She stated that the accused pleaded in terms of section 119 of the CPA on a charge of contravening section 4(1) *(a)* of the Controlled Wildlife Products and Trade Act, no. 9 of

2008 as amended by Act 6 of 2017 – Possession of any controlled wildlife product without a permit. This is not the charge that the accused pleaded to. And on count 2; contravening section 7 of the Immigration Control Act 7 of 1993 – Failure to present oneself to an immigration officer before entering Namibia. She further stated that when the record was prepared it incorrectly reflected that count one was contravening section 4(1) *(b)* of Act 9 of 2008 as amended –Dealing in a controlled wildlife products *(sic)*. In addition she stated: 'This has been rectified'.

[12] The initial annexure, reflecting that the accused was charged of contravening section 4(1) *(b)* of the Controlled Wildlife Products and Trade Act, no. 9 of 2008 as amended by Act 6 of 2017 (the Act), appears to have been removed from the proceedings that are re-submitted with the response from the magistrate. The record now contains an annexure reflecting that the accused was charged with section 4(1) (a) of the Act. This conduct of changing and substituting the annexure amounts to tampering with the record and is impermissible.

[13] The magistrate further confirmed the decision of the Prosecutor-General and that the public prosecutor is not authorized to amend that instruction. She correctly stated that section 34(1) of the Immigration Control Act 7 of 1993 does not disclose an offence and that the correct section is section 34(3). According to her, the conviction followed due to an oversight to verify if the charges to which the accused pleaded in the section 119-procedure, were the same as the charges put to the accused when the case was finalized.

[14] The fact of the matter is that the instruction of the Prosecutor-General (the PG) was not complied with by both the public prosecutor and the magistrate. These are serious misdirection's. In addition the procedure followed, by simply confirming the 119- procedure and then convicting the accused as quoted above, cannot be condoned and is another misdirection. The accused should have been invited to plead afresh as per the instruction of the Prosecutor-General and questioned afresh, if he pleaded guilty. The convictions, as they stand, are for dealing in the prohibited 20 x

Hippopotamus tusks and contravening section 7 of the Immigration Control Act 7 of 1993 contrary to the instruction of the PG. In the circumstances, the convictions and sentences fall to be set aside.

[15] I endorse and reiterate what was quoted in *S v Poppas*[1] with reference to *S v Mafudza* para 5 -7; *S v Mushanga; S v Nghishidimbwa*:

'The magistrate appears to have simply followed the charge as presented by the prosecutor. It should be understood that Prosecutors are essential to the attainment of justice in the criminal justice system. They should thus draft charges with professionalism, precision and where the offence is statutory, the charge should reflect the wording preferred in the statutory provision with the correct and valid legislation establishing the offence. Magistrates should also carefully examine charges to ensure that such charges are valid and not objectionable in terms of section 85(1) (a) of the CPA.[2]

Failure to examine the correctness of the charge may result in incurably defective proceedings. Accused persons should be correctly charged. Incorrect charges defeat the whole purpose of the criminal justice system. A question comes to mind, that, what would be the purpose of subjecting an accused person and the costly state functionaries to tedious court proceedings based on a wrong or repealed charge? It is a waste of the valuable time and resources of the court, state functionaries and the accused.'[3]

[16] In the result it is ordered that:

1. The convictions and sentences are set aside;
2. The matter is remitted in terms of section 304(2) (c) (v) with a directive that the instruction of the Prosecutor-General should be complied with and the matter be brought to it natural conclusion;
3. If convicted, the magistrate should consider the sentence of imprisonment that the accused has already served.

H C JANUARY	**N N SHIVUTE**

[1] *S v Poppas* (CR 48/2020) [2020] NAHCMD 287 (16 July 2020).
[2] *S v Mafudza* para 5 -7; *S v Mushanga; S v Nghishidimbwa*: (CR 55/2019) [2019] NAHCMD 295 (20 August 2019) para 15.
[3] *S v Poppas* (supra).

JUDGE	JUDGE