

REPUBLIC OF NAMIBIA

IN THE HIGH



COURT OF NAMIBIA

JUDGMENT

CASE NO.: CA 25/2012

IN THE HIGH COURT OF NAMIBIA
NORTHERN LOCAL DIVISION

In the matter between:

SEMBA IYAMBO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: The State v Iyambo (CA 25/2013) [2013] NAHCNLD 42 (2 May 2013)

CORAM: SMUTS J et UEITELE J

Heard on: 2 May 2013

Delivered on: 2 May 2013

Flynote: A notice of appeal against a sentence of 24 months imprisonment lodged more than 3 years out of time. Wholly inadequate explanation provided. Furthermore no prospects of success. Condonation for late filing of notice of appeal refused.

ORDER

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1. Condonation for the late filing of the notice of appeal is refused;
 2. The appeal is struck from the roll.

EX TEMPORE JUDGMENT

JUDGEMENT

SMUTS, J: [1] On 2 October 2007 the appellant pleaded guilty to and was convicted of escaping from lawful custody. On the same day he was sentenced to two years imprisonment. The presiding magistrate correctly convicted the appellant after being satisfied that the appellant's plea was genuine and unequivocal after questioning had taken place in terms of section 112 (1) (b) of the Criminal Procedure Act, 1977. The appellant only seeks to appeal against sentence.

[2] After being referred to the previous convictions which were proved against the appellant, some 13 previous convictions, his rights to mitigation were explained. He chose to address the court concerning his personal circumstances and asked that the sentence run concurrently with his serving sentences. That application was opposed by the State and was understandably not granted by the presiding magistrate who sentenced the appellant to 24 months imprisonment.

[3] The record indicates that the appellant's rights to review and appeal were explained to him. Despite this, a notice of appeal dated 30 May 2011 was filed on 12 July 2011 and an accompanying affidavit seeking condonation for the late filing of the notice of appeal was dated 3 June 2011, some considerable period out of time.

[4] When this raised was with the appellant today, he stated that he in fact had raised his appeal in 2008. But this is not correct and is not supported by the facts. It would in any event have been out of time. The only reason given for the delay is that the appellant suffers from asthma. No dates or any specific issues are however set out as to when this arose, what treatment has been given and how this could have precluded a notice being filed timeously. When this appeal was originally called on 30 April 2013 counsel for the state submitted that the appellant's term of imprisonment had been completed and that the appeal had lapsed. But state counsel was under the impression the appeal was against the conviction for housebreaking and theft on 20 June 2007 for which the appellant received a sentence of three years.

[5] It is correct that the term for housebreaking has been served. But what seems to have created confusion is that the appellant was also sentenced to escaping from custody on 11 June 2007 to two years imprisonment, which has also been served.

[6] I clarified these convictions and sentences with the appellant on 30 April 2013 and it became clear that he is currently serving his sentence for escaping from custody of which was imposed on 2 October 2007 which he seeks to appeal against.

[7] The matter was then postponed to today to enable state counsel to consider his position and file heads of argument which he duly did. In his written argument, Mr Shileka for the State has taken issue with the adequacy of the explanation which has been provided in the condonation application and also that the appeal in any event does not enjoy prospects of success.

[8] As I explained to the appellant when he argued, there are two distinct requirements for condonation. The first relates to the adequacy of the explanation and the second is that the appellant would need to convince this Court that he has prospect of success in his appeal against sentence. In this matter, neither of those requirements is present.

[9] We have before us a singularly inadequate explanation where no specific facts are provided as to the nature of the treatment and quite how this could have precluded him from filing a notice of appeal for more than three and a half years. For this reason alone, condonation would be refused.

[10] I also want to point out that the appellant does not meet the second requirement of establishing prospects of success as well. He was sentenced to two years imprisonment for escaping from lawful custody in June 2007. He had five previous convictions for the very same offence including one only a few months before. He has not been able to put before us any basis as to any misdirection or irregularity on the part of the Magistrate in passing sentence. I could also not find any basis for a misdirection or irregularity in respect of sentence. If anything, the sentence was on the lenient side. It follows that the second requirement of establishing prospects of success has also not been met.

[10] In the circumstances the following order is made:

1. Condonation for the late filing of the notice of appeal is refused;

2. The appeal is struck from the roll.

DF Smuts
Judge

I agree

SFI Ueitele
Judge