

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING

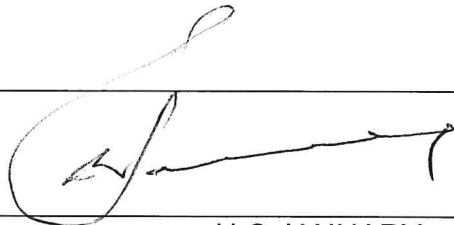

<b>Case Title:</b> <i>Amunime Godhard Kaelanus v The State</i>	<b>HC-NLD-CRI-APP-CAL-2018/00057</b> Case No. 231/2018
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Ms. Justice Salionga J <i>et</i> Honourable Mr. Justice January J	<b>Delivered on:</b> 16 April 2019
<b>Neutral citation:</b> <i>Kaelanus v S</i> (HC-NLD-CRI-APP-CAL-2018/00057) [2019] NAHCNLD 44 (16 April 2019)	
<b>Ruling</b> <ol style="list-style-type: none"><li>1. Judge's certificate can be withdrawn.</li><li>2. Application for condonation is condoned.</li></ol>	

### Reasons for Order

SALIONGA J (JANUARY J concurring):

1. Appellant initially appealed against the conviction and sentence by the Outapi magistrate's court on a charge of housebreaking with intent to steal and theft. The matter was scheduled for hearing on 2 April 2019. At the start of the hearing appellant abandoned the appeal against conviction and proceeded with appeal against sentence.
2. Points in limine: Counsel for the respondent objected to the granting of an application for condonation for the late filing of the notice of appeal as there is no prospect of success. Counsel further argued that a judge is functus officio and could not withdraw a judge's certificate. That counsel is aware of a High court judgement on the same issue in his opinion it is wrong and cannot be followed. Appellant has to appeal to the Supreme Court.
3. The issue is whether the lower court proceedings which have already been certified by a judge in terms of section 304(1) of the CPA when the notice of appeal reaches the registrar could be withdrawn.
4. Secondly whether the application for the late filing of the notice of appeal can be condoned.
5. Section 302 (1) (b) of the CPA provides that the provisions of paragraph (a) shall be suspended in respect of an accused who has appealed against a conviction or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused when judgement is given.

6. In the Criminal Procedure Handbook on page 307 par 3.1.4, Joubert has this to say; if the proceedings have already been certified by a judge in terms of section 304 (1), when the notice of appeal by the accused reaches the registrar, the certificate will be withdrawn to allow an accused to prosecute his or her appeal.
7. The court in *Disler 1933 CPD 405* held that there is no inconsistency in criminal proceedings being set aside on appeal after they have been confirmed on review, since the test on review is different from the criteria applied on appeal.
8. Judge's certificate does not stand in the way of an appeal (See *S v Mudihlaba 1990(1) SA 76 (T)* at 79 A-E).
9. In *S v Mwambazi 1991 (2) SACR 149 (Nm)* the court had dealt with the difference between the review and appeals. It was held that where accused complains of conviction and sentence, the High Court of Namibia should be approached by way of appeal. In this instant case the appellant appeals against conviction and sentence and as such this court has jurisdiction to hear the matter. The presiding judge is available and has withdrawn the certificate.
10. In *The State v Plota (CR 14/2016) [2016] NAHCNLD 93* delivered on 21 November 2016, Tommasi J with January J concurring withdrew the certificate granted on review. It is our settled law that the High Court judgement is binding until otherwise set aside by the court of equal status or superior court.
11. With regards to the condonation application, appellant explained that due to Correctional facilities cumbersome procedures he was unable to consult his lawyer on time. This court found that the appellant has not been negligent in the late filing of his notice of appeal and the application for condonation is granted.

	
 J T SALIONGA JUDGE	H C JANUARY JUDGE

APPEARANCES

APPELLANT:

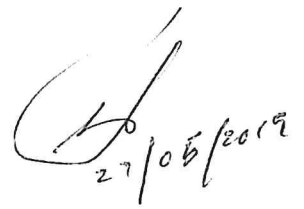
Nicky Ngula

Of Ngula & Associates, Ondangwa

RESPONDANT:

Johan Pienaar

Office of the Prosecutor General, Oshakati

  
27/06/2019

HC-NLD-CRI-APP-CAL-2018/00057

IN THE HIGH COURT OF NAMIBIA: NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI: 16 APRIL 2019  
BEFORE THE HONOURABLE MR JUSTICE JANUARY J  
MS JUSTICE SALIONGA J

In the matter between:

**STATE**

v

**AMUNIME GODHARD KAELANUS**

**APPELLANT**

---

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

**IT IS ORDERED THAT:**

1. Judge's certificate can be withdrawn.
2. Application for condonation is condoned.

**BY ORDER OF COURT**



**REGISTRAR**

//k