

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

HC-NLD-CRI-APP-CAL-2017/0007

AINDJI DAVID AUKONGO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Aukongo v S* (HC-NLD-CRI-APP-CAL-2017/0007) [2018]
NAHCNLD 9 (06 February 2018)

Coram: TOMMASI J et JANUARY J

Heard: 14 November 2017

Delivered: 06 February 2018

Flynote: Maintenance – Appeal — Criminal proceedings – Converted into an enquiry – Magistrate proceeded with sentencing – Misdirection – Failure to explain section 39(2) of the Maintenance Act 9 of 2003 – Appellant prejudiced.

Summary: The appellant was convicted of failure to pay maintenance in contravention of section 39(1) of the Maintenance Act, Act 9 of 2003. The magistrate converted the matter into an enquiry. He did not hold the enquiry and proceeded to sentence the appellant. The provisions of section 39(2) of the said act which protects an accused with a valid defence was not explained to the undefended appellant. The conviction and sentence are set aside.

ORDER

1. The conviction and sentence are set aside.
 2. In the event that the Prosecutor-General decides to prosecute the appellant afresh for the offense of contravening section 39(1) of Act 9 of 2003, the matter should be heard by a different magistrate.
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JUDGMENT

JANUARY, J (TOMMASI, J concurring):

[1] The appellant was charged with failing to pay maintenance in contravention of section 39(1) of the Maintenance Act, Act 9 of 2003. It was alleged that the amount in arrear is N\$75 600. The appellant pleaded not guilty and a trial proceeded. He was convicted and sentenced to 12 (twelve) months imprisonment wholly suspended for 3 years on condition that he; (1) is not convicted of contravention of section 39(1) of the Maintenance Act, Act 9 of 2000, committed during the period of suspension; and (2) the accused liquidates the arrear maintenance of N\$70 400 by paying the full arrear amount on or before 30 September 2017 to the Clerk of Court, Outapi in favour of Oscar Aindji and Rosemary Aindji. He was unrepresented in the court a quo. In this court he is represented by Mrs Horn and the respondent is represented by Ms Nghiyoonanye.

[2] The amount in arrears was reduced because the magistrate detected a miscalculation by the clerk of court who testified on the amount in arrears. The appellant who was unrepresented did not cross-examine the clerk of court but only made a statement saying; 'that there must be an investigation that has to been (sic) made, both of us are working but the burden is all on me. Investigations should be done to find a common case.'

[3] The state only called the clerk of court to testify and thereafter closed its case. The appellant testified in his defence. He testified that he and his wife are staying in the same house with the children that he has to pay maintenance for. He stated that he is already maintaining the children at home. He is paying for the house and complies with his responsibility at home. It was for these reasons that he did not comply with the maintenance order. He is a teacher by profession. He further testified that he applied at some stage for variation of the order and was never informed that the application was dismissed. According to the appellant there is an agreement between him and the wife that they share school fees between the two of them. He did not call any witnesses.

[4] In his address on the merits the appellant alluded to the fact that he has four children and that if he has to pay the arrears while he supported the two children in question, he would not afford to support the other two kids. He maintained that he is not guilty as he maintained the children outside the maintenance order.

[5] The magistrate in his reasons before sentence alluded to the fact that the appellant failed to comply with a court order. The failure according to the magistrate was not justified. The magistrate found that a defence of lack of means is non-existent. He found that the case was proven beyond reasonable doubt. Surprisingly the magistrate stated in court that: 'The criminal matter will be converted into an enquiry to determine the position of the wife if she agrees that the appellant was supporting the children outside the maintenance order.' The matter was then postponed to secure the presence of the wife. The wife testified and the court thereafter proceeded to sentence the appellant. The

magistrate provided additional reasons and states *inter alia* the following: 'After realizing on the return date that there could not be a conversion of the trial into an enquiry and that it would result in a misdirection on the part of the court, the court proceeded to sentence.' In my view this is another misdirection because the matter was already converted into an enquiry.

[6] The appellant addressed the court *a quo* in mitigation and handed documents as proof of maintenance into court. The court received these documents. On the face of these documents, in my view it is clear that the appellant contributed to maintenance outside the maintenance order by paying for a bond with a premium of N\$6780 and periodical payments of school fees. The wife in her testimony also confirmed that they are staying in the same house and that the appellant periodically pays school fees and does occasionally contribute to food. I agree with the learned magistrate that payment of maintenance in disregard to a court order to pay maintenance to the clerk of court is not a justifiable excuse. In my view, however, the magistrate must have found it desirable to convert the proceedings into an enquiry, hence the conversion.

[7] Even if I am wrong with this assessment, section 34 of the Maintenance Act, Act 9 of 2003 provides:

'34 Conversion of criminal proceedings into maintenance enquiry

If during the course of criminal proceedings in a magistrate's court in respect of-

(a) an offence referred to in section 39(1); or

(b) the enforcement of a sentence suspended on condition that the convicted defendant make periodical payments of sums of money towards the maintenance of the beneficiary,

it appears to the court that it is desirable that a maintenance enquiry be held, or when the public prosecutor so requests, the court must convert the proceedings into such enquiry.' (My underlining]

[8] Section 39 provides *inter alia*:

'39 Offences relating to maintenance orders

(1) Subject to subsection (2), any person who disobeys a court order by failing to make a particular payment in accordance with a maintenance order commits an offence and is liable to a fine which does not exceed N\$4 000, to be imprisoned for a period which does not exceed 12 months or to periodical imprisonment in accordance with section 285 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.

(3) ...

(4) ...'

[9] The appeal is noted on the following grounds:

'Against conviction:

1. The learned magistrate misdirected himself, alternatively erred in law and/or in fact in;
 - 1.1 Finding the appellant guilty of contravention of section 39(1) of the Maintenance Act, Act 9 of 2003, and then
 - 1.2 Directing on the same day (7 March 2017) that the criminal matter must be converted into an enquiry to determine the position of the wife if she agrees that the appellant was supporting the children outside the maintenance order;
 - 1.3 Failing to proceed with a maintenance enquiry;
 - 1.4 Proceeding on 17 March 2017 to sentence the appellant in terms of the criminal complaint after evidence was heard in mitigation and aggravation of the sentence.
2. The learned magistrate misdirected himself, alternatively erred in law and/or fact, in not taking into account that both Appellant and the Complainant gave evidence that:

- 2.1 They are staying in the same house
- 2.2 The Appellant did support the children.

Against sentence:

- 3. The learned Magistrate misdirected himself, alternatively erred in law and/or fact by sentencing the appellant in terms of the criminal complaint when such complaint was converted into a maintenance enquiry.
- 4. The learned Magistrate misdirected himself, alternatively erred in law and/or fact in not taking into account the Parties' evidence of the Appellant supporting the children, although not through payment to the clerk of court in terms of the Maintenance Order.'

[10] Ms Nghiyoonanye alerted this court to the magistrate's failure to inform the appellant of the provisions of section 39(2) of the Maintenance Act, and that the appellant might have tailored his defence differently and despite the fact that he is gainfully employed, might have proven that he lacked the means to afford to comply with the court order. In my view, that is what the appellant implied when he stated that he has an extended family, that he cannot pay double maintenance and has two more children that he supports. The learned magistrate indeed failed to explain the defence to the undefended appellant. In my view, the failure prejudiced the appellant.

[11] I agree with Hoff J (as he then was) where he states;

'It is apparent from the record that the magistrate did not explain to the undefended accused person the defence contained in the provisions of section 39(2) of Act 9 of 2003.

Nevertheless, a magistrate is obliged to explain the existence and meaning of this defence to an undefended accused. Failure to do so could prejudice an accused person resulting in the proceedings being set aside on review or on appeal.

(See *S v Moeti* 1989 (4) SA 1053 (OPD)).¹

¹ *S v Libanda* (CR 18/2012), [2012] NAHC 60 (12 March 2012); See also *S v Shivute* & several other cases 1991 NR 433 (HC).

[12] I agree with counsel that the failure to explain the defence in section 39(2) is an irregularity that vitiates the whole proceedings. I do not deal with the submissions on sentence in view of the undermentioned order. The conviction and sentence therefore stands to be set aside.

[13] Counsel are ad idem that the matter should be remitted to the magistrate to convert the matter into an enquiry in accordance with section 39(2) of the Maintenance Act, explain the provisions of the said section and conduct an enquiry accordingly. Section 13 of the Maintenance Act, Act 9 of 2003 regulates the procedure of an enquiry. I do not agree with counsel. In my view, the matter cannot be referred back to the same magistrate. He already convicted and sentenced the appellant and did not find it desirable to convert the proceedings into an enquiry according to his additional reasons. I have already stated that the entire proceedings are vitiated by the irregularity.

[14] My interpretation of section 39(2) of the Maintenance Act, Act 9 of 2003 is that if the presiding magistrate in the criminal proceedings finds it desirable that a maintenance enquiry should be held, such magistrate must convert the proceedings into an enquiry. (My emphasis). Another magistrate cannot at this stage conduct an enquiry because the entire proceedings of the court a quo are quashed.

[15] Moreover, an accused must be informed of the provisions of section 39(2) before he/she pleads to the charge.² Common sense dictates that an irregularity at the commencement of the proceedings will therefore influence the entire proceedings thereafter. I agree with counsel for the respondent that had the appellant been informed and explained the provisions of section 39(2) of the Act, he may have tailored a defence

² *S v Shivute* & several other cases 1991 NR 433 (HC).

clearly which might have led to the proceedings being converted into an enquiry at an early stage in accordance with the Maintenance Act.

[16] In the result:

1. The conviction and sentence are set aside.
2. In the event that the Prosecutor-General decides to prosecute the accused person afresh for the offence of contravening section 39(1) of Act 9 of 2003, the matter should be heard by a different magistrate.

H C January
Judge

M A Tommasi
Judge

APPEARANCES:

For the Appellant:

W Horn

Of W Horn Attorneys, Oshakati

For the Respondent:

M Nghiyoonanye

Of Office of the Prosecutor-General, Oshakati