REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 85/2010

In the matter between:

PETRUS ELIUD TANGENI **FIRST APPELLANT**

JACKSON SHEEFENI **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tangeni v The State* (CA 85/2010) [2013] NAHCNLD 16 (15 April 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: **05 April 2013**

Delivered: **15 April 2013**

Flynote: **Criminal procedure** – Appeal – Findings on credibility – Court on appeal will not readily interfere with credibility findings of trial court – Such interference justified only where irregularity or misdirection by trial court occurring.

Summary: Appellants were convicted on a charge of robbery, the court having been satisfied that the appellants were duly identified by several witnesses. On appeal the appellants attacked the conclusion reached by the trial court as far as it concerns their identification. On appeal the court found no irregularity or misdirection apparent from the record, thus there is no basis on which the findings of credibility by the trial court can be rejected. The court restated the principle that the function to decide on acceptance or rejection of evidence falls primarily within the domain of the trial court.

ORDER

The application for condonation in respect of both appellants is declined; accordingly the matter is struck from the roll.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] The appellants were arraigned (together with three co-accused) in the regional court sitting at Ohangwena, on a charge of robbery (with aggravating circumstances). After evidence was heard both appellants (and accused no 4) were convicted as charged, and sentenced to seven (7) years' imprisonment. This appeal only lies against the conviction.

[2] Both appellants elected to argue their appeal in person whilst Mr *Shileka* appeared for the respondent.

[3] Whereas the notices of appeal filed by both the appellants were clearly filed out of time, application was made in which condonation for non-compliance with the rules, is sought. The respondent opposes the application on the basis that the explanations proffered by the appellants are not reasonable, and that there are no prospects of success.

[4] In view of the appellants being lay persons, the respondent did not take issue with the informal manner in which the notices of appeal were drawn; neither that the appellants failed to give their respective explanations for their non-compliance on oath. These explanations are contained in unsworn statements in which each appellant explains why their respective notices were filed out of time, namely, shortly after their conviction, they sought to obtain the services of a legal practitioner to prosecute their appeal but their endeavours were not met with success. It was only whilst serving their sentence that they received assistance from a fellow inmate who drew up the papers as currently before the court.

[5] To grant condonation or not falls entirely within the discretion of the court and although this court has not in all instances insisted on meticulous compliance with the Rules of Court in an application of this nature (where the applicant is without legal assistance and acts in person), it has been said that condonation will not be granted upon the mere asking, but that the court, in the exercise of its discretion, will consider all facts and circumstances 'including the tenets of fairness to both the prosecution and the appellant, and will, in general, be guided by what is in the interest of fairness and justice'.[1] The fact that an appellant is a lay person and therefore does not know how to satisfy the requirements set out in the Rules of Court, has in itself been considered to be an insufficient explanation for non-compliance, as it is not the position in our law that the rules only apply to appellants who are legally represented – they equally apply to unrepresented appellants.[2]

[6] In the circumstances of the present matter and particularly because of the view taken by the respondent, I have, in the exercise of my discretion, come

[1] *Jose Ngongo v The State,* (unreported) Case No. CA 128/2003 delivered on 22.07.2004.
[2] *Kalenga Iyambo v The State,* (unreported) Case No. CA 165/2008 delivered on 19.10.2009.

to the conclusion that, despite the appellants' failure to satisfy the rules, it would be in the interest of fairness and justice to continue considering the application without affidavits having been filed. Proper condonation will be granted only if a reasonable and acceptable explanation for the failure to comply is given; and where the appellants have shown that there are indeed good prospects of success on appeal. I shall find in the appellants' favour that ever since their conviction, they already intimated to the trial court that they were not satisfied and already then sought the court's assistance to have their conviction overturned. At the end of the trial their right to appeal was duly explained and they were reminded about the time limit within which their notice of appeal had to be filed with the clerk of court. Another factor that contributed to the delay in prosecuting their appeal is that they were informed by the clerk of court to file separate notices and condonation applications. Problems were also experienced in obtaining *amicus curiae* assistance and when this was eventually secured, counsel withdrew one day before the hearing.

[7] After due consideration of all the facts and circumstances alluded to above, I am satisfied that the appellants' explanation for the delay in prosecuting their appeal, is reasonable and acceptable. I now turn to consider the prospects of success.

[8] Whereas the appellants have couched the grounds of appeal as set out in their respective notices in the same manner, it can be dealt with simultaneously to avoid any unnecessary repetition. Though the notices may be criticised for not containing clear and specific grounds, as required by the rules, I am, notwithstanding, satisfied that one is able to discern those grounds relied upon for purposes of the appeal. These grounds were furthermore extensively elaborated on in comprehensive heads filed by both the appellants. The purview of these grounds is mainly that the magistrate erred in his evaluation of the evidence by accepting the State witnesses' evidence which, according to the appellants, was 'inconsistent, assumptive and contradictory' and amounted to a fabrication of evidence. It is further contended that the magistrate erred by relying on evidence of the State

witnesses for purposes of identification, based on the attire of the culprits during the robbery; and for coming to the conclusion that the appellants were duly identified without giving sufficient weight to the appellants' evidence, showing otherwise.

[9] On the strength of the State case the appellants and accused no 4 on the 23rd of July 2007 at around 19h00 approached Niliatwa Shilongo, a pump attendant at Ondobe filling station, enquiring about toilets and the availability of food. First appellant and accused no 4 remained behind when second appellant proceeded in the direction of the toilets. The next moment the first appellant and his co-accused covered their faces by pulling down balaclavas they were wearing rolled up on their heads, and grabbed Shilongo. Both of them were armed with firearms. They thereafter pulled him inside the office where his colleague, Andreas Neumbo, was and ordered them to lie down on the floor. They demanded the keys to the safe and money, and after discovering some money stashed in a wardrobe, they made good their escape.

[10] I pause here to remark that although the witness Shilongo testified that he identified both appellants on their faces (when they talked to him and before they pulled down the balaclavas and grabbed him), he later on in his testimony said that the only thing he identified the appellants on, were their clothing. I shall revert to this aspect of his evidence.

[11] Neumbo said he was in the office when Shilongo was pulled inside by two men. First appellant approached him, pointing a firearm, whilst demanding money. Their assailants left with over N$4 000 in cash and some recharge vouchers. Neumbo then rushed to a nearby bar from where the police were contacted. Whilst at this spot, he noticed first appellant boarding a blue coloured motor vehicle that came from behind the bar. He said visibility was good as the lights outside the bar were switched on. According to Neumbo he was able to identify the first appellant because he was still wearing the same clothes. They again contacted the police and conveyed this information about the vehicle to them, saying that it was leaving Ondobe.

They then drove in the same direction and soon thereafter found the said vehicle already parked at Ondobe police station, with the appellants and the driver already arrested. Neumbo immediately pointed out the first appellant. The identification of the first appellant was clearly made on the clothes and boots he was wearing which, according to the witness, was exactly the same than what he had earlier observed at the filling station.

[12] Both Shilongo and Neumbo said that visibility at the filling station where they identified the robbers was good as the lights outside, as well as inside the office, were switched on.

[13] Shilongo also claimed having identified the appellants at the police station on their attire. According to him the first appellant wore long jean trousers; a jacket (both black); and boots with striped soles, while second appellant wore a white T-shirt and Jack Purcell shoes.

[14] Hafeni Peneyambeko was at the filling station and seated outside when she saw three men approaching. She drew Shilongo's attention to the approaching men. They were talking to her boyfriend (Shilongo) when the second appellant approached her. He pulled out a firearm and told her not to move. He then used her jersey to blindfold her and whilst pulling her towards the office, she managed to free herself and fled the scene. She boarded a vehicle and only returned to the filling station when taken there by the police later. She explained that she identified second appellant on his facial features as well as his height; though conceding that she did not have a proper look at him. She also confirmed that visibility was good, in that the area was illuminated in the front of the building.

[15] Sergeant Nehemia was on duty when receiving a report about the robbery and that it involved a blue coloured vehicle, leaving Ondobe village. He then set up a make-shift roadblock where he stopped a vehicle in which the two appellants were found seated in the rear seat. He ordered the driver to proceed to the police station where the vehicle was searched. On the rear seat two black balaclavas were found. According to him the complainant

identified these as having been used during the robbery. He did not specify which of the complainants tendered this information.

[16] According to Constable Mukete, the investigating officer, the first appellant gave his co-operation with the investigation of the matter and besides admitting his own involvement in the robbery, also furnished the names of those persons who eventually were charged together with him. Mukete thus referred him to Chief Inspector Agas (Abner) to obtain his statement in writing. However, no statement was handed in at the trial. The second appellant however denied any involvement in the robbery, claiming to have been at Eenhana where he went to see a client at Okatope, for whom he fitted dentures. (He seems to have been trading in golden tooth caps.) He directed Cst Mukete to this lady, but she disputed knowing the second appellant or having conducted any business with him. The lady turned out to be Ms Sipora and her evidence corroborates that of Mukete in all material respects. In fact, her evidence is that when second appellant was brought there, it was her first time to see him.

[17] Though admitting that they have been in Ondobe village at the relevant time, the appellants deny any involvement in the commission of the crime. They claim to have travelled there in order to meet first appellant's cousin and hand to her goods they had brought along for her birthday party that were to take place the following day. It is clear from their evidence that they had indeed met with this person and had also spent some time in her room thereafter. Second appellant then proceeded to see his client at Okatope and soon after his return, they decided to leave. They boarded the blue Toyota driven by the second accused and proceeded up to where they were stopped by the police. At the police station someone identified the shoes he was wearing to be those seen at the scene of the robbery. They were then assaulted by the police, apparently to confess their involvement in the robbery.

[18] Second appellant confirmed the first appellant's narrative of events that took place that day. He said it was his first time to meet the cousin of first

appellant. Although he was unable to recall her name, he (and first appellant) decided to call her as a witness to give evidence on their behalf. He further said that he proceeded to see a client of his at Okatope, but that he failed to meet with this person. He confirmed that they were in the taxi when stopped by the police. They were charged for the robbery and were subsequently assaulted during their detention. He disputed having said that the lady at Okatope was his client. According to him he had to meet with someone else, but was unable to do so. On this point he stands contradicted by Cst Mukete and Ms Sipora.

[19] Puje Ndakenongo is the cousin to the first appellant for whom they brought the goods. She however denies having met either of the appellants on that day and said that, although she did receive the things they had brought, she did not see any of them and was only informed about their arrival earlier. She only heard from someone else that first appellant and another person brought the things there whilst she was out shopping, but that they had left before her return. It was between 16h00 and 17h00 when she returned home. She then went to a bar where she remained until 19h00. Second appellant, now realising that this witness' evidence rebuts their version about their visit to first appellant's cousin, contended next that, if she was not the person whom they had met on that day, then it must have been someone else and that they had mistaken her identity. I find this contention implausible because it has been their case all along that they went to first appellant's cousin (with whom they met), the very same person they had called as a witness to support their evidence. On the evidence adduced, there is simply no room for a mistaken identity of this witness and both appellants clearly lied on this point.

[20] The magistrate, in his evaluation of the evidence adduced, was satisfied that a robbery was committed and approached the evidence with the view that, one of the central issues in deciding the matter is whether or not the evidence adduced proves the identification of the appellants (and co-accused) as being the culprits. The court correctly found that the area where the robbery took place was illuminated which, to the court's satisfaction,

eliminated any dangers of a mistaken identification due to poor visibility. As far as it concerns the identification of the two appellants and accused no 4, the court mainly relied on the evidence of the witness Shilongo, who had spoken to the attackers and saw them facially before they rolled down the balaclavas over their faces. Though clearly not impressed with the evidence of the witness Peneyambeko regarding her identification of second appellant, the court, notwithstanding, was satisfied that the shortcomings in her evidence was bolstered by that of Shilongo, who was emphatic in his identification of these persons and who also saw the second appellant moving in the direction where Peneyambeko was. These observations were made before he came under attack from first appellant and accused no 4.

[21] I am unable to come to a different conclusion, because there was nothing that prevented Shilongo to make the observations he testified about. The fact that he, in his report to the police, said that he would be able to identify his assailants when he sees them, is an indication that he could identify them facially. I am therefore of the opinion that not too much should be made of the witness' answer when asked whether there was anything else, besides the persons' attire, on which he identified them and to which he replied 'no'. When considering his evidence as a whole, it is clear that the identification of the appellants partly rested on a facial identification, and not only on their attire, as the answer suggests. In addition thereto, the witness gave a detailed description of each person's attire, which they were found still wearing upon their arrest by the police shortly thereafter. The court *a quo,* as regards identification, did not follow a compartmental approach in its evaluation of the evidence, but adopted a holistic approach by also considering other factors, as it was required to do.

[22] Besides the evidence on identification made during the commission of the offence, the evidence of the witness Neumbo about first appellant's attire and him having boarded a blue coloured vehicle, was also taken into account. Though it has not been dealt with by the magistrate in the judgment, another factor which, in my view, played a significant role in the assessment of the evidence, is the find of two balaclavas on the rear seat. According to the

evidence the appellants were seated in the rear seat of the vehicle in which first appellant was seen boarding soon after the robbery. This evidence tallies with reports made about the attackers having covered their faces with balaclavas, yet, this evidence was not challenged. Another factor taken into account was that the appellants, on their own evidence, were in the area where the robbery took place; though both disputing any involvement on their part.

[23] Coming to the defence case, the court considered the evidence of accused no 2 (the taxi driver) about the appellants having boarded his vehicle at the same time – thus refuting Neumbo's evidence about seeing first appellant getting into a blue coloured vehicle (alone) – and found accused no 2's evidence on this point, untruthful. The court had reached this conclusion on the strength of evidence adduced that their co-accused were in the same vehicle, but got off before the vehicle had reached the roadblock. As for the appellants' explanation for having been in that area at the relevant time, the magistrate merely remarked that the calling of a witness to corroborate their evidence 'was not very helpful to their cause'. In my view the court should have elaborated more on this point but, be that as it may, the calling of the witnesses who testified about the appellants' movements on that day, materially contradicts their evidence and casts serious doubt on their respective versions on this point. It does not constitute an alibi; neither does it explain their movement after they had dropped off the goods at the house of first appellant's cousin. The only reasonable conclusion to come to thus, is that they deliberately fabricated evidence, probably to bolster their innocence. Evidence that the police unconstitutionally extracted evidence from the appellants was not dealt with in the judgment, probably because the court did not rely on such evidence when convicting.

[24] Although the court did not in its judgment specifically state that it rejected the two appellants' evidence, it is clear that this is actually what the court did because, ultimately, it had been satisfied, and found, on the totality of the evidence, that the guilt of the appellants was sufficiently proved. In order to reach this conclusion, it had to reject the appellants' evidence. The

conclusion reached by the trial court, in my view, cannot be faulted and is consistent with the proven facts. The judgment reflects that the court was cautious in its approach pertaining to the evidence of the witness Peneyambeko, and only relied on the evidence of the respective witnesses' identification of the appellants to the extent where it was safe to do so; whilst satisfactorily furnishing reasons for having come to that conclusion. In the absence of any proof that the trial court erred on the facts and misdirected itself on the application of the law, I am unable to see on what legal basis this court, sitting as court of appeal, would be entitled to interfere with the credibility findings made by the court *a quo* in its assessment of the evidence.

[25] It is trite law that the function to decide on the acceptance or rejection of evidence falls primarily within the domain of the trial court, and unless that court has misdirected itself, or that the proceedings are tainted by irregularities, the findings on credibility by the trial court must stand.[3] This court does not have the same advantages than what the trial court had when seeing and hearing the witnesses when giving their evidence and is not steeped in the atmosphere of the trial. This is well demonstrated in the present matter where the magistrate specifically considered the demeanour of the witness, Peneyambeko, on the witness stand and which was taken into consideration when concluding that her evidence was suspect. The mere fact that the magistrate did not equally comment on the demeanour of all the witnesses who testified at the trial, does not mean that he did not take it into consideration when assessing the veracity of the respective witnesses. It has been said that where there has been no misdirection on the facts by the trial court, the presumption is that the conclusion reached by that court is correct, and that it will only be reversed where the court of appeal is convinced that it is wrong.[4]

[26] When applying the aforesaid principles to the present facts, I have no doubt when coming to the conclusion that, in respect of both appellants, there are no prospects of success on appeal.

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[3] *S v Slinger,* 1994 NR 9 (HC).
[4] *R v Dhlumayo and Another,* 1948 (2) SA 677 (AD).

[27] Resultantly, both appellants' application for condonation is declined and the matter is struck from the roll.

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JC LIEBENBERG

JUDGE

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MA TOMMASI

JUDGE

APPEARANCES

FIRST AND SECOND APPELLANTS	In person

RESPONDENT	L Matota Of the Office of the Prosecutor-General, Oshakati