

REPUBLIC OF NAMIBIA



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

Case Title: The State v Stephanus Kativa Thikambo	Case No: CR 18/2023
High Court MD Review No: 1818/2022	Division of Court: Main Division
Heard before: Judge January <i>et</i> Judge Usiku	Delivered on: 24 March 2023
Neutral citation: <i>S v Thikambo</i> (CR 18/2023) [2023] NAHCMD 140 (24 March 2023)	
The order: The conviction and sentence are set aside.	
Reasons for order:	
January J (concurring Usiku J): [1] The case was submitted from the Rundu Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act No. 51 of 1977 as amended (the CPA). [2] The accused was charged with kidnapping. On his first appearance the public prosecutor requested the court to explain his rights and that the accused indicated that he wanted to apply for legal aid. In addition the prosecutor informed the court that the accused had to be send to the district surgeon seemingly for a section 77 enquiry. The	

matter was postponed with the accused remaining in custody. On the second appearance there was a different prosecutor but the accused was not brought to court. On the third appearance, the same public prosecutor as on the second appearance informed the court that there was no information that the accused is not mentally well. The matter was then postponed for further investigations and eventually for plea and trial.

[3] On the date for plea and trial, the charge was put and the accused pleaded guilty. He was questioned in accordance with s 112(1)(b), convicted and sentenced as follows: A custodial sentence of 6 months imprisonment of which 3 months are suspended, on condition that upon 5 years the accused should not be convicted of a similar offence in nature. The conviction at the time of perusing the record of proceedings seemed to me in accordance with justice but the sentence was so confusing and surprising to the extent that at the time, I did not realise that, although there was a request that rights should be explained, it reflects nowhere that any rights to legal representation were explained.

[4] Consequently, I inadvertently directed a query only in relation to the sentence and not the omission of the explanation of rights. The query was as follows:

1. "The magistrate must explain if the sentence of '6 months' imprisonment, of which 3 months are suspended' as reflected on the review cover sheet and J 15 charge sheet is a competent sentence.
2. In addition, an explanation is required for the sentence of 'a custodial sentence of 6 months' imprisonment of which 3 months are suspended, on condition that upon 5 years the accused should not be convicted of a similar offence in nature.'
3. In particular it is not clear that upon 5 years he should not be convicted and what is meant by a similar offence in nature."

[5] The magistrate replied, correctly conceded that the sentence is not competent and

requested that the correct sentence be imposed. She stated the correct sentence to be a sentence of 6 months imprisonment of which 3 months are suspended for a period of 5 years on the condition that the accused is not convicted of the offence of kidnapping, committed during the period of suspension.

[6] The condition of suspension of the sentence is wrong and confusing in relation to the period of suspension and the reference to similar offences in nature. This court gave judgments in numerous cases¹ in the past where the correct conditions of suspension were set out and the use of the words 'similar offence' or 'same offence' struck down and amended. The incompetent sentence in the circumstances of this case is, however academic in view of the fact that the right to legal representation was not explained.

[7] It is reiterated that "in Namibia the duty of judicial officers to inform an unrepresented accused is placed upon them by the Constitution. Article 12(1)(e) provides: 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'" This to ensure that an accused receives a fair trial.² An accused should be comprehensively and meaningfully warned and informed of his/her right to legal representation to allow him/her to make a decision and his/her response to the warning should be recorded.³ A failure of judicial officer to do so may result in gross irregularities.⁴

[8] In the result:

¹ *S v Farmer* (CR 64/2014) [2014] NAHCMD 328 (5 November 2014); Also: *S v Afrikaner* (CR73/2022) [2022] NAHCMD351 (18 July 2022); *S v Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022); *S v Mwilima* (CR 38 /2021) [2021] NAHCMD 221 (10 May 2021).

² See: *S v Kau and others* 1995 NR 1 (SC).

³ *S v Engelbrecht* 2017 (3) NR 912 (SC).

⁴ *S v Kau and others* (supra).

The conviction and sentence are set aside.	
H C JANUARY JUDGE	D USIKU JUDGE