

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Tulipamwe Mandume</i>	Case No: CR 8/2022
High Court MD Review No: 1982/2021	Division of Court: High court Main Division
Heard before: Honourable Mrs. Justice Shivute <i>et</i> Honourable Mr. Justice January	Delivered on: 11 February 2022
Neutral citation: <i>S v Mandume</i> (CR 8/2022) [2022] NAHCMD 46 (11 February 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. If the accused paid a fine, it should be refunded to him.	
Shivute, J and January J (concurring)	
[1] This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).	
[2] The accused appeared in the Magistrate's Court for the district of Grootfontein where he was charged of being found in Namibia without a valid permit and failing to report to immigration office in contravening section 34(3) of the Immigration Control Act 7 of 1993.	

[3] He pleaded not guilty to the charge and after evidence was led during trial, he was convicted as charged and sentenced to N\$ 3000 or 9 months' imprisonment.

[4] on review, I directed a query to the learned magistrate as to why the accused was convicted if the charge sheet does not contain particulars of the offence or does not disclose an offence and why was the charge of entry into Namibia without an unexpired passport bearing a valid visa contravening section 12(1) of the Immigration Control Act 7 of 1993 attached to the record.

[5] The learned Magistrate responded to the query as follows:

1. The magistrate concedes that accused is convicted of the offence of found in Namibia without a valid permit and failing to report to an immigration office- Contravening section 34(3) of the Immigration Control Act 7 of 1993 and sentenced to N\$ 3000 or 9 months imprisonment.

2. He is wrongly convicted of that charge as the charge sheet does not contain particulars of the offence nor does it disclose an offense.

3. The charge of entry into Namibia without an unexpired passport bearing a valid visa contravening section 12(1) of the Immigration Control Act 7 of 1993 attached to the record is the correct charge.

4. The offenses have the same elements and or have more or less the same elements and evidence led can prove both offenses. The court a quo thus pleads with the Honourable Review court to set aside the conviction on the offense of "found in Namibia without a valid permit and failing to report to an immigration officer- Contravening section 34(3) of the Immigration Control Act 7 of 1993" and replace it with a conviction on the charge of "entry into Namibia without an unexpired passport bearing a valid visa contravening section 12(1) of the Immigration Control Act 7 of 1993".

The accused will suffer no prejudice if the Honourable Review Court set aside the conviction on the former charge and replace it with one on the later charge

5. The sentence may be confirmed if the Honourable Court deems it fit.'

[6] Section 34(1) of the Immigration Control Act under which the accused was charged and convicted provides;

'Any person who at any time entered Namibia and, irrespective of the circumstances of his or her entry, is not or is not deemed to be in possession of a permanent residence permit issued to

him or her under section 26 or an employment permit issued to him or her under section 27 or a student's permit issued to him or her under section 28 or a visitor's entry permit issued to him or her under section 29, or has not under section 35 been exempted from the provisions of section 24, as the case may be, shall present himself or herself to an immigration officer or to an officer of the Ministry.'

[7] Whilst section 34 (3) provides that;

'(3) Any person referred to in subsection (1) or who fails to comply with the provisions of that section or any person referred to in subsection (2) who fails to comply with the provisions of the last mentioned subsection or any person, so referred to, who fails on being called upon to do so by an immigration officer, then and there to furnish to such immigration officer the particulars determined by the Chief of Immigration to enable the board, the Chief of Immigration officer, as the case may be, to consider the issuing to the said person of a permit concerned, shall be guilty of an offence and on conviction be liable to a fine not exceeding N\$4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[8] In terms of sections 34(1) and 34(3) of the Immigration Control Act, an offence is committed on the mere basis that an accused is found in the country without valid documents irrespective of how he had entered the country.

[9] In terms of the learned magistrate's reply to the query, the accused was supposed to be charged with Entry into Namibia without an unexpired passport bearing a valid visa contravening section 12(1) of the Immigration Control Act 7 of 1993, as per the charge annexed to the record. The charge reads as follows:

'Entry into Namibia without an unexpired passport bearing a valid visa or authority. 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 01 day of December 2020 at or near Berg Aukas in the district of Grootfontein 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) 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 or to imprisonment for a period not exceeding five years or both such fine and such imprisonment and may be dealt with under Part VI as prohibited immigrant.'

[10] Section 12 (1) and 12(4)¹ read as follows:

'Passports and visas

(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.

(2) ...

(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.'

[11] Regarding the above charge, we can do no better than echo what has already been stated in *S v Ngono*²; *S v Mushanga*; *S v Nghishidimbwa*³, *S v Nkomo*⁴, *S v Katiti*⁵ that

¹ Immigration Control Act 7 of 1993

² *S v Ngono* 2005 NR 34 (HC)

³ *S v Mushanga*; *S v Nghishidimbwa* CR 55/2019) [2019] NAHCMD 295 (20 August 2019)

⁴ *S v Nkomo* 2009 (1) NR 352 (HC)

⁵ *State v Fernando Katiti* Case No .CR 12/2011 (unreported) delivered on 24 March 2011

the section creates two offences: (a) entering Namibia in contravention of the provisions of subsection (1) of s 12 of the Act; and (b) being found in Namibia after having been refused to enter Namibia in terms of that subsection. In order to be convicted under s 12 (4), the charge must allege that the accused was found in Namibia after having been refused entry into Namibia under the provisions of s 12 (1), an essential element of subsection (4).

[12] The charge in this instance, did not contain the allegations that the accused person was found in Namibia after having been refused entry into Namibia under the provisions of s 12 (1). This is an essential element of the charge. The absence of such allegation entails that the accused was not properly charged. The charge does not meet the requirement set out in s 84 (3) of the Criminal Procedure Act, which requires the formulation of the charge to follow the words of the Act which creates the offence, thus rendering the charge objectionable in terms of section 85(1) (a) of the Criminal Procedure Act.

[13] The learned magistrate's suggestion that although the accused was incorrectly charged and convicted under a wrong section *to wit*, section 34(3) of the Act⁶, the review court should replace the conviction with that of contravening section 12(1) and 12(4) of the Act⁷ as there will be no prejudice to the accused seeing as the two offences contain more or less similar elements and the evidence led will prove such elements. This suggestion is incorrect because the offense created under section 34(3) of the Act⁸ does not contain the same elements as those created under section 12(1) and 12(4) of the Act⁹.

[14] In addition to the above, this court cannot replace the section under which the accused was convicted, with a conviction under section 12(1) and 12(4) of the Act¹⁰ because the charge in respect of that section is defective in that it does not contain the necessary wording to constitute offences committed in terms of the statutory provisions of Section 12(4) read with Section 12(1) of the Immigration Control Act. The fact that the legislature attached different penalties to the offences created under the two sections also

⁶ Immigration Control Act 7 of 1993

⁷ Immigration Control Act 7 of 1993

⁸ Immigration Control Act 7 of 1993

⁹ Immigration Control Act 7 of 1993

¹⁰ Immigration Control Act 7 of 1993

indicates that the offences differ in gravity or seriousness. As a result, the proceedings are not in accordance with justice and stand to be set aside.

[15] In the result, it is ordered that:

1. The conviction and sentence are set aside.
2. If the accused paid a fine, it should be refunded to him.

N N SHIVUTE JUDGE	H C JANUARY JUDGE