



“ANNEXURE 11”
IN THE HIGH COURT OF NAMIBIA

Case Title: <i>The State v Kurbo Kapito</i>	CR 2/2019
	Division of Court: High Court Northern Local Division
Heard before: Honourable Justice Tommasi J Honourable Justice Salionga J	Delivered on: 24 January 2019
Neutral citation: <i>S v Kapito</i> (CR 02/2019) [2019] NAHCNLD 2 (24 January 2019)	
The order: 1. Convictions and sentences are set aside.	
Reasons for order:	
<p>SALIONGA J (TOMMASI J concurring):</p> <ol style="list-style-type: none"> 1. The review cover sheet indicates that the accused was convicted of having contravened section 6(2) of Act 7 of 1993, found in the Republic without valid travel documents contravening section 34(1) read with 34(3) of the Act 7 of 1993. 2. The typed record reflect that the accused was charged with having contravened 34 (91) read with 34(3) of the Immigration Control Act. 3. The handwritten charge Sheet reflects that the accused was charged with having contravened section 6(1) and found in the Republic without valid travel documents – contravening section 34(1) read with section 34(2) of Act 7 of 1993. 4. A second charge Sheet reads that the accused is charged with the offence of contravening section 7,8, 9 and 59 of the Immigration control Act. 5. A handwritten page reflects that the accused is charged with having contravened section 34(1) read with section 34(3) of Immigration Control Act, 1993 (Act 7 of 1993). The particulars of this charge read as follows: “In that upon or about the 19th day of August 2018 and at or near Outapi Town in the District of Otapi the said accused was wrongfully and unlawfully found in the Republic to wit; Outapi Town without valid travel documents.’ 	

6. The accused pleaded guilty and the learned magistrate, after questioning the accused in terms of section 112(1)(b) of the Criminal Procedure Act, was satisfied that the accused admitted to the charge and convicted the accused. It is not clear which charge the learned magistrate was referring to but for purposes hereof I would have to assume that is the offence of having contravened section 34(1) read with section 34(3) of the Immigration Control Act, 1993 (Act 7 of 1997).
7. Section 34 (1) reads as follow:
- ' Any person who at any time entered Namibia and, irrespective of the circumstances of his or her entry, is not or is not deemed to be in possession of a permanent residence permit issued to him or her under section 26 or an employment permit issued to him or her under section 27 or a student's permit issued to him or her under section 28 or a visitor's entry permit issued to him or her under section 29, or has not under section 35 been exempted from the provisions of section 24, as the case may be, shall present himself or herself to an immigration officer or to an officer of the Ministry.'[my emphasis]
8. Section 34 (3) makes it an offence for a person referred to in subsection (1) who fails to comply with the provisions of that subsection (1).
9. The description of the offence does not correspond with the words as they appear in the statute which creates the offence.
10. The learned magistrate ought to have advised the accused that he may object to the charge on the ground that the charge does not contain the essentials of the statutory offence which he was charged with and that he has the right to apply to have the charge quashed.
11. Failure by the learned magistrate renders the proceedings irregular and not in accordance with justice.
12. The conviction and sentence are set aside.

	
M A TOMMASI JUDGE	 J SALONGA JUDGE



CR 2/2019

**IN THE HIGH COURT OF NAMIBIA: NORTHERN LOCAL DIVISION
HELD AT OSHAKATI: 24 JANUARY 2019
BEFORE THE HONOURABLE MS JUSTICE TOMMASI J
MS JUSTICE SALIONGA J**

In the matter between:

STATE

v

KURBO KAPITO

ACCUSED

Having considered the matter in chambers and having read the documents filed of record:

IT IS ORDERED THAT:

1. Conviction and sentences are set aside.

BY ORDER OF COURT



REGISTRAR

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