

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

<b>Case Title:</b> <i>Steven Garoeb v The State</i>	<b>Case No:</b> HC-MD-CRI-APP-CAL-2021/00037
<b>Division of Court:</b> Main Division	
<b>Heard before:</b> Claasen J et Usiku J	<b>Delivered on:</b> 11 February 2022
<b>Neutral citation:</b> <i>Garoeb v S</i> (HC-MD-CRI-APP-CAL-2021/00037) [2022] NAHCMD 51 (11 February 2022)	
<b>The order:</b> The appeal is struck from the roll.	
<b>Reasons for order:</b>	
Claasen, J (concurring Usiku, J)  <ol style="list-style-type: none"><li>1. The appellant was charged with two counts. In respect of count one, he was charged with assault on a member of the police contravening s 35(1) read with s 1 and 13 of Act 19 of 1990, with an alternative count of resisting a member of the police, contravening s 35(2)(a) read with s 1, 13, 14, 15, 16 and 35(2) of Act 19 of 1990 and a second alternative count of malicious damage to property. The second count was <i>crimen injuria</i>.</li><li>2. After a trial the appellant was convicted in the Magistrates' Court in the district of Karibib and sentenced to 3 years' imprisonment in respect of count 1 and acquitted in respect of count 2. Aggrieved by the court <i>a quo</i>'s finding, he lodged an appeal to this court.</li></ol>	

3. Upon perusal of the record, it is apparent from the date stamp of the Usakos Clerk of Court that the notice of appeal was only filed on 18 May 2021, roughly two months after sentencing. This necessitated that the notice be accompanied by a condonation application for the late filing, however, this was not done.
4. During the appeal hearing, this court acquainted the appellant, who appeared in person, with the content of Rule 67(1) of the Rules of the Magistrates' Court that requires that a notice of appeal be lodged within 14 days of sentencing and that such notice should set out the grounds clearly and specifically. The court enquired from the appellant whether his appeal was properly before the court.
5. The appellant explained he gave his notice to a certain Correctional Service Officer on 16 March 2021, just one day after his sentencing. He was of the belief that it would be lodged with the Clerk of Court accordingly.
6. Counsel for the Respondent, Mr Gaweseb, submitted that he too was of the opinion that the notice had been filed within the 14 day period as required by the rules of court, given the date the notice was drafted by the appellant and failure then to have it filed with the Clerk of Court was attributed to the prison officials. He did however concede that the date stamp on the notice indicated that it had been filed late.
7. In the Supreme Court case of *S v Nakale*<sup>1</sup>, the Court held as follows:

'It has become necessary now to consider also the procedure appellant had to follow to note and prosecute his appeal against conviction and sentence by the regional court. In terms of s 309 of the Criminal Procedure Act 51 of 1977 read with rule 67 of the Magistrates' Courts rules, appellant had to deliver a written notice of appeal to the clerk of the court within 14 days of the date of the conviction, sentence or order. In spite of the assertion on the part of the appellant that he had noted the appeal on time, it must be accepted that the written notice of appeal had not been delivered to the clerk of the court within the time limit set in the rule. As such the appellant was required to apply for condonation for the late noting of the appeal as he had indeed done. Section 309(2) of the Criminal Procedure Act empowers the High Court to condone the failure to file the notice of appeal within the prescribed time limit. Generally, a court may condone such a late filing if an applicant

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<sup>1</sup> *S v Nakale* 2011 (2) NR 599 (SC) at para. 7.

provides an acceptable explanation for such late filing and if there is reasonable prospect of success on appeal.'

8. Despite the appellant's assertion that he noted the appeal on time, it must be accepted that the written notice of appeal had not been delivered to the clerk of the court within the time limit set in the rule. As such the appellant was required to apply for condonation for the late noting of the appeal, which was not done. Furthermore it is also apparent that the purported notice of appeal does not comply with the requirement that the grounds must be clear and specific.
9. As was pointed out by this Court in *Lazarus v S*<sup>2</sup> there is, in the absence of an application for condonation, no appeal before Court to consider.
10. For this reason, the case is struck from the roll.

**C M CLAASEN**  
**JUDGE**

**D N USIKU**  
**JUDGE**

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<sup>2</sup> HC-NLD-CRI-APP-CAL-2020/00043 [2020] NAHCNLD 172 (03 December 2020) paragraph 10.