



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
APPEAL JUDGMENT**

Case no: HC-NLD-CRI-APP-CAL-2018/00048

NALIMANGULUKE KANASIUS ANDJAMBA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Andjamba v S* (HC-NLD-CRI-APP-CAL-2018/00048) [2019]
NAHCNLD 13 (14 February 2019)

Coram: TOMMASI, J and SALIONGA, J

Heard: 20 November 2018

Released: 14 February 2019

Fly note: Application for condonation of the late filing of a notice of appeal — Charge defective — Prospect of success— Condonation for the late filing of the notice of appeal granted.

Maintenance — Failure to pay maintenance in contravening s 39(1) of Maintenance Act 9 of 2003— Appellant pleaded not guilty on a blank charge —Magistrate has a duty to ensure accused plead to a proper charge – Failure to pay maintenance was not due to unwillingness to work or misconduct as contemplated by s 39(2) of Act — A sentencing court imposed a sentence of 3 years' imprisonment suspended for 5 years on condition appellant pays the arrear maintenance in 5 instalments of N\$7800 — Sentence not competent in law

Criminal Procedure – When trial court is satisfied that accused is without means, it should convert criminal proceedings into a maintenance enquiry in terms of s 34 of the Act — Enquire into the accused's means — Failure to hold an enquiry in terms of s 34 of the Act constituted misdirection — Conviction and sentence set aside.

Summary: Appellant was charged with contravening s 39(1) of the Maintenance Act 9 of 2003. He pleaded not guilty explaining he was unemployed to an incomplete charge put to him. The state called the complainant and one witness. Appellant testified and had two witnesses. The magistrate notwithstanding her finding; that there is no evidence proving that appellant has businesses registered on his name; that the evidence was corroborated by two witnesses and his evidence outweighed that of the state, convicted the accused as charged. The appellant was sentenced to 3 years' imprisonment wholly suspended for 5 years on condition appellant pays the arrear maintenance of N\$39000 in monthly instalments of N\$7800 which sentence is not authorized by the Act.

ORDER

1. The application for condonation is granted;
 2. The appeal against conviction and sentence is upheld; and
 3. The conviction and sentence imposed are set aside.
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APPEAL JUDGMENT

SALIONGA J (TOMMASI J concurring):

Introduction

[1] The order in this matter was handed down on 15 January 2019 keeping accord with justice, what follows herein are the reasons for the order. The appellant appeared in the Magistrates' Court for the district of Oshakati on a charge of failure to pay maintenance in contravention of s 39(1) of the Maintenance Act 9 of 2003. He pleaded not guilty on 10 August 2017 and after the evidence was led he was convicted and sentenced to 3 years' imprisonment wholly suspended for a period of 5 years on condition that the appellant pays the arrear maintenance in 5 monthly instalments of N\$7800 commencing end of January. The appellant was not legally represented at the trial. In the appeal, Mr Greyling (Jnr) appears for the appellant and Mr Pienaar represented the respondent.

[2] Section 39(2) of the Act was explained and appellant indicated that he was unemployed and has no business to run.

[3] Displeased with the magistrate's findings, the appellant appeals against conviction and sentence. He filed a notice of appeal against the judgement on 29 August 2018 out of time and lodged an application for condonation for the late filing. In his supporting affidavit, the appellant explained that he needed funds to secure the assistance of a legal practitioner. He further explained that after the funds had been secured and a legal practitioner appointed, his legal practitioner made various requests for the record to enable him to draft the notice of appeal; that the record was only provided to him on 24 July 2018; and it was not possible to comply with rule 67 of the Magistrates' Court Act. He was of the view that a satisfactory explanation was provided

and that the condonation be granted as the appellant has reasonable prospects of success.

[4] Respondent in his heads of argument opposed the application for condonation of the late filing, submitting that condonation should not be granted and the appeal be struck from the roll. He clearly set out the law in granting an application for condonation but did not pursue or persist with its opposition during the appeal hearing. The court proceeded to hear the point *in limine* and the merits of the appeal at the same time.

[5] Counsel at the hearing were given an opportunity to advance oral arguments in supplementing their written heads of arguments and they both opted to stand by their heads.

[6] The issues before the Appeal Court were; whether failure to convert the criminal proceedings into an enquiry constitutes a misdirection, whether from the evidence adduced it can be inferred that the accused's failure to comply with the court order, was due to his unwillingness to work or misconduct on his part; and whether the sentence imposed by a court *a quo* is competent in law.

[7] The State called the complainant. She testified that appellant has a bar and flats which are rented out. He also owns a hardware store and flats in Outapi. He can afford to pay for 3 cars and is well dressed owning a contract cellphone. The State further called the clerk of the court to testify that the maintenance order was prepared, signed and handed to the appellant. After the state had closed its case accused elected to testify and called two witnesses.

[8] Although admitting the amount in arrears, the appellant testified that he was unemployed and was looking for work; that the little income he had was from struggling; that during sporadic intervals two eldest of these children stayed with his family and complainant collected them and refused to return them to his parents, that he was not the registered owner of the vehicle referred to in the complainant's evidence. He further testified that, the bars in question belong to his father and the liquor license in question was in his father's name. In cross examination the appellant stated that he was

unemployed since he failed grade 12, and that he only assists his parents with driving. The appellant called two witnesses to testify on his behalf.

[9] In the course of drafting the judgement, I discerned a blank annexure to the charge attached to the appeal record, meaning appellant pleaded to an incomplete charge sheet. The issue was brought to the attention of both counsel after the submission. Thus, this appeal turns out to similarly address the issue whether the appellant received a fair trial given the fact that he was not legally represented during the trial proceedings.

[10] Counsel for the appellant submitted that the State failed to prove that failure to comply with the maintenance order was intentional. He argued that notwithstanding the magistrate concluded in her judgement that the evidence of the defense outweighs the evidence of the State, she nevertheless convicted the appellant. According to counsel the businesses upon which the state relied to prove the appellant's income does not belong to him. That the magistrate ought to have converted the criminal proceedings into an enquiry in terms of s 34 of the Act. He further argued the fact that the Appellant signed the consent order is not sufficient to make inference that he was able to pay.

[11] The court *a quo* sentenced the appellant to 3 years' imprisonment wholly suspended and in accordance with s 39 of the Act, the maximum sentence that a magistrate may impose is N\$4000 and/or 12 months imprisonment. Correctly in my view the defense is correct on this point that the sentence imposed is not competent in law and should be set aside.

[12] In his Heads of Argument, counsel for the respondent submitted that the appellant's notice of appeal did not contain any grounds or the grounds were unclear and must be struck off, save to submit that the matter be remitted to another magistrate to convert it into an enquiry in accordance with section 34 of the Maintenance Act or alternatively that the conviction and sentence be set aside

[13] The charge to which the accused pleaded and was subsequently convicted of is defective, in that it lacks particularity. The annexure attached to the record was blank. The magistrate was under a duty firstly to ensure that a fully completed charge was put

to the appellant to enable him to answer to it. Section 84 of the Criminal Procedure Act provides for the essentials of a charge and reads:

‘(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.’

[14] The defect in the charge is such that it invalidates the charge which, could not be cured by the leading of evidence. On this issue both counsel conceded that the appellant could not have been convicted on the defective charge and the conviction stands to be set aside.

[15] There was no evidence to prove that the appellant derives income from the said businesses as alleged by the complainant. Counsel for the Appellant correctly referred the court to a case of *S v Guibeb* (CR 42/2017) [2017] NAHCMD 210 (07 August 2017) where Liebenberg J held that; ‘if the court was of the view that on the facts before it, there is reason to believe that the accused did not have the means to comply with the maintenance order, it should have converted the criminal proceedings into a maintenance enquiry in terms of s34 of the Act and enquire into the accused’s means where after make the appropriate order’. The court should have considered the application of s 34 of the Act.

Section 34 provides that:

‘ If during the course of criminal proceedings in a magistrate’s court in respect of

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

(b)...

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. The court a quo misdirected in not converting the criminal proceedings into enquiry and convicted the appellant instead.’

[16] It was also not proven that the appellant's failure to pay maintenance was due to his unwillingness to pay maintenance or misconduct on his part. Section 39(2) of the Maintenance Act provides that:

'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.'

In the present case accused gave a reasonable explanation for his failure to comply with the maintenance order.'

[17] The approach taken and the conclusion reached by the magistrate was irregular and misdirection. The conviction and sentence cannot be allowed to stand.

[18] Accordingly, I made the following order:

1. The application for condonation is granted;
2. The appeal against conviction and sentence is upheld; and
3. The conviction and sentence imposed are set aside.

J T SALIONGA

JUDGE

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

J Greyling (Jnr)

Of Greyling & Associates, Oshakati

For the Respondent:

J Piennar

Of Office of the Prosecutor General, Oshakati