

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: <i>Reonard Nafuka</i> v <i>The State</i>	<i>Appellant</i> <i>Respondent</i>	Case No: HC-MD-CRI-APP-CAL-2022/00046	Division of Court: Main Division
Heard before: Mrs Justice Shivute <i>et</i> Mrs Justice Usiku		Delivered on: 21 October 2022	
Neutral citation: <i>Nafuka v S</i> (HC-MD-CRI-APP-CAL-2022/00046) [2022] NAHCMD 578 (21 October 2022)			
The order: (a) The application for condonation is refused. (b) The matter is struck from the roll and regarded as finalised.			
Reasons for order: SHIVUTE J (USIKU J concurring): [1] The appellant appeared in the Magistrate's Court sitting at Katutura on charges of theft from a motor vehicle that was properly locked and escaping from lawful custody (common law). He pleaded guilty to both counts and was convicted accordingly. On the first count of theft from a motor vehicle, he was sentenced to five years' imprisonment and on the second count of escaping from lawful custody, he was sentenced to four months' imprisonment on 27 November 2020. The appellant is not happy with the			

sentence hence this appeal.

[2] The appellant only filed his notice of appeal on 14 June 2022 which is out of time by one year and seven months.

[3] Counsel for the respondent raised a *point in limine* that the notice of appeal was filed out of time and that the appellant did not provide a reasonable and acceptable explanation for the course of the delay. He further stated that the appellant has no reasonable prospects of success on appeal.

[4] The appellant explained that the cause for the delay for him to file his notice of appeal on time was due to the fact that he is a layman who had suffered for a long period of time seeking for legal opinion from those who are legally qualified to assist him how to file his notice of appeal. He further explained that he requested for the record of proceedings to be provided to him on 5 December 2020 before the expiration of 14 days within which he was supposed to file his notice but the Clerk of Court failed to provide the record of proceedings to him. Furthermore, the appellant explained that he was convicted and sentenced during the Covid-19 pandemic. Therefore, it was difficult for him to be escorted to the Magistrate's Court to enable him to get the record of proceedings due to the Covid-19 restrictions that were imposed on the Hardap Correctional Facility.

[5] Counsel for the respondent argued that what amounts to a reasonable and acceptable explanation for failure to file a notice of appeal within the prescribed time limit is normally a value judgment based on particular circumstances of the case. Hence, the reasons advanced by the appellant are not reasonable nor acceptable or sufficient for the court to accept the condonation application.

[6] It is trite law that, the court will condone an application for the non-compliance with the Rules of Court if the following two requirements are met:

(a) There must be a reasonable, acceptable and bona fide explanation for the delay; and

(b) There must be reasonable prospects of success on appeal. *S v Nakapela and Another* 1997 NR 184 HC at 185.

[7] In considering the accused's reasons for the cause of the delay, it is evident from the record of proceedings that after sentencing, the court a quo apprised the appellant of his right to appeal and the period within which the appellant must file his notice of appeal. The appellant claimed that he requested the record from the clerk of court who failed to give it to him. However, the appellant did not show proof to this court by providing a copy of the letter in which he allegedly requested for the record of proceedings. The appellant also stated that he was busy seeking for legal assistance from unnamed sources. He did not explain as to when he started seeking for legal assistance and when he obtained it. Furthermore, although the appellant said he was convicted and sentenced during the Covid-19 pandemic where there were restrictions, this court takes judicial notice that those restrictions did not apply continuously from 2020-2022 without intervals.

[8] We reserved the ruling on the application for condonation and the parties were allowed to address the court on the merits of the appeal in relation to the prospects of success.

Grounds of appeal

[9] The appellant listed several grounds of appeal, however some of them are overlapping or amount to repetitions. Grounds of appeal raised may be summarised as follows:

1. The learned magistrate misdirected himself by emphasising the seriousness of the offence and the interest of society and failing to take into account adequately the

appellant's personal circumstances.

2. The learned magistrate erred by failing to genuinely apply the principle of mercy and the principle of individualisation of sentencing. The learned magistrate further disregarded to impose a wholly suspended sentence.
3. The learned magistrate misdirected himself by imposing a sentence of five years effective imprisonment which is severe and shockingly inappropriate without considering that the appellant pleaded guilty.

[10] The appellant argued that he has prospects of success on the merits because the learned magistrate sentenced him based on his previous convictions. The appellant further argued that, the court was not wrong to impose a sentence of five years' imprisonment but urged this court to impose a fine or to reduce the sentence. The sentence of five years is a bit harsh.

[11] On the other hand, counsel for the respondent argued that, the appellant has no prospects of success on the merits as he has three previous convictions. On the first previous conviction, the appellant was given a wholly suspended sentence and on the second and third previous convictions, he was given an option of a fine. The learned magistrate did not misdirect himself by considering the previous convictions and the sentence imposed is not shockingly inappropriate.

[12] This court having considered the explanation of the cause of the delay tendered by the appellant, it is of the view that it is not a reasonable explanation nor is it acceptable and it is not bona fide. Again considering the merits in relation to the prospects of success, the accused properly conceded that the court a quo did not misdirect itself.

[13] The court a quo took into consideration the appellant's previous convictions, whereby he was given a wholly suspended sentence as well as option of a fine but he was not deterred. On these reasons, the appellant has failed to satisfy this court that he has prospects of success when prosecuting his appeal.

<p>[14] In the premise, the following order is made:</p> <p>(a) The application for condonation is refused.</p> <p>(b) The matter is struck from the roll and regarded as finalised.</p>	
<p>N N SHIVUTE</p> <p>Judge</p>	<p>D USIKU</p> <p>Judge</p>