

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> The State  versus  Joseph Sipilian Mukewu                      Accused	<b>Case No:</b> CR 113/2024
<b>High Court MD Review No.:</b> 1168/2024	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Shivute J et Christiaan J	<b>Delivered on:</b> 22 October 2024
<b>Neutral citation:</b> <i>S v Mukewu</i> (CR 113/2024) [2024] NAHCMD 621 (22 October 2024)	
<b>The order:</b> The conviction and sentence are set aside. The fine if paid, should be refunded to the accused.	
<b>REASONS FOR ORDER:</b>	
SHIVUTE J (CHRISTIAAN J concurring):	

[1] The accused appeared in the Magistrates' Court for the district of Rundu. The charge reads that the accused undertook public paid transportation on a public road without a transportation permit – contravening s 31(1)(b) read with s 31(2) of the Road Traffic and Transportation Act, Act 22 of 1999. The charge annexure and the review cover sheet reflects that the accused is charged with - and convicted of contravening s 31(1)(b) read with s 31(2) of the Road Traffic and Transportation Act 22 of 1999 and Act 74 of 1977 s 31 and s 35.

[2] The prosecutor applied for an amendment of the charge, stating that the sections that were cited were incorrect and that it should have read as Act 74 of 1977. The amendment seems to have added s 31 and s 35 of Act 74 of 1977 to the initial charge sheet. Based on this, I queried the magistrate as follows:

- (a) Is there such an Act as the Road Traffic and Transportation Act?
- (b) Can the court convict the accused on both Acts 22 of 1999 and 74 of 1977?
- (c) The prosecutor having applied for the charge to be amended to read Act 74 of 1977 as the sections previously cited were incorrect, should the charge sheet not have been amended accordingly?
- (d) How did the court satisfy itself that the accused is guilty of transportation for reward?

[3] In addressing the first issue, the magistrate replied that it was an oversight on her part and that the accused was convicted only in terms of the 'Road Traffic and Transportation Act 74 of 1977'. Unfortunately, the magistrate has once again misdirected herself in that, there is no such Act. The two Acts that deal with road traffic and road transport is the Road Traffic and Transport Act 22 of 1999 and the Road Transportation Act 74 of 1977.

[4] The magistrate failed to address the second and third issues raised. Section 31(1)(b) of the Road Traffic and Transport Act 22 of 1999 provides that no person shall drive a motor vehicle on a public road without a licence or temporary authorization, while s 31(2)

provides for temporary authorization in the event that the licence is lost or destroyed. Section 31(1)(b) of the Road Transportation Act 74 of 1977 provides for 'Any person being the holder of a permit, undertakes road transportation otherwise than in accordance with the provisions of such permit, or, subject to the provisions of section 12bis, contravenes or fails to comply with any condition or requirement of a permit or any provision of section 24, while s 31(2) provides for when permit holders shall not be convicted of an offence under s 31(1). Section 35 of the Road Transportation Act 74 of 1977 provides for penalties.

[5] In reading the sections cited in both Acts, it is evident that the Road Traffic and Transport Act 22 of 1999 does not find application, considering the particulars of the charge, hence, the amendment sought by the prosecutor. It is also evident that s 31(1)(b) and s 31(2) of the Road Transportation Act 74 of 1977 deals only with permit holders, while the particulars of the charge read that the accused undertook public transportation without a permit. In essence, despite the amendment by the prosecutor, the act the accused is alleged to have committed, is not provided for in the sections cited in either of the two Acts. Section 31(1)(a) of the Road Transportation Act 74 of 1977 would be the appropriate section to charge an accused of road transportation without a permit.

[6] It is clear that, when the magistrate certified the review record and even after the query regarding the name of the statute was sent, she did not acquaint herself with the correct name of the statute. I pause here to urge magistrates to ensure that the conviction and charges are not vague or confusing. Magistrates must be attentive to the correct name of the statutes under which an accused person is charged and convicted, to avoid any anomalies.

[7] The second and third issues raised in the query, although not answered by the magistrate, have already been covered in the preceding paragraphs, therefore, I will move on to the fourth issue raised.

[8] Regarding the fourth issue, the magistrate replied that she was satisfied that the

accused was guilty of transportation for reward because the single witness for the State testified that the accused drove customers in his taxi and upon enquiry, the accused failed to furnish a transportation permit. None of the evidence was disputed or rebutted by the accused in cross-examination of the witness and the accused opted not to testify in his defence.

[9] However, in considering the evidence of the only State witness, the element of a reward/ payment was not established or proved by the State, in that the witness did not testify as to whether the accused had received any payment from the passengers and or whether he was indeed transporting passengers for payment. In the absence of such evidence, the magistrate could not have satisfied herself that the accused was guilty of transporting members of the public and that he intended to do so for a reward/ to be paid.

[10] As a result, it is ordered that:

The conviction and sentence are set aside. The fine if paid, should be refunded to the accused.

**N N SHIVUTE  
JUDGE**

**P CHRISTIAAN  
JUDGE**