

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2022/00038

In the matter between:

MATHEW SAGARIAS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sagarias v S* (HC-MD-CRI-APP-CAL-2022/00038)[2023]
NAHCMD 257 (12 May 2023)

Coram: Liebenberg J et Claasen J

Heard: 31 March 2023

Delivered: 12 May 2023

Flynote: Late filing of appeal – Reason advanced that appellant was shocked and did not comprehend the explanation – Magistrate gave clear and elaborate explanation of appeal and review rights – Appellant confirmed in writing that he understood the explanation and required no further explanation – Additional reason for delay that the police did not want to transport him to Clerk of Court, which featured nowhere in initial affidavit for condonation – Reasons for delay not truthful and *bona fide* – That coupled with poor prospect of success on appeal the applicant failed to show good cause for the granting of condonation.

Summary: The appellant was convicted of the theft of one head of cattle valued at N\$12 000 in the district court of Outjo. He was sentenced to 5 years' imprisonment and appealed against the sentence. The appeal was filed late hence the need to consider condonation first.

Held, that the court *a quo* considered the information in mitigation and aggravation and after weighting the factors concluded that a deterrent sentence was called for in the circumstances. That being the case, the court *a quo* exercised its sentencing discretion judiciously and properly.

Held, further that the reasons for the delay were not truthful and *bona fide* and that coupled with poor prospect of success, the applicant failed to show good cause for the granting of condonation.

Held, further that it does not suffice to merely list the grounds of appeal under the pretext that it constitutes the prospects of success on appeal in the affidavit that accompanies the condonation application. The deponent is required to briefly and succinctly set out essential information to enable the court to assess the appellant's prospects of success.

ORDER

1. The application for condonation is refused.
2. The matter is struck from the roll and deemed finalised.

JUDGMENT

CLAASEN, J (Concurring LIEBENBERG, J)

[1] The appellant was convicted of theft of one head of cattle valued at N\$12 000 in the district court of Outjo. He was sentenced to five years' imprisonment on 14 February 2022.

[2] On 30 May 2022 the appellant, in person, lodged a Notice of Appeal against sentence. Subsequently, in October 2022 the Directorate of Legal Aid gave instructions to Mr Andreas to represent the appellant. Early this year, Mr Andreas filed an amended Notice of Appeal. The grounds of appeal were that the sentence is shockingly inappropriate, that the court *a quo* erred in overemphasising the nature of the offence and that the court *a quo* merely paid lip service to the personal circumstances of the appellant.

[3] Ms Esterhuizen, counsel for the respondent, took issue with the late filing of the appeal. In brief, she set out the State's position in its heads of argument that there was no satisfactory explanation, nor are there any prospects of success on appeal.

[4] Both the initial appeal as well as the amended Notice of Appeal was accompanied by an affidavit wherein the applicant explained the reasons for the delay. In that regard, in the second affidavit he stated that he was too shocked to have properly understood the appeal and review rights explanation given by the court *a quo* at the time. He also stated that after the imposition of sentence he was detained for 2 more weeks at the Outjo Police Station and that the police officials there did not want to take him to the Clerk of Court. Eventually he was transferred to Walvis Bay Correctional Facility and that is when an official assisted him to file the necessary documents.

[5] For an application of this kind to succeed, the appellant must give a reasonable and acceptable explanation for the cause of the delay and satisfy the appeal court that he has a reasonable prospect of success on appeal.¹

[6] In evaluating the reasons for the delay, the first is that he could not fully understand the explanation because of being shocked at the sentence. It is

¹ *S v Nakale* 2011(2) NR 599 at 603 para (7).

evident that the court *a quo* gave a clear and elaborate explanation about appeal and review rights at the end of the case. The appellant was expressly asked whether he understood the explanation to which he answered in the affirmative. The appellant was also asked whether he needs any further explanation and he answered in the negative. The appellant even affixed his signature below the recording of this information in the court record. As such this part of the explanation has no ring of truth to it.

[7] There was an additional explanation that the police officers did not want to take him for assistance to the Clerk of Court. It is noteworthy that this information featured nowhere in the initial affidavit. It begs the question as to why he would be silent about such a persuasive reason. Counsel for the State argued that the refusal of the police would have been included in the initial affidavit if it had been true. This court concurs that it appears to have been an afterthought which does not make for a truthful and *bona fide* explanation. Even if we accepted it as a truthful and a *bona fide* explanation for the delay, condonation does not stop there. The appellant still has to cross over the second hurdle, namely prospects of success, which depends on the merits of the matter.

[8] The function of an appeal court in a criminal appeal against sentence is to decide whether or not the trial court in imposing sentence exercised its discretion judicially and properly. In doing so, an appeal court will be mindful that the determination of a sentence is pre-eminently a matter for the trial court and will thus not usurp the sentencing discretion of the trial court. The proper approach to an appeal in sentencing has been set out in *S v Pillay*² as follows:

‘As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence. It must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a

² *S v Pillay* 1977 (4) SA 531 (A) 535 E-G.

misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.'

[9] Mr Andreas in his argument emphasised that there should be consistency in sentences of similar cases, and that the five years' imprisonment term herein is too harsh in comparison to other similar cases. He referred the court to *S v Ilukena*³ wherein a sentence of four year's imprisonment for one ox valued at N\$5000 was set aside. The review court held the view that it was too harsh and it replaced it with a sentence of three years' imprisonment and suspended one year thereof conditionally. Mr Andreas also relied on the sentence imposed in *Noabeb v S*⁴ wherein the appeal court had set aside parts of the convictions and sentences of the court *a quo*. In *Noabeb*, the court on appeal convicted for stock theft of two cattle in respect of count one and three, and the counts were taken together for sentencing. The appellant was sentenced to two years' imprisonment of which six months imprisonment was conditionally suspended.

[10] Ms Esterhuizen argued that the court *a quo* exercised its sentencing discretion judiciously and fairly. She also cited several stock theft matters and the sentences therein. In *S v Kalaluka*⁵ the conviction for theft of stock was valued at N\$9000 and all the stock was recovered. The sentence of twelve years' imprisonment of which four years' imprisonment was suspended conditionally, was confirmed by the appeal court. Thus, the appeal court found that there was no striking disparity between that sentence and a sentence that the appeal court would have imposed. In *Johannes v S*⁶ a sentence of eight year's imprisonment was confirmed by the appeal court for the theft of one head of cattle valued at N\$16000.

[11] I return to the appeal before this court. Several judgments were written to explain the new sentencing regime after the full bench decision of *Protasius Daniel and another v Attorney General and two others*⁷ which struck down the mandatory minimum sentence for theft of stock wherein the value was more

³ *S v Ilukena* (CR 76/2019) [2019] NAHCMD 415 16 October 2019.

⁴ *Noabeb v S* (HC-MD-CRI-APP- CAL-2019/00024) [2020] NAHCMD 226 15 June 2020.

⁵ *S v Kalaluka v S* CA 14/2017 [2017] NAHCMD 279 (6 October 2017)

⁶ *Johannes v S* (CA49/2016) [2018] NAHCNLD 8 (25 January 2018).

than N\$500. *S v Lwishi*⁸ represents one of those judgments where guidance was given for sentencing on stock theft matters. *Lwishi* inter alia stated that where the value of the stock is more than N\$500, the court's approach should be to commensurate the sentence with the value of the stock and that the courts are required to consider the usual factors in sentencing, whilst still being mindful of the need to impose deterrent sentences. Furthermore, that appropriate lengthy custodial sentences should be imposed to serve as deterrence in a particular case, as well as generally. Ultimately, that would give effect to the Legislature's intention to address the problem of stock theft (which is rampant in this country) by the imposition of deterrent sentences.

[12] It has to be said, nothing has changed since then to detract from the severity of stock theft as an offence. As for the authorities on which Mr Andreas relies, he cited the same cases in the stock theft appeal matter of *Katukundu v S*.⁹ That judgment pointed out that no reasons were given in the matters cited by Mr Andreas for the divergence from the established sentencing principles in stock theft cases. That being said, this court is unable to follow the path proposed by counsel for the appellant.

[13] Having considered the sentences in the cases cited by Ms Esterhuizen and being mindful of the general severe nature of stock theft in this country, this court does not regard the five years' imprisonment imposed herein as startlingly inappropriate. The magistrate has referred to a few other stock theft cases which endorsed the need for severe and deterrent sentences.

[14] I move on to the complaint that the court *a quo* merely paid lip service to the personal circumstances of the appellant. Mr Andreas summarised the appellant's personal circumstances as the time of conviction as that the appellant was single at the age of 28 years, he has not attended any school, he has one minor child and had lost his employment at a lodge as a result of the COVID-19 pandemic that ravaged Namibia. In addition, the court record shows that the appellant tendered a guilty plea, and that he is a first offender.

⁷ *Protasius Daniel and another v Attorney General and two others* (Case no A 238/2009 and A430 /2009) unreported 10 March 2011.

⁸ *S v Lwishi* 2012 (1) NR 325 (HC).

⁹ *Katukundu v S* (HC-MD-CRI-APP-CAL-2022/00087) [2023] NAHCMD 164 (3 Apr 2023).

[15] On the aggravating side, the court *a quo* considered the high value of the ox, that only half of the carcass was recovered, that the complainant lost the financial benefits that could come from reproduction, and the prevalence of stock theft in that community.

[16] At the end of the day, competing interests were weighed and balanced against each other. It is not unheard of that in the exercise of balancing a sentence, that at times the objective of rehabilitation and personal circumstances has to give way to deterrence. It has been said that the reasons for judgment or sentence is the best indicator as to whether a court has applied its discretion judiciously. That is borne out by the reasons for sentencing provided by the court *a quo*. Not only did the court *a quo* consider the information in mitigation of sentence, but was also duty bound to consider the aggravation, whereafter it had weighed the variables and concluded that a deterrent sentence was called for in the circumstances. That being the case, we find that the court *a quo* exercised its sentencing discretion judiciously and properly.

[17] Consequently, the appellant has not made out a case for prospects of success on appeal. The effect of the lack of *bona fides* and lack of truth in the reasons for the delay, coupled with poor prospects of success on appeal, is that the application for condonation stands to fall.

[18] Finally, this court has an observation as regards the articulation or approach to denote prospects of success in the condonation application. In the case at hand, the purported 'prospects of success' as deposed to by the appellant merely listed the three grounds of appeal, nothing more. That does not suffice. This court is of the view that in applications of this sort, the deponent is required to briefly and succinctly set out essential information to enable the court to assess the appellant's prospects of success on appeal. At the very least, it calls for a concise reference to established legal principle(s) or case law, as applicable that forms the basis of the deponent's belief that he/she has prospects of success on appeal.

[19] In the case before court, the appeal revolved around a claim of an excessively harsh sentence for a stock theft case. Presumably what moved the appellant to appeal was his belief that the sentence was not in conformity with comparable cases, which could have underpinned his notion of success on appeal in his affidavit. Thus, it is advisable that a foundation be laid in the affidavit, albeit in cryptic terms, of what is to come in the heads of argument.

[20] For these reasons it is ordered:

1. The application for condonation is refused.
2. The matter is struck from the roll and deemed finalised.

C Claasen
Judge

J C Liebenberg
Judge

APPEARANCES

APPELLANT: Mr Andreas
Of Andreas-Hamunyela Legal Practitioners
Windhoek

RESPONDENT: Ms Esterhuizen
Of Office of the Prosecutor-General,
Windhoek